

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,  
*et al.*

*Plaintiffs,*

v.

WILBUR ROSS, in his official  
capacity as Secretary of Commerce,  
*et al.*

*Federal Defendants,*

and

MAINE LOBSTERMEN'S  
ASSOCIATION,

*Intervenor-Defendant,*

and

MASSACHUSETTS LOBSTERMEN'S  
ASSOCIATION, INC.,

*Intervenor-Defendant,*

and

MAINE LOBSTERING UNION,

*Intervenor-Defendant,*

and

LITTLE BAY LOBSTER, LLC,

*Intervenor-Defendant.*

Civil Action No. 1:18-cv-00112-JEB

MAINE LOBSTERMEN'S ASSOCIATION, INC. AND MASSACHUSETTS  
LOBSTERMEN'S ASSOCIATION, INC.'S BRIEF ON REMEDY

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## **INTRODUCTION**

On April 9, 2020, this Court granted one claim in Plaintiffs' motion for summary judgment, holding that the incidental take statement ("ITS") in the National Marine Fisheries Service's ("NMFS") 2014 Biological Opinion ("2014 BiOp") was arbitrary and capricious. Intervenor-Defendants Maine Lobstermen's Association, Inc. ("MLA") and Massachusetts Lobstermen's Association, Inc. ("MALA") agree with Federal Defendants that the appropriate remedy is remand of the ITS without vacatur, with a reasonable deadline of up to May 31, 2021, for promulgation of a new ITS. Plaintiffs' proposed vacatur of the 2014 BiOp with a stay until January 31, 2021, and imposition of an injunction on use of certain fishing gear in a specific geographic area are unjustifiably overbroad, unnecessary, and inappropriate remedies that exceed the scope of the Court's ruling on the merits. The proposal would involve this Court in managing a fishery when NMFS is already proceeding with a new Biological Opinion and ITS to address Plaintiffs' concerns. Moreover, Plaintiffs' proposed remedy actually poses greater risk to endangered right whales than the status quo, since vacatur could lift requirements put in place under the 2014 BiOp that have greatly improved conditions for right whales. Accordingly, the Court should remand the ITS to NMFS without vacatur for promulgation of a new ITS.

## **ARGUMENT**

### **I. PLAINTIFFS SEEK REMEDIES THAT ARE UNNECESSARY TO CURE NMFS'S STATUTORY VIOLATION.**

The remedies sought by Plaintiffs (vacatur and injunction) are forms of equitable relief. As the Plaintiffs point out, this Court, while sitting in equity, has the power "to do equity and mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 328-30 (1944). In doing so, the Court should act with "flexibility rather than rigidity." *Id.*

The extreme remedies sought by Plaintiffs in this case run afoul of these basic equitable principles. Plaintiffs demand that the Court impose a vacatur remedy that would go into effect on January 31, 2021 in the event that NMFS has not issued a final new biological opinion by that date. Such a remedy would be counter-productive, eliminating a regulatory framework that is *more* protective of whales than the pre-existing regulations that would be reinstated in the event of vacatur. A vacatur also would cause confusion among fishermen who have spent the time and money adjusting their fishing practices to comply with regulations developed under the auspices of the 2014 BiOp. To the extent vacatur leads to a shut-down of lobster fishing, it would have devastating consequences on an industry already reeling from the economic hardships wrought by the COVID 19 pandemic. Declaration of Beth Casoni (“Casoni Dec.”) ¶ 13; Declaration of Patrice McCarron (“McCarron Dec.”) ¶ 8.

The blunt tool of vacatur is neither necessary nor appropriate here. As set forth below, since 2010, numerous federal and state regulations have been put in place to protect right whales. The new regulatory environment coupled with changes in whale migratory patterns have minimized the risk of right whale entanglements from lobster fishing gear in the Northeastern United States. Instead of vacating the 2014 BiOp, this Court should remand the 2014 BiOp to NMFS and order it to issue a new ITS and biological opinion consistent with its Summary Judgment Order within a reasonable time frame taking into account (i) the delays encountered and described by the agency including those related to the pandemic, and (ii) the need for proper administrative process, including notice and public comment.

The Court also should reject plaintiffs’ request for an interim injunction. The requested injunction would involve the Court in rulemaking, i.e., drawing the boundaries of a newly designated year-round closure area in Southern New England. Determining precisely when and

where fishing may occur on the waters is the proper function of an agency with the necessary expertise; it is not the proper role of a Court. Moreover, right whales are adequately protected under existing federal and state regulations. The plaintiffs present no evidence that right whales have been entangled in lobster fishing gear from the proposed designated area in the past 10 years. More importantly, there is serious risk that such a court-imposed closure will *increase*, rather than decrease, the risk of right whale entanglements as fishermen re-position fishing lines immediately outside of the proposed designated area, thereby increasing the density of gear in adjacent waters.

