

THE INEFFICACY OF STATUTORY PROTECTIONS FOR THE NORTH ATLANTIC RIGHT WHALE

by Emma Green

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On August 6, 2022, a young North Atlantic right whale (NARW) was spotted off the coast of New Brunswick, Canada.¹ Appearing in good health, #4501's appearance was cataloged and touted as a bright point for the future of this critically endangered species.² Weeks later, in late August, #4501 was spotted again with fishing gear wrapped across his back.³ Biologists at the National Oceanic and Atmospheric Administration (NOAA) categorized this entanglement as a "serious injury."⁴ Unfortunately, #4501 will likely die from this injury.⁵

In March 2021, whale #3560, affectionately nicknamed "Snow Cone," was spotted with a "serious injury" from fishing gear wrapped around her head.⁶ A team of highly trained disentanglement experts were able to remove hundreds of feet of rope and improve her chances of survival.⁷ On December 2, 2021, Snow Cone was spotted with her newborn calf, whose presence made further attempts to remove the fishing gear impossible.⁸ On September 21, 2022, Snow Cone appeared off the coast of Nantucket with a new set of gear wrapped around her tailstock.⁹ She is in extremely poor health, suffering from whale lice, slowed movements, and various visible injuries.¹⁰ The whereabouts of her calf is unknown.¹¹ As one of the last 100 reproducing females of her species, the loss of Snow Cone will have a devastating effect.¹²

These two whales are a small sample of the 115 that have been documented dead, seriously injured, or sporting sub-

lethal injuries and illnesses since 2017.¹³ Scientists refer to this phenomenon as an unusual mortality event (UME), and assert that entanglement and vessel strikes are the leading causes. Fewer than 350 NARWs remain, and it is estimated that only one-third of their deaths are documented.¹⁴ Experts claim that only "quick and decisive action from humans" can ensure the species' survival.¹⁵ Some proposed regulations will affect where and how the relevant fisheries are able to operate. The NARW also gains certain protections under the Endangered Species Act (ESA)¹⁶ and the Marine Mammal Protection Act (MMPA).¹⁷ But exacerbated by climate change, the future of the NARW is uncertain at best.

This Comment will explore the conflicting interests between conservationists attempting to see that statutes and regulations protecting NARWs are adhered to, and federal lobster fisheries fighting the same statutes and regulations. Part I explores the effects of climate change on both parties. Part II summarizes the existing protections for the NARW created by statutes, federal agencies, and transboundary partnerships. Part III provides an in-depth analysis of the history of litigation and the two most recent cases from both conservation groups and the lobstermen's associations. Part IV analyzes the recently passed 2023 Omnibus Appropriations Bill and how the U.S. Congress' actions will affect the future of environmental regulation in the United States. Part V dives into the most recent opinion from the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, siding with the lobstermen. Part VI concludes.

1. National Oceanic and Atmospheric Administration (NOAA) Fisheries, *North Atlantic Right Whale Updates*, <https://www.fisheries.noaa.gov/national/engangered-species-conservation/north-atlantic-right-whale-updates> (last updated July 17, 2023).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Snow Cone Watch: Updates on Entangled Right Whale Mother and Newborn Calf*, NOAA FISHERIES (Jan. 31, 2022), <https://www.fisheries.noaa.gov/feature-story/snow-cone-watch-updates-entangled-right-whale-mother-and-newborn-calf>.

12. *Id.*

13. NOAA Fisheries, *2017-2023 North Atlantic Right Whale Unusual Mortality Event*, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event> (last updated July 14, 2023).

14. *Id.*

15. Hadeel Ibrahim, *Snow Cone Death "All but Certain," Researchers Say About Entangled Right Whale*, CBC NEWS (Sept. 23, 2022), <https://www.cbc.ca/news/canada/new-brunswick/snow-cone-death-north-atlantic-right-whale-1.6592999>.

16. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

17. NOAA Fisheries, *North Atlantic Right Whale*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last updated May 31, 2023); 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-410.

