

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD MAXIMUS STRAHAN,

Plaintiff,

v.

SECRETARY, MASSACHUSETTS
OFFICE OF ENERGY AND
ENVIRONMENTAL AFFAIRS
("MEOEEA"), et al.

Defendants.

CIVIL ACTION 1:19-cv-10639-IT

MASSACHUSETTS DEFENDANTS' MEMORANDUM IN SUPPORT
OF MOTION TO STAY FURTHER PROCEEDINGS

Defendants Secretary of the Massachusetts Office of Energy and Environmental Affairs and Director of the Massachusetts Division of Marine Fisheries (collectively, "Massachusetts Defendants") have moved for a stay of further proceedings in this case until the process required by the Court's April 30,

2020, Order is completed. The order required the Massachusetts Defendants to “promptly seek” an Incidental Take Permit (“ITP”) under the Endangered Species Act (“the Act”) from a federal agency. The Massachusetts Defendants complied with the Court’s order by promptly undertaking the process to seek an ITP. This memorandum and the accompanying Declaration of Robert P. Glenn (“Affidavit” or “Aff.”) are submitted in support of the motion.

A stay will allow expert biologists at the National Marine Fisheries Service (“NMFS”) to determine, in the first instance, whether Massachusetts can license commercial lobster pot and gillnet fishing consistently with the Act. The ITP process requires development of conservation measures for endangered species. By prioritizing the ITP process over the litigation process, a stay will also allow the Defendants to focus its resources on developing and implementing further real, effective protections for endangered species rather than spreading those resources between conservation measures and litigation support.

Introduction

A fact-intensive analysis is required to determine if an otherwise lawful activity creates legal liability under the Act. The amended complaint (Doc. 68) alleges that the Massachusetts Defendants have violated 16 U.S.C. §§ 1538(a) and (g) of the Act by promulgating regulations that require the use of vertical buoy

rope (“VBR”).¹ Docs. 68, 160. The allegation survived the Massachusetts Defendants’ motion to dismiss because the Court concluded that “Plaintiff has sufficiently pleaded that state-licensed VBRs [used for lobster pot or gillnet fishing] actually harm and kill right whales” in Massachusetts. Docs. 117, 160 at p. 5. Thus, the parties are locked in a dispute over whether Massachusetts’ licensing of commercial lobsterpot and gillnet fishing in state waters makes them liable for a “take” of critically endangered right whales and endangered sea turtles in violation of 16 U.S.C. § 1538.²

Before this case proceeds to a disposition on the merits, the Court has ordered the Defendants “to promptly seek an Incidental Take Permit pursuant to

¹ Massachusetts requires licensed fishers to mark the location of their submerged gear with a surface buoy. 322 Code Mass. Regs. 4.13(2)(c). The buoy and gear are tied together with VBR. The buoy indicates the location of submerged gear for the benefit of the fisher, other fishers who want to avoid dangerous gear conflicts, and enforcement officials. The rope also aids the fisher when bringing the submerged gear to the surface. Compliance with the Act is at issue because plaintiff alleges that endangered species can get entangled in the VBR, sometimes leading to serious injury or mortality. In other proceedings between the parties, this Court “properly found that a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.” Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997).

² Plaintiff and the Massachusetts Defendants are the only parties. The other named defendants were dismissed, although Plaintiff has appealed. See Doc. 150 (order of dismissal); Strahan v. MEOEEA et al., United States Court of Appeals for the First Circuit, Case No. 20-1281.

Section 10 of the Endangered Species Act.” Order Granting in Part and Denying in Part Preliminary Injunctive Relief, April 30, 2020, Doc. 206 (“Order”), at 31.

The Court concluded that “the evidence portends that Plaintiff will be able to demonstrate that state-licensed VBRs have harmed *and* will continue to harm right whales.” Order at 21. However, the Court also recognized the important role that Congress established for expert agencies in administering and enforcing the ESA:

Congress has set forth a permitting process through appropriate expert agencies that allows for the incidental taking of endangered species *if* the agency is satisfied that such incidental takes will, among other things, not threaten the survival of the species. The determination to allow such takings, however, is for the expert agency, and not the court, to make.

Id. at 2. Accordingly, the Court concluded “that allowing the Incidental Take permitting process to take place ensures Congress’s objectives for the Act are achieved.” Id. at 30.