## **II. THE COURT SHOULD NOT VACATE THE 2014 BIOP**

In this Circuit, precedent counsels that the Court should remand without vacatur when equity so requires. *See Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002). Indeed, where there is a violation of the APA, courts often remand to the agency so that the agency can address the violation. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *INS. v. Ventura*, 537 U.S. 12, 17 (2002) (a reviewing court “seriously disregard[s] the agency’s legally-mandated role” if it denies an agency the “opportunity to address the matter in the first instance in light of its own expertise”). *See also Public Emples. for Env’tl. Responsibility v. Beaudreau*, 25 F. Supp. 3d. 67, 130 (D.D.C. 2014) (allowing agency action under the ESA, including ITS, to remain in place during remand).

Ultimately, the decision whether to vacate rather than remand depends on the weighing of two factors: “[1] the seriousness of the order’s deficiencies. . . and [2] the disruptive consequences of an interim change that may itself be changed.” *Milk Train*, 310 F.3d at 755-56, citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir.



1993).<sup>1</sup> Here, although the Court found a violation of the ESA, the disruptive consequences of a vacatur would be severe and the evidence demonstrates that vacatur is unnecessary.

**A. Vacatur Would Disrupt American Lobster Fishing Without Benefit – and With Potential Risk – to Right Whales**

“When a court vacates an agency’s rules, the vacatur restores the status quo before the invalid rule took effect.” *See Env’t. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (citing *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987)); *see also Humane Soc’y of U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 21 (D.D.C. 2008) (reinstating prior regulatory regime).

Here, plaintiffs demand a vacatur with a short stay. Specifically, they request that NMFS implement substantial changes to the regulations underlying the Atlantic Large Whale Take Reduction Plan (“ALWTRP”) and issue a new biological opinion compliant with this Court’s Summary Judgment Order by January 31, 2021. Since NMFS has not yet issued a *draft* biological opinion and in light of the delays caused by the pandemic, the agency will be challenged to meet this deadline for a final rule and biological opinion.

The consequences for right whale protection and for the fishing industry if the stay lifts on January 31 will be severe. As Plaintiffs acknowledge, the 2014 BiOp contains important conservation measures designed to protect right whales. Plaintiffs’ Opening Remedy Brief (“Plaintiffs’ Brief”) at 10. Further, as described more fully below, the regulatory framework that has developed under the auspices of the 2014 BiOp, including new ALWTRP regulations, has significantly enhanced the protections afforded right whales with demonstrated success. New England lobster fishermen have taken pains to comply with the new regulations including

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<sup>1</sup> Intervenor-Defendants assume for purposes of this Remedy Brief that this Court’s summary judgment ruling is correct. Intervenor-Defendants reserve the right to contest any aspect of that summary judgment ruling, however.

substantial investment in new equipment. Declaration of David Borden ¶ 3 (“Borden Dec.”); McCarron Dec. ¶17. It would make no sense to suddenly remove this framework on January 31, 2021, thereby plunging the lobster fishing industry into a confused pre-2014 environment with *less* protection for right whales. *See e.g., Humane Soc’y of U.S.*, 579 F. Supp. at 21 (vacatur may not be appropriate where reinstatement of prior regulation would cause “confusion or inefficiency.”)

To the extent plaintiffs seek vacatur as a means to shut down American lobster fishing,<sup>2</sup> such a result would be devastating to fishermen. Lobster fishing in the United States is a \$684 million industry supporting the livelihood of thousands of fishermen throughout the country. U.S. Department of Commerce, NOAA, Fisheries Commercial Landings Statistics.<sup>3</sup> McCarron Dec. ¶¶ 2, 4, 5, 6, 7. Massachusetts lobster fishing constitutes about \$94 million of that economic output Casoni Dec. ¶ 12 Maine’s lobster fishery is heavily dependent on its lobster fishing industry. McCarron Dec. ¶ 2, 27.

Much of American lobster fishing is performed by individual fishermen or small businesses. Casoni Dec. ¶ 12; McCarron Dec. ¶ 5. These individuals and businesses lack the financial resources to withstand a sustained fishing shut down. *Id; see, e.g., Strahan v. Pritchard*, 473 F. Supp. 2d 230, 240 (D. Mass. 2007) (denying injunction precluding fishing because “it would be devastating to the livelihood of fishermen and to the survival of their communities”).

The resulting economic disruption to the livelihood of fishermen (and those in related industries) weighs heavily against the imposition of a vacatur order. *See, e.g., Chamber of*

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<sup>2</sup> The Intervenor-Defendants anticipate that plaintiffs may argue that a vacatur of the BiOp will remove NMFS’s authority to manage the fishery and thereby require the termination of fishing activity. The Intervenor-Defendants dispute that vacatur necessarily requires any such result, but the consequences of a shutdown, if imposed, would be catastrophic.

<sup>3</sup> Available at <https://www.fisheries.noaa.gov/national/sustainable-fisheries/commercial-fisheries-landings>.

*Commerce of the U.S. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (vacatur not appropriate where it would cause serious disruption to affected industry); *Milk Train*, 310 F.3d at 756 (granting remand without vacatur after considering economic harm to dairy farmers); *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (considering economic harm to sugar cane growers, processors, and refiners); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (considering economic harm to producer of an animal drug).