I. Fish Out of Water: Climate Change, the NARW, and New England Fisheries

The impact of a warming climate and ocean has had a deleterious effect on the NARW population as well as federal fisheries in New England. Changes in the biome have forced fishermen to significantly alter their behavior to remain profitable. New industry practices were created to protect NARWs, but lobstermen are concerned about the economic resilience of their industry.¹⁸

A. The NARW in Warming Waters

Climate change has greatly reduced the availability and consistency of feeding grounds for NARWs and has shifted their traditional migration patterns.¹⁹ This makes it challenging to create effective protected areas to limit or prohibit fishing near NARWs.

The deep waters inhabited by the NARW have warmed nearly 9 degrees Fahrenheit since 2004.²⁰ The ocean warming has reduced the population of *Calanus finmarchicus*, a small crustacean that is the NARW's primary prey.²¹ Not only is there less to eat, but the loss of consistent feeding grounds has forced the whales out of protected areas and put them at greater risk of entanglement, vessel collision, and other dangers. Current models predict that by 2067 there will be only 32 adult female NARWs.²² However, as the effects of climate change rapidly increase, this prediction is likely optimistic.

B. New England Fisheries and the Struggle to Remain Viable

The cultural identity of New England is forever entangled with its commercial fishing industry. In an annual report, NOAA compiles data on commercial landings—that is, the “weight of, or revenue from fish” sold for profit.²³ In 2019, landings revenue in New England totaled \$1.5 billion, a slight increase from the previous year.²⁴ Massachusetts' commercial fishing industry supported \$681 million in revenue and more than 100,000 jobs.²⁵ In 2021, Maine

reported a record \$724,949,426 in landed value from lobster harvesting alone.²⁶

Suffice it to say these New England coastal economies are dependent on commercial fishing, an industry that has become wildly unpredictable due to climate change. In 2021, there were 26 stocks on NOAA's overfishing list and 56 on the overfished list.²⁷ A decrease in fish stocks globally speaks to an uncertain future for commercial fishermen.²⁸ And current generational fishermen find themselves limited and frustrated by regulations intended to allow stocks to recover.

Ocean acidification, warming waters, and an overall decrease in biodiversity have dramatically changed fish populations and behavior.²⁹ As noted, climate change has also resulted in a movement of crustaceans and fish, including the highly valuable lobster, further offshore, forcing lobster fishermen to follow.³⁰ This increases the amount of gear within NARW habitats and potential entanglements.

Fisheries and coastal economies are at odds with the statutes, regulations, and policies meant to protect the NARW from entanglement and vessel strikes. Many in commercial fishing see this as another injury imposed on an industry already struggling to keep its head above water.

C. Further-Offshore Fishing and the Increased Risk to the NARW

An estimated one million vertical lines are currently deployed throughout NARW “migratory routes, calving, and foraging areas.”³¹ While the lobster industry has regulated the allowable line strengths for offshore fishing, there has been no evidence of mortality reduction for the NARW.³² Implementing restrictions greater than they are now (decreasing allowable line strength) might make fishing in deep waters cost ineffective.³³ Limiting the line strength means fewer traps can connect to one vertical line, which increases the risk of entanglement. Allowing greater line strength and more connected traps will decrease the chances of entanglement but increase mortality for those that occur.³⁴

18. See Nathaniel Willse et al., *Vertical Line Requirements and North Atlantic Right Whale Entanglement Risk Reduction for the Gulf of Maine American Lobster Fishery*, 14 MARINE & COASTAL FISHERIES e10203 (2022) (describing the new regulations for lobster traps and trawls).

19. NOAA Fisheries, *supra* note 17.

20. *Climate Driving New Right Whale Movement*, BIGELOW LAB'Y FOR OCEAN SCIS. (May 29, 2019), <https://www.bigelow.org/news/articles/2019-05-29.html>.

21. *Id.*

22. NOAA, NMFS-NE-247, NORTH ATLANTIC RIGHT WHALES—EVALUATING THEIR RECOVERY CHALLENGES IN 2018 (2018).

23. NOAA National Marine Ecosystem Status, *Commercial Fishing*, <https://ecowatch.noaa.gov/thematic/commercial-landings> (last visited July 24, 2023).