The ITP process is a lengthy, resource-intensive, and iterative undertaking by the applicant and the permitting authority: in this case, the National Marine Fisheries Service (“NMFS”). The Massachusetts Defendants respectfully request a stay until the ITP process concludes and the Court and the parties have the benefit of NMFS’ decision on whether Massachusetts has taken all necessary steps under federal law to mitigate effects of its licensing activities and whether the continuing

of those activities will not jeopardize the survival and recovery of right whales. See 16 U.S.C. § 1539(b).

The Habitat Conservation Planning and Incidental Take Permit Processing Handbook (“Handbook”) issued by the U.S. Department of the Interior (the U.S. Fish and Wildlife Service) and the U.S. Department of Commerce (NMFS) describes the process, standards and best practices for evaluating ITP applications. See Handbook, https://www.fws.gov/endangered/esa-library/pdf/HCP_Handbook.pdf (last accessed July 28, 2020). The duration of the process, which is largely controlled by the requirements of the Act and NMFS, is expected to take a minimum of two years and probably longer. By the attached testimony, the Massachusetts Defendants explain that the process is complicated and the outcome unsure, but there is reason to believe that their ITP application may well be successful.

By the Order, Plaintiff obtained relief he sought upon a motion for preliminary injunction, albeit not full relief. See Doc. 144. The Court declined to then-grant Plaintiff’s request that Massachusetts be enjoined from licensing lobsterpot or gillnet fishing that uses VBR. The Order granted him the right, however, to “renew his motion for a preliminary injunction enjoining Defendants from licensing fishing activities that use Vertical Buoy Ropes in Massachusetts

state waters if Defendants have not obtained an Incidental Take Permit within ninety (90) days of this Order.” Order at 31.

As the Handbook and the Affidavit make clear, while the Massachusetts Defendants promptly began the ITP application process as ordered, 90 days is an inadequate period of time to actually obtain an ITP or even submit a formal application. While the Massachusetts Defendants have focused their efforts since the Order issued on the ITP process, the Plaintiff has used that time to engage in discovery. Defendants have cooperated,³ including sitting for a deposition, notwithstanding the expiration of the discovery period established in the Scheduling Order. Doc. 94 (requiring discovery, other than expert discovery, to be completed by Dec. 31, 2019). Defendants have not yet taken discovery; they have reserved with Plaintiff their right to do so.

As more fully explained below, the Massachusetts Defendants seek an adequate amount of time to concentrate on their ITP application, and make their best efforts to obtain an ITP. They seek the Court’s protection to allow them to concentrate on making a successful ITP application without the distraction of, and

³ As of this writing, some discovery responses are due. They will be forthcoming; the motion is not intended to stay those responses.

dedication of public resources to, defending on the merits at this time or against what they expect would be further motion practice.⁴

The Massachusetts Defendants are willing to prepare and file a status report every three months, or any shorter or longer interval that the Court deems appropriate. They understand that the Court retains discretion to lift the stay at any time if necessary to serve justice. Accordingly, Defendants hereby request a stay of these proceedings until the completion of the ITP application process required by the Court's April 30 order or other date selected by the Court.

Background: The ITP application process is underway.

Declarant Robert P. Glenn is the Program Manager/Chief Scientist of the Massachusetts Division of Marine Fisheries' Assessment and Survey Program. Aff. 1. He leads the Massachusetts Defendants' task force formed in May 2020 for the purposes of seeking an Incidental Take Permit ("ITP") in compliance with the Court's Order of April 30, 2020. *Id.* at ¶ 14.

Mr. Glenn and other task force members have reviewed the ITP Handbook, a 405-page document. *Id.* at ¶ 6. They understand that a detailed Habitat

⁴ No less than eight motions for temporary or preliminary injunctive relief have been filed in this case to date. Massachusetts Defendants do recognize that Plaintiff's motion practice has subsided since he obtained representation.

Conservation Plan (“HCP”) serves as the primary foundation of an ITP application.⁵ Id. at ¶ 7.

The HCP must contain the following elements: (a) An assessment of impacts likely to result from the proposed taking of ESA listed species; (b) Measures the applicant will undertake to monitor, minimize and mitigate the proposed impacts to listed species; (c) Description of funding available to implement mitigation and monitoring measures; (d) Alternative action to the taking of species and reasons why the applicant did not adopt those alternative. Id. at ¶ 7.