1. The new regulatory environment has significantly reduced the risk of right whale entanglement in American lobster fishing gear

Lobster fishing has undergone massive changes over the past 10 years. Regulations developed and imposed at the state and federal level, including those implemented under the ALWTRP have significantly reduced both (i) the amount of lobster fishing gear on the water, and (ii) the risk of right whale entanglement in such gear. Declaration of Glenn Salvador (“Salvador Dec.”) ¶ 19; Borden Dec. ¶ 3 - 5. Lobstermen throughout the industry, including members of MLA and MALA, have worked on Take Reduction Teams and energetically embraced changes designed to protect right whales. Casoni Dec. ¶¶ 9, 11, 16; McCarron Dec. ¶¶ 14- 15.

The principal regulatory changes are described in the Declarations of James Lecky (“Lecky Dec.”), Glenn Salvador and David Borden, filed herewith. A brief summary is as follows:

- Sinking groundline requirement. ALWTRP regulations now preclude the use of “floating lines” connecting lobster pots and, instead, require that “sinking” lines be used. This eliminates the potential for whale entanglement in floating lines. These regulations have resulted in the removal of over 27,000 miles of floating groundlines from New England waters. Salvador Dec. ¶ 10, 23, 24; Borden Dec. Exh. B.

- Vertical line regulations. Implemented under ALWTRP in 2015, these regulations establish minimum traps per trawl based on geographic area and distance from shore which have resulted in the removal of approximately 2,740 miles of rope from the water. Borden Dec. ¶3 and Exh. B; Salvador Dec., ¶ 10; Lecky Dec. ¶ 13 (2,540 miles removed).
- Massachusetts Restricted Area. Since 2015, ALWTRP regulations have created a 3,000 square mile area spanning Cape Cod Bay, Massachusetts Bay and outer Cape Cod which has been closed to lobster gear from February 1 to April 30 annually. The state waters portion of this closure is managed by the Massachusetts Division of Fisheries (“DMF”) which has extended its applicability to recreational fishermen and extend the closure date beyond April 30 as appropriate. Borden Dec. ¶3 and Exh. B
- Universal Gear Requirements. A suite of gear modifications have been in place to reduce entanglement risk to right whales that prohibit the use of floating line at the surface and wet storage of gear for more than 30 days, elimination of knots in ropes to the extent practicable, and require the incorporation of weak links in the top of buoy line and to any attachments along the buoy line. U.S. regulated fixed gear fishermen have been required to mark vertical lines to aid in identifying source of gear if removed from an entangled whale. In 2020 Maine has implemented new regulations to require unique and expanded gear markings. Borden Dec. Exh. B
- Effort Reduction. The lobster fishery has reduced effort across all jurisdictions since the inception of the ALWTRP. Area 3 has implemented mandatory annual trap allocation limits of 5% per year, Massachusetts has a long-standing moratorium on lobster licenses

and Maine has implemented a limited entry program, all of which have resulted in a significant reduction in overall lobster gear. Borden Dec. Exh. B.

These regulatory changes (and others) have led to a dramatic decline in right whale entanglements attributed to American lobster fisheries. From 2000 to 2010, U.S. lobster gear comprised 45% of known cases of such entanglements (6 cases out of 13). However, since 2010 U.S. lobster gear comprises only 4% of known cases (1 case out of 25). Since 2014, there has been only one entanglement, a non-serious injury, in New England lobster gear. Salvador Dec. ¶ 19; Borden Dec. ¶ 4. During this same time period, no right whale has died or suffered serious injury arising from entanglement in gear attributed to American lobster fishing. Salvador Dec ¶ 10; Borden Dec. ¶ 5. Thus, contrary to the Plaintiffs' narrative, the past 10 years have been a success story of cooperative interaction between the U.S. lobster fishery, regulators and endangered right whales.

Plaintiffs would have the Court believe that the U.S. lobster fishery is responsible for multiple deaths of right whales in recent years, prompting NMFS to declare an "Unusual Mortality Event" for the species based on an extraordinarily high number of mortalities in the population since 2017.<sup>4</sup> Plaintiffs' expert, Michael Moore, reaches this dire conclusion about the fate of right whales based on an inaccurate presentation concerning the sources of whale mortality over time and a solitary statement from Michael Asaro, a NMFS employee, who asserts that the single greatest threat to right whales is from the U.S. lobster fishery because it accounts for 97% of the vertical lines in Atlantic Coast waters that right whales have been known to traverse.<sup>5</sup>

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<sup>4</sup> See Moore Dec. ¶ 10.

<sup>5</sup> Plaintiffs' Remedy Brief 11, 17.

In fact, the cause of right whale mortality cannot be determined simply by asserting that the lobster fishery deploys a great deal of rope in the water column during the fishing season. Whales can only be injured by lobster fishing gear if they actually encounter it, and in order to determine whether whales encounter lobster fishing gear, scientists must be able to establish co-occurrence between whales and lobster fishing gear in the same geographic area at the same time.

As explained in the expert declarations of James Lecky, David Borden and Glenn Salvador, the best available scientific evidence and supporting data demonstrate that Plaintiffs' assertions are unsupported.<sup>6</sup> They are, in fact, at odds with the exemplary record of the U.S. lobster fishery for more than a decade as described above. Since 2010, the documented incidents of entanglements in gear from the American lobster fishery have declined by 90%. Salvador Dec. ¶ 19. Plaintiffs have presented no evidence of any right whale entanglement in gear attributed to Maine lobster fishermen in the past ten years. During the same period, the only documented entanglement with New England gear was a non-serious incident that resulted in no injury to a right whale. Salvador Dec. ¶ 10. In short, since the implementation of additional protective measures by American lobster fishermen in 2010, there is no evidence of any serious injury or mortality to right whales from entanglement with gear from the American lobster fishery. Salvador Dec. ¶ 19.

2. Data collected by NOAA/NMFS gear specialists confirms that Canadian fisheries, not the American lobster fishery, pose significant risk to right whales.

As noted, there is a growing scientific consensus that climate changes now prompt the animals to spend more time in Canadian waters. Lecky Dec. ¶¶ 16, 18; Borden Dec. ¶ 10; Moore

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<sup>6</sup> To be clear, Intervenor-Defendants do not dispute the serious plight of North Atlantic right whales. Intervenor-Defendants fully support the design and implementation of a conservation program to restore the species by targeting reduction and elimination of the actual sources of harm currently suffered by endangered whales.

Dec. ¶ 20. In particular, right whales are known to frequent the Gulf of Saint Lawrence, where they are vulnerable to entanglement in Canadian lobster and snow crab fishing gear. *Id.* While the United States has had protection measures in place for more than 20 years, and has transformed its regulations to protect right whales over the past 10 years, Canadian lobster and snow crab fishing gear has been relatively unregulated. Indeed, concerted right whale surveying and management did not begin in the Gulf of Saint Lawrence until 2017. Borden Dec. ¶ 13; Lecky Dec. ¶ 17. Canadian snow crab traps are heavier and ropes used to deploy them are larger in diameter than U.S. lobster gear, thus presenting greater risk to whales. Lecky Dec. ¶ 24.

Plaintiffs' requests for an interim remedy fail to differentiate the risks posed to right whales in Canadian and American waters. The differences are stark, however. The Declaration of Glenn Salvador describes these different risks. Mr. Salvador presents an expert analysis of the information maintained by NMFS on entanglement and the conclusions that can be drawn from it about the known causes of harm to right whales.

Mr. Salvador reviewed the data on entanglements submitted to the TRT as background information for its April 2019 meeting. At that meeting, TRT members were instructed by NMFS to concentrate their efforts on reduction of entanglements from the American lobster fishery because the fishery posed a significant threat to the species.<sup>7</sup> Mr. Salvador, who spent more than two decades as a gear specialist at NMFS, concludes that the April 2019 presentation

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<sup>7</sup> See NMFS presentation at April TRT meeting at [https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/Meeting%20Materials/overview\\_of\\_relative\\_risk\\_reduction\\_decision\\_support\\_tool\\_04\\_23\\_2018.pdf](https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/Meeting%20Materials/overview_of_relative_risk_reduction_decision_support_tool_04_23_2018.pdf) and additional meeting materials at [https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/01\\_april\\_2019\\_meeting\\_materials.html](https://archive.fisheries.noaa.gov/garfo/protected/whaletrp/trt/meetings/April%202019/01_april_2019_meeting_materials.html)

does not accurately reflect the threat level presented to right whales by the American lobster fishery.<sup>8</sup>

Mr. Salvador reviewed data available for 138 documented entanglement cases in U.S. and Canadian fisheries of all types from 2000-2018. He observed several important trends in the data: First, there has been a significant decline in right whale entanglements in U.S. lobster gear since 2010. Moreover, he notes that since 2014 there has only been a single, non-serious entanglement in lobster gear attributed to the New England lobster fishery, and he observes that rope removed from entangled whales since that time is not characteristic of ropes used in the New England lobster fishery. *Id.* Based on these findings, he concludes, “the decline in lobster gear entanglement is due to the success of whale protection measures implemented by lobstermen and a significant distributional shift of right whales into Canadian waters where they encounter Canadian fishing gear.” *Id.*

The second important trend Mr. Salvador identifies from the data has to do with a dramatic — and deadly — surge in right whale entanglements with Canadian trap/pot gear since 2010. In particular, he observed that from 2000 to 2010, 23% of known entanglements were in Canadian trap gear (3 out of 13). But in the period since 2010, Canadian entanglements increased to represent 52% (13 out of 25) of all entanglements where a fishery was identified. Notably,

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<sup>8</sup> Mr. Salvador states:

These data clearly show that since 2010 lobster fishing gear and ropes have been rarely removed from North Atlantic right whales, something that was common prior to 2010. Based on [review of the data presented to the TRT] and my cumulative professional experience as a gear specialist and commercial fisherman, it is my opinion that the changes in gear and fishing practices in the American lobster fishery implemented in 2009 and 2014 have significantly reduced the risk of the New England lobster fishery to right whales. The largest entanglement threat is now posed by Canadian snow crab gear trap/pot gear.