⁵ The Massachusetts Defendants may exercise their prerogative to consult with NMFS on activities beyond those referenced in the Court’s Order. The Order arises from the Court’s assessment of the Plaintiff’s likelihood of success on the merits of his complaint. Plaintiff, who is the master of his complaint, alleges violations of the Act “owing to [Defendants] requiring the use of Vertical Buoy Ropes in lobsterpot fishing gear and in Gill nets.” Doc. 68, Relief at II. He seeks an order “enjoining the Defendants from licensing or engaging in further Lobster Pot and Gill Net commercial fisheries operations that could result in the entanglement of any Endangered Whale and Sea Turtle and enjoining the Government Defendants from licensing said commercial fisheries operations unless they can scientifically demonstrate that these acts will not result in the killing and/or injuring of individuals of said endangered species.” Id. at III. Thus, the Order pertains to “Lobster Pot and Gill Net commercial fisheries operations.” In Massachusetts, VBR is also used in the commercial whelk pot fishery, fish pot fishery, offshore aquaculture industry, and by recreational fishers. Plaintiff has not alleged a violation of the Act based on these activities. Nevertheless, the Massachusetts Defendants may decide to address some or all of these activities when consulting with NMFS under the Order. Broadening the scope would require additional time to draft the appropriate HCP. They have not yet had time to make a final decision on the scope.

The Departments of Interior and Commerce have indicated in the Handbook that the full ITP process typically takes between two (2) and four (4) years to complete. Id. at ¶ 12. The timeline is largely out of Defendants' control.

Mr. Glenn has had several telephonic pre-consultation meetings with NMFS. Id. at ¶ 15, 16. Based on those conversations, Mr. Glenn understands that this particular ITP application would be a complex one, because the right whale (a marine mammal) is involved, but attempting to obtain an ITP is not futile. Id. at ¶ 18-29.

Mr. Glenn anticipates that the Massachusetts HCP mitigation efforts will involve undertaking additional state regulatory measures to protect endangered species. The Massachusetts defendants have already initiated a rulemaking for additional Massachusetts HCP mitigation efforts involving additional proposed state regulatory measures to protect endangered species. If fully adopted following the required comment process, these regulatory changes would take effect January 1, 2021, and include:

- Closure of all Massachusetts state waters to lobster pot fishing February 1st through April 30th annually. This represents a substantial expansion of the Massachusetts Bay Restricted Area (the "MBRA") and will provide

additional protection to right whales that have been observed using the area to the north of the MBRA in recent years.

- Expand the dynamic extension of seasonal closures of all state waters beyond May 1st as necessary when right whales are documented to be present and until surveillance informs a safe opening.
- A complete ban on all buoy rope greater than 3/8” diameter in the commercial lobster pot fishery. In the last five years the vast majority of rope successfully removed off of entangled right whales has been greater than 1/2” in diameter. 3/8” diameter rope or less is what is already typically deployed in the Massachusetts lobster fishery. By banning rope larger than 3/8” diameter, Massachusetts will be able to distinguish its fishery from all other jurisdictions where rope larger than 3/8” is allowed. This will also allow Massachusetts to establish that rope greater than 3/8” taken off entangled right whales did not originate in Massachusetts.
- Require all Massachusetts licensed fixed gear commercial fishermen to use weaker rope, specifically 1,700 lb. rope, or approved 1,700 lb. contrivance in buoy lines. The Massachusetts Defendants anticipate that this measure alone will further reduce the risk of serious injury and mortality to right whales by 72%.