Salvador Dec. ¶ 9.



seven of these recent cases resulted in serious injuries or mortalities to right whales. *Id.* ¶ 20. *See also* Borden Dec. ¶ 5.<sup>9</sup>

In summary, Mr. Salvador's data analysis reaches a conclusion inconsistent with Plaintiffs' allegations that the American lobster fishery presents the most significant threat of harm to right whales. Instead, he finds that performance of the American lobster fishery in its interactions with right whales was greatly improved in the last decade — notwithstanding the significant volume of rope it deploys in the water column which Plaintiffs put forward, without supporting evidence, as the reason why the fishery imminently threatens whales. Salvador Dec. ¶¶ 9, 17, 18, 20, 21, 22, 23

**B. Instead Of Ordering Vacatur, The Court Should Remand the 2014 BiOp to NMFS**

For the reasons described in the Federal Defendants' Remedy Brief, the appropriate remedy here is a remand to the agency to address the deficiencies in the 2014 BiOp and allow sufficient time for public notice and comment. The threat of an impending vacatur is unnecessary given the substantial protective measures already in place on the water to guard against whale entanglements.

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<sup>9</sup> Although not specifically at issue in this case, Mr. Salvador also reviewed data concerning other sources of harm to right whales that pose greater risk to right whales than the American lobster fishery. In that regard, he points to vessel strikes as a significant source of mortalities and serious injury. Salvador Dec. ¶ 15. Mr. Salvador also pointed to the emergence of gillnet gear as a growing threat to the right whale population. *Id.* ¶ 21. While gillnet gear accounted for only a single entanglement case prior to 2010, since then, seven whales have been entangled in gillnet gear, three of them inflicting serious injuries. *Id.*

**III. THE COURT SHOULD DECLINE TO CLOSE A PORTION OF THE FISHERY BY INJUNCTION**

**A. Summary.**

Plaintiffs urge the Court to exercise its discretionary equitable powers to enjoin the agency from issuing a permit for fishing with the use of static vertical lines and buoys in an area of Massachusetts waters that has become an aggregation point for right whales during their breeding and calving season. Moore Dec. ¶¶ 42, 50-52. Based on current, safe fishery operating practices and expert evaluation of the rudimentary state of research and development into lobster harvesting operations without the use of static vertical lines and buoys, Intervenor-Defendants submit that Plaintiffs effectively are requesting the Court to close a portion of Massachusetts waters to all commercial lobster fishing, leaving them open only to vessels testing experimental gear designed to be used with technology that enables remote location and retrieval of fishing gear located on the ocean floor.

Plaintiffs essentially request the Court to exercise its equitable powers to order an experiment in ropeless fishing. Such an order would do nothing to remedy NMFS's failure to include an ITS in its 2014 BiOp, and therefore bears no relationship to the statutory violation. Moreover, Plaintiffs have made no demonstration that experimental ropeless fishing (a) would provide right whales with more effective protection from entanglements than they have under NMFS's existing regulations; or (b) could be implemented without unintended adverse consequences caused by re-positioning of fishing gear outside the proposed closure zone.

Plaintiffs have not met their burden of demonstrating a likelihood of irreparable harm to the species unless the proposed closure is implemented. As noted above, the regulatory framework in place since issuance of the 2014 BiOp has greatly reduced the incidents of entanglement between right whales and gear deployed in the New England lobster fishery with

no serious injury or mortality. Salvador Dec. ¶ 10. In fact, the best available, most current information reveals that the closure Plaintiffs seek would do nothing to protect right whales from the fishing gear that has ensnared and killed 16 animals in recent years, namely: vessel strikes and ineffectively-regulated Canadian snow crab and trap/pot fisheries and other U.S. commercial fisheries such as the gillnet fishery.

Plaintiffs have failed to demonstrate that their proposed closure of certain Massachusetts waters meets the exacting standard required for exercise of extraordinary equitable powers by the Court. Plaintiffs' proposed closure would not deliver a material, demonstrable benefit to right whales during the interim before NMFS issues an updated biological opinion. Indeed, it would not ensure any necessary protection over and above the effective gear modifications, seasonal closures and other measures already in place. Rather, the Court is being asked to indulge Plaintiffs' "wish and a prayer" that ropeless fishing is commercially practicable. Plaintiffs have presented the Court with no evidence to address either the feasibility of ropeless fishing or experts' concerns that a closure will result in unintended consequences having the potential to adversely impact the right whale population.

In sum, Plaintiffs' request for injunctive relief is intended not to address NMFS's failure to issue an ITS with the 2014 BiOp but, instead, is an opportunistic move to jump-start an experimental program in unproven fishing technology that plaintiffs favor.<sup>10</sup> Intervenor-Defendants therefore respectfully request the Court to reject Plaintiffs' request for equitable relief.

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<sup>10</sup> Plaintiffs acknowledge that NMFS has initiated a rulemaking to establish a framework for the testing of ropeless fishing, but the program apparently has not moved forward on a time frame satisfactory to them. Plaintiffs' Remedy Brief at 1.

**B. Standard of Review**

The standard for a preliminary injunction is well established. A moving party must show: (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.

*Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *see Hall v. Johnson*, 599 F. Supp. 2d 1, 3 n.2 (D.D.C. 2009).

In applying the four-factor standard, district courts may employ a sliding scale as to which a particularly strong showing in one area can compensate for weakness in another. *Hall*, 599 F. Supp. 2d at 3 (quoting *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005)). Nevertheless, both the United States Supreme Court and the Court of Appeals for the D.C. Circuit have emphasized that a movant must show at least some likelihood of irreparable harm in the absence of an injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (holding that a plaintiff must “demonstrate that irreparable injury is likely in the absence of an injunction,” and not a mere “possibility”).

In this case, Plaintiffs have prevailed on the merits, and now seek injunctive relief for an interim period until NMFS issues a new biological opinion that (a) cures its prior failure to incorporate an ITS, and (b) otherwise meets NMFS’s substantive obligations under the ESA. The question remains whether plaintiffs have demonstrated a likelihood of irreparable injury, a lack of substantial harm to interested parties such as Intervenor-Defendants, and a furtherance of the public interest in protection of right whales. Plaintiffs fail to make a convincing case under any of these factors.

**C. The best available scientific evidence indicates the likelihood of irreparable injury from entanglements with American lobster gear is low and therefore an interim remedy is unnecessary.**

A fundamental flaw in Plaintiffs' expert Dr. Moore's analysis of risk to right whales is that it does not present evidence to demonstrate the *likelihood* of risk to whales from New England fishing gear. Scientists must establish co-occurrence between right whales and lobster fishing gear in the same geographic area at the same time in order to determine whether whales have the potential to encounter lobster fishing gear. A growing body of scientific evidence and supporting data demonstrate that Plaintiffs' assertions are unsupported and that the co-occurrence between North Atlantic right whales and New England lobster gear has decreased dramatically since 2010.

Effectively addressing the threat of the New England lobster fishery to right whales requires consideration of the impacts of climate changes on right whale distribution and changes to the spatial-temporal distribution of lobster gear. Recent trends in climate have affected oceanic conditions, right whale distribution, and lobster fishing practices. Lecky Dec. ¶ 16-20. Failure to consider ongoing effects of climate change can undermine right whale conservation efforts by mis-assignment of risk between and among the various sources of potential harm to the species. An accurate assessment of risk is key to the development of a successful conservation program, especially for a species such as right whales that are under threat from multiple sources with complex interactions. *Id.* at ¶¶ 16 - 19.

Scientists have learned that the impacts of a changing climate have altered the geographic distribution, timing, and quality of right whale's preferred prey, *Calanus finmarchicus*, which in turn resulted in shifts in right whale distribution as whales search for food. Lecky Dec. ¶¶ 16 - 18. An examination of passive acoustic data collected at sites along the Atlantic coast show a significant shift in right whale distribution after 2010, resulting in an increased right whale

presence in the mid-Atlantic region and a simultaneous decrease in the northern Gulf of Maine where much of the New England lobster fishery takes place. Right whales appear to have shifted away from previously prevalent northern grounds in the Bay of Fundy and greater Gulf of Maine, and are spending more time in mid-Atlantic regions year-round. While acoustic data for the Gulf of Saint Lawrence have not been analyzed, data from the NOAA Right Whale Sighting Advisory System confirms significant right whale sightings in the Gulf of Saint Lawrence in recent years. Lecky Dec. ¶ 20.

The plaintiffs also ignore the success of recent modifications to the ALWTRP and reductions in the amount of lobster gear fished. Substantial amounts of fishing rope have been removed from the New England lobster fishery over the last ten years. According to NMFS, the sinking groundline rule implemented in 2009 is expected to have removed more than 27,000 miles of floating ground line by converting it to sinking line and the vertical line rule is expected to have removed an additional 2,540 miles of vertical line from the water in 2014 Lecky Dec. ¶ 13; Borden Dec. Exh. B. The ALWTRP also closes a vast expanse of fishing grounds in Massachusetts where large aggregations of right whales are known to feed. This closure was thoroughly analyzed by NOAA and included significant stakeholder and public input. In addition to ALWTRP requirements, effort in the New England lobster fishery has declined significantly in recent years as a result of a gradual trap reduction program in Lobster Management Area 3 with only about 5,400 lines currently fished in this area, a moratorium on lobster licenses in Massachusetts, a limited entry program in Maine, and recent mandatory trap reductions of 25% to 50% in Southern New England (Area 2 and 3) Borden Dec. Exhibit A, Lecky Dec. ¶ 23.

Plaintiffs' expert Moore's assertions that the American lobster fishery poses a likely and imminent threat to the right whale population is an unreliable basis on which the Court to base a

remedy to counteract that threat. Dr. Moore's analysis does not integrate updated science about whale migratory patterns with the impact of changes in fishery effort across the whale's range. As a result, he fails to present a credible basis for his conclusion that the American fishery is likely to inflict harm on right whales sufficient to justify an interim remedy in addition to the protective measures already in place.