- Require new distinct gear marking scheme that distinguishes all Massachusetts (state waters of home port) lobster gear from other gear in the New England lobster pot fishery. This will allow DMF and NMFS to determine if and the extent to which Massachusetts lobster gear is involved in right whale entanglements in the future.
- Ban on fishing VBRs with only 1 trap attached (so-called “singles”) on all vessels over 29’ length. There are a small portion of lobster vessels greater than 29’ in length in Massachusetts that fish singles. These vessels can safely fish lobster pots in a trawl configuration and by doing so further reduce the number of VBRs deployed in the Massachusetts lobster fishery. This measure will reduce entanglement risk to right whales and also further distinguish the Massachusetts lobster fishery from the rest of the NELTF as the only jurisdiction that does not allow the use of singles by the majority of its participants. Massachusetts will still allow the use of singles on vessels less than 29’ to ensure the safety of small vessel participants. It is not possible to safely fish multiple trap trawls on small fishing vessels.
- Limit the issuance of seasonal student licenses to a maximum of 150 annually. The seasonal student permit allows full time students to commercially fish for lobster with a maximum of 25 traps. Currently there is no cap on the number of seasonal student licenses that DMF issues.

However, to date DMF has never issued more than 110 seasonal student licenses. This measure sets a maximum upper limit on participation and eliminates any potential for substantial escalation in the number of VBRs that can be deployed in this sub-component of the Massachusetts lobster fishery.

- Expand the area of gillnet closure impacting fishing in Cape Cod Bay during the time period of January 1 – May 15 to include some additional areas in the northwestern portion of Cape Cod Bay where right whales may aggregate during this period.

Id. at ¶ 28. Further, comprehensive exploration of VBR alternatives is also planned with the use of funding from the National Fish and Wildlife Foundation.

Id. at ¶ 29.

NMFS has adopted a best practice of “Going Fast by Starting Slow.” Handbook, p. 2-4. Substantial work on the HCP is expected before NMFS considers an application ready for filing. Aff. ¶ 16, 27; Handbook 1-1 – 14-2. In NMFS’ experience, the Handbook process is “meant to streamline” and “increase the overall effectiveness” of the program. Handbook at *i*.

ARGUMENT

The Court has inherent and statutory authority to stay these proceedings. “United States district courts have inherent authority to stay proceedings, for the power to stay ‘is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.’” Nat. Res. Def. Council vs. Bernhardt, E.D. Cal., No. 105CV01207LJOEPG (Jan. 22, 2020), quoting Landis v. North American Co., 299 U.S. 248, 254 (1936). In addition, the citizen’s suit provision of the Endangered Species Act provides a basis to stay these proceedings. 16 U.S.C. § 1540(g)(1); Strahan v. Pritchard, 473 F.Supp.2d 230, 241 (D.Mass. 2007) (citing equitable powers conferred by 16 U.S.C. § 1540(g)(1) as a basis to stay that proceeding for a period of two years). Thus, courts, including this court, have entered stays in cases brought under the Endangered Species Act.

The Massachusetts Defendants respectfully seek an order exercising that authority and suspending further proceedings in this case in the interests of judicial economy and orderly proceedings, and to allow defendants to fully devote their available resources to completing the process the Court has ordered them to undertake. Control of the disposition of causes on its docket “‘calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.’” Ctr. for Biological Diversity vs. United States Fish & Wildlife Serv.,

S.D. Cal., No. 09-CV-0103-B (WVG) (Nov. 9, 2009), quoting Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936); see also Leyva v. Certified Grocers of Calif., Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979) (“A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent [judicial, administrative or arbitral] proceedings which bear upon the case.”).

Here, a balanced evaluation of the competing interests affected by either granting or refusing a stay demonstrates that a stay should be granted. The Court has already undertaken that balanced evaluation by ordering the State Defendants to undertake the ITP process but declining to issue an injunction against the continued licensing of VBR’s. Order, Doc. 206, pg. 30-31. The stay will allow that process to be completed, promote judicial economy, conserve the resources of the parties, and will not result in prejudice to any party.

As the Court observed in the Order, “If NOAA Fisheries were to agree that Defendants’ efforts are sufficient and issues an Incidental Take Permit, Plaintiff would no longer have any claim against Defendants arising under Section 9 of the Endangered Species Act.” Order at 29-30. The stay will allow time for the Court and the parties to obtain an answer from NMFS based on science and vetted through a public process. If the stay is denied and the ITP application progresses, the Court and the parties will be litigating liability in this case in the context of an

uncertain legal environment. Thus, judicial efficiency and the orderly course of justice favor a stay.