**D. Plaintiffs' proposed closure is contrary to the public interest because it may heighten risk to right whales from fishing gear positioned around the periphery of the closure.**

Plaintiffs' request that the court enjoin NMFS's authorization of the use of static vertical lines in the lobster fishery in an area south of Martha's Vineyard and Nantucket would result in a year-round closure of the area to fishing. Plaintiffs' declarant, Dr. Moore, offers a flawed argument that "the entanglement risks in Southern New England waters are significant" and that "allowing traditional trap/pot fishing to continue in the proposed Protected Area is likely to lead to entanglement, causing potential injury or death, to one or more right whales." Moore Dec. ¶¶ 43, 51.

It is important to consider the unintended consequences of a year-round closure, based on realistic expectations of how fishing vessels will respond, rather than simply drawing a box on a chart and assuming that fishing gear is no longer a threat. One must consider where the displaced fishing gear will go and how relocation of fishing gear might impact the surrounding habitat and entanglement risk to whales. Expert David Borden posits that "the fishing fleet would have only two options: fish somewhere else or go out of business.... vessels [that fish in the proposed closure] specialize in moving lobster gear, as they seasonally move between shallow and deep waters." Borden Dec. ¶ 13. The closure would either cause significant economic harm by removing a fisherman's ability to fish, or more likely, would displace and concentrate fishing effort to an adjacent area and "actually increase risk to whales." *Id.*

The plaintiff's proposed closure would also render significant economic harm on fishermen who rely on those fishing grounds. At least 35 fishermen hailing from Massachusetts and Rhode Island would be impacted, with substantial economic harm. Casoni Dec. ¶ 15; Borden Dec. ¶ 14.

**E. Plaintiffs' proposed closure does not meet the public interest in an effective, scientifically-justified program of whale protection measures.**

The core purpose of the ESA is to vindicate the public interest in protecting the nation's precious natural resources whose existence is threatened or endangered by human activities. To do so, Congress has authorized and supported programs entrusted to NMFS intended to take the steps necessary to build credible scientific understanding of threats to marine species like the highly-endangered North Atlantic right whale population. As illustrated by the expert declarations submitted in support of this brief, it is an enormously complex and sophisticated process to develop adequate knowledge of the right whale's needs, identify the sources of threat to the species and design and implement effective measures that will mitigate and avoid harm with the goal of restoring the population to a healthy, sustainable level. Regulation of multiple human uses of the marine environment in order to protect an imperiled species is a task quintessentially suited for the expertise of a specialized agency like NMFS, not a Court.<sup>11</sup> Intervenor-Defendants respectfully urge the Court to follow the maxim that, when seeking to solve a problem involving health, the first priority is to avoid doing harm. The right whale

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<sup>11</sup> Federal courts are particularly deferential toward agency findings that involve "scientific determination[s]," because they are presumed to be the product of agency expertise. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). The court "must look at the decision not as the chemist, biologist or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimum standards of rationality." *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (*en banc*).



population is unhealthy. The management plan for restoring it to good health should be left in the hands of experts with the singular mission of species restoration.

Declarants Lecky, Borden, and Salvador have each explained aspects of the complexities of the multiple commercial fisheries and other human activities that co-exist with right whales throughout their migratory range. They have effectively illustrated the difficulty of pulling together the information and expertise required to design an effective management scheme for whale protection. They have also raised concerns about how to avoid potentially harmful unintended consequences of causing multiple harvesters to reposition their gear. This concern alone should be sufficient to give the Court pause before stepping into the shoes of a regulator. *See* Borden Dec. ¶ 13. The public interest would not be well served by imposing an interim remedy that undermines the effectiveness of existing regulatory and management schemes that protect not only right whales but that regulate many commercial fishing resources that could be disrupted by changes in existing lobster fishing practices.

**F. Plaintiffs’ proposed closure amounts to an “incentive” for innovative technology — an undertaking that would involve the Court in fishery management decisions best reserved for an expert agency.**

Plaintiffs’ request for an injunction to ban static vertical lines in a closure area to be created within the Massachusetts lobster fishery is not only unnecessary to remedy a statutory violation, it is a back-door effort to gain momentum for an experimental program in ropeless fishing that NMFS has thus far declined to pursue.<sup>12</sup> Their request would involve the Court in complex fishery management decisions reserved to the agency, and simply does not meet the standards for exercise of equitable relief by the Court.

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<sup>12</sup> 83 Fed. Reg. 49,046 (Sept. 28, 2018).