Even if the Court were to proceed on the merits and find liability, ongoing administrative proceedings before NMFS create tremendous uncertainty in the context of designing a remedy. NMFS' Biological Opinion on the impact of the American Lobster fishery on endangered species is under development. As the Court is aware, there are not only ongoing administrative proceedings at NMFS to develop a new, formal Biological Opinion but also pending court proceedings in the United States District Court for the District of Columbia that will have a bearing on the complex factual and legal issues underlying this case. See Center for Bio. Diversity v. Ross, United States District Court for the District of Columbia, Case 2018-cv-00112. Those proceedings will not be concluded until 2021 at the earliest. Id. at Minute Order 7/16/20 ("a principal issue in dispute is the timetable on which NMFS can promulgate a new BiOp," with the earliest proposed date being January 2021).

The forthcoming BiOp, any incidental take statement issued under 16 U.S.C. § 1536, and the related federal court proceedings are also reasonably expected to influence NMFS' decisions on Defendants' ITP application. NMFS' administrative actions will also directly impact those Massachusetts fishers who also hold federal lobster-fishing permits. Those fishers must comply with both

state and federal regulations when fishing in state waters. Granting the stay will avoid forcing the Court and the parties to address Plaintiff's claim in the context of an evolving, overarching legal and factual landscape, and thus, it would avoid the risking the waste of scarce judicial and party resources.

Granting the stay is also equitable. Defendants will be prejudiced if a stay is not granted in this case because they will be required to devote scarce public resources toward discovery and motion practice to prepare for a disposition on the merits, while simultaneously engaging in the resource-intensive ITP application process mandated by the Court. The Commonwealth has limited personnel with the knowledge and expertise necessary to respond to the plaintiff's litigation and to prepare the ITP application. If the Commonwealth is successful in the ITP application process, the vast amount of time and expense of defending the case will be wasted.

Plaintiff will not be prejudiced by granting the stay. Plaintiff asked the Court to "ORDER the State Defendants to immediately apply to [NMFS] for an ESA Section 10 incidental take permit for their licensing and regulating lobsterpot and gillnet fisheries in ESA listed designated critical habitat for the [North Atlantic] Right Whale." Plaintiff's Motion for a Preliminary Injunction, Doc. 144, at 2. The stay is consistent with Plaintiff's request. As a practical matter, which perhaps Plaintiff himself recognized when he requested that the Court order

Defendants to apply for an ITP, the mitigation efforts arising from the HCP element of a successful ITP application will likely be as impactful in terms of endangered species conservation, if not more so, than any remedy the Court could fashion in this case. For this reason, the public's interest in the fate of endangered species is also served by the stay.

Plaintiff may contend, but he would be wrong, that it is necessary to press forward in this case to save the North Atlantic right whale from extinction. Even assuming, for the sake of argument, that Plaintiff and the Court were in agreement that eliminating VBR is necessary to save the right whale, pressing forward is not going to eliminate VBR from the Atlantic Ocean.⁶ Surface buoys, and thus ropes, are routinely deployed in the Atlantic Ocean at the command of every jurisdiction that licenses salt-water fishing, including the United States. Massachusetts is only one jurisdiction among many that permit VBR, which Plaintiff has known for a long time. Accord Strahan v. Holmes, 595 F.Supp.2d 161 (D. Mass. 2009) (dual-permitted commercial lobster fisher's gear entangled a whale; the investigating

⁶ Indeed, for fishers who hold both state and federal permits, federal regulations will require the use of surface buoys wherever a federal permit holder fishes, even in state waters. Thus, for the approximately 25% of state-licensed lobster fishers in Massachusetts who hold federal permits, both state and federal law require the use of surface buoys in Massachusetts waters. See Aff. ¶22.

federal agency found that the gear “fully complied with Massachusetts and federal regulatory requirements”).

Conclusion

The Motion to Stay should be granted. It will promote judicial economy and orderly proceedings, allow the Massachusetts Defendants to devote their scarce resources to a coordinated effort with NMFS on conservation planning in accordance with the Act, and no party will be prejudiced.

Respectfully submitted,

OFFICE OF ENERGY AND
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July 29, 2020

Local Rule 7.1 Certification

I hereby certify that I have consulted with counsel for the Plaintiff in an attempt to resolve or narrow the issues raised in this motion.

/s/ Maryanne Reynolds

Maryanne Reynolds, BBO # 627127

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

Maryanne Reynolds, BBO # 627127

Dated: July 29, 2020