The idea of creating innovative, ropeless fishing technology has been around for more than a decade. In theory, it would remove completely the potential for harmful entanglements between whales and fishing gear. In practice, the technology cannot yet deliver on its promise. Nevertheless, Plaintiffs hope to create a small zone in the fishery where they believe entrepreneurs will be incentivized to jump start the technology. But even avid promoters of the concept caution that it is far from ready for commercial development.<sup>13</sup>

To explain the technological, operational, safety, and regulatory hurdles associated with commercial development of ropeless fishing, Intervenor-Defendants present the expert declaration of Noah Oppenheim that documents repeated unsuccessful efforts to prove the viability of currently-available ropeless fishing systems. His evidence shows that ropeless fishing systems are currently impracticable for use in a commercial-scale fishery and have yet to achieve acceptable standards of reliability, safety or operational capability. Oppenheim Dec. ¶ 37. They provide no basis for a federal judge to exercise equitable powers to displace NMFS' expertise in whale conservation and fisheries management.

In summary, Mr. Oppenheim identifies the following material obstacles to ropeless fishing as a timely, realistic approach to enable safe, efficient commercial fishing that eliminates potential harm to right whales.

- Commercial fishermen in Australia, California, and New England have tested ropeless gear under benign marine conditions, i.e., flat bottom with minimal

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<sup>13</sup> Dr. Mark Baumgartner of Woods Hole Oceanographic Institute (WHOI), is a founding member of the Ropeless Fishing Consortium and a prominent promoter of ropeless fishing as a resolution to whale/fishing gear conflicts. When asked during the group's 2019 conference, "When can we go ropeless?" he observed: 1) "We are in the early stages of development – mostly proof of concept with prototypes that are not yet designed for operational fishing by hundreds to thousands of fishermen," and 2) "Every system you have seen today will need to go through a redesign process to (a) incorporate an interoperable gear location system, (b) work for fishing at scale . . . and (c) enable mass production at low cost." Oppenheim Dec. ¶ 28.

current and tides, and found that they have a high failure rate even in these conditions. Oppenheim Dec. ¶¶ 23-26, 30-34. In order to deploy ropeless gear successfully in the American lobster fishery, it would need to be capable of operation in far more harsh conditions. *Id.* The fishermen involved in the testing concluded that ropeless gear compatible with commercial fishing conditions does not currently exist. *Id.*

- Existing ropeless technology systems do not include spatial mapping software and other capabilities necessary to enable reliable deployment and retrieval of gear. *Id.* at ¶ 21. Fishermen anticipate that gear loss from the system would be common and costly. *Id.* at ¶ 22. Gear loss creates a problem with “ghost gear” that litters the sea bottom and adversely affects marine species as well as commercial fishing effort.
- Ropeless fishing technology is currently incompatible with other existing fisheries that overlap the lobster fishery. According to Mr. Oppenheim, widespread deployment of such gear “would result in significant conflict amongst fishermen and between competing gear types.” *Id.* at ¶ 34. “Deployment of [ropeless] gear on a fixed gear fishery would require that all other fisheries operating in the area purchase and use expensive electronic mapping and communications equipment in order to be able to detect and avoid traps deployed with pop-up buoy gear. Alternatively, it would require the delineation of zones of the ocean for specific fisheries or gear types, prioritizing access to resources to some and denying it to others.” *Id.* Such conflicts between competing uses of shared marine environments are a core concern for fisheries managers and are not suitable for

resolution as part of this litigation. Indeed, Mr. Oppenheim indicates he is not familiar with “any fishery management or marine spatial planning process that could legally facilitate an ocean zoning scheme that would prevent gear conflicts between fishing sectors if one or more were required to use [ropeless] gear.” *Id.* at ¶ 35.

- In Mr. Oppenheim’s opinion, moreover, a requirement to use ropeless gear in the American lobster fishery would violate federal and state fishery management laws. *Id.* at ¶ 36. For example, if a separate zone were to be set aside for ropeless fishing, it would lead to inefficient use of the nation’s fisheries resources in violation of the guiding principles of the Magnuson-Stevens Fishery Conservation and Management Act. *Id.* at ¶ 35.
- Finally, the current cost profile of available ropeless gear systems is exorbitant by comparison with the cost of traditional gear. According to Mr. Oppenheim, a ropeless fishing economic model is unsupportable in the American lobster fishery. *Id.* at ¶ 37.

Given the significant operational, economic, legal and safety hurdles ahead before ropeless fishing is ready for commercial deployment, Intervenor-Defendants submit that it would be an inadvisable use of the Court’s equitable powers to order a closure for the purpose of providing an incentive for ropeless fishing development.

### **CONCLUSION**

For the reasons set forth above, Intervenor-Defendants urge the Court to deny Plaintiffs’ request for vacatur with a stay until January 31, 2021 and to deny Plaintiffs’ further request for interim injunctive relief. Rather, the Court’s ruling on April 9, 2020 can best be implemented by

remand to NMFS of the 2014 BiOp with instructions for the agency promptly to complete a new biological opinion that is fully compliant with the procedural and substantive obligations of the ESA and the MMPA. Intervenor-Defendants support the imposition of a reasonable deadline up to May 31, 2021 for the agency to complete its work in light of uncertainties arising from the ongoing pandemic., and the need for proper administrative process, notice and public comment. Nevertheless, Intervenor-Defendants believe that it would be appropriate for the Court to direct NMFS to submit a report on its progress by a date certain.

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Respectfully submitted,

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