24. NATIONAL MARINE FISHERIES SERVICE, U.S. DEPARTMENT OF COMMERCE, NMFS-F/SPO-229A, FISHERIES ECONOMICS OF THE UNITED STATES (2019).

25. *Id.*

26. 2021 Maine Lobster Harvest the Most Valuable in the History of the Fishery, ME. OFF. GOV. MILLS (Feb. 14, 2022), <https://www.maine.gov/governor/mills/news/2021-maine-lobster-harvest-most-valuable-history-fishery-2022-02-14>.

27. NOAA Fisheries, *Status of Stocks 2021*, <https://www.fisheries.noaa.gov/national/sustainable-fisheries/status-stocks-2021> (last updated Dec. 28, 2022).

28. Doug Struck, *Warming Waters Exacerbate Dwindling New England Fisheries*, SCI. AM. (July 13, 2010), <https://www.scientificamerican.com/article/warming-waters-exacerbate-dwindling-new-england-fisheries/>.

29. Intergovernmental Panel on Climate Change, *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY 3, 12 (H.-O. Pörtner et al. eds., Cambridge Univ. Press 2022).

30. *American Lobster, Sea Scallop Habitat Could Shift Off the Northeast*, NOAA FISHERIES (May 28, 2020), <https://www.fisheries.noaa.gov/feature-story/american-lobster-sea-scallop-habitat-could-shift-northeast>.

31. *Id.*

32. Scott D. Kraus et al., *Recent Scientific Publications Cast Doubt on North Atlantic Right Whale Future*, 13 FRONTIERS MARINE SCI. 1, 3 (2016).

33. Willse et al., *supra* note 18, at 3.

34. *Id.*

II. Ship's Log: Existing Protections for NARWs

Recent legal battles over the restrictions imposed under the ESA and the MMPA have favored the NARW. The landscape has become a heated crusade between two parties whose asserted interests appear at odds. On one side, conservationists, environmental groups, and scientific organizations proclaim the dire necessity of preventing the imminent extinction of a critically endangered species. On the other side is an industry whose existence supports entire communities, and that is already suffering the effects and losses of climate change. Appeasing the two requires reconsidering the current legal framework, assessing modern technology available to mitigate injury to all parties, and creating a transparent and collaborative partnership moving forward. As the world embraces the value of the blue economy, reconciling legacy and emerging uses is critical to sustainability.

A. Statutory Protections for NARWs Under the ESA and the MMPA

Most of the litigation concerning NARW protection is brought under §7 of the ESA and the “takings” clauses of the MMPA.³⁵ Both statutes address required procedures for federal agencies that precede issuing permits for possibly harmful activity. Under these statutes, “harm” can be defined as actions that result in death or physical injury, but also actions that disrupt behavioral patterns or breeding grounds.³⁶ An agency must evaluate a proposed project or renewed permit for any potential harm and impact on endangered and protected species.³⁷ Failure to meet statutory obligations opens the door to litigation.

Section 7 of the ESA requires federal agencies to ensure that any action authorized, funded, or carried out by a federal agency will not “jeopardize the continued existence of” or result in the destruction or adverse modification of a listed species or its habitat.³⁸ The agency must consult with an expert wildlife agency and prepare a “biological assessment” to determine whether adverse effects will occur using the best scientific and commercial data available.³⁹ If there is likely to be an effect, the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) must prepare a biological opinion (BiOp) outlining whether jeopardy or adverse modification is likely.⁴⁰

The proposed action will not be allowed if jeopardy is likely and no reasonable alternatives exist.⁴¹ An incidental take statement (ITS) must be prepared for a “no jeopardy” opinion that outlines the impact on the protected species and limitations on allowable takes.⁴² A court can apply an injunctive remedy if an agency does not prepare this statement.⁴³

Under the MMPA, marine mammals in danger of extinction due to human activities are entitled to certain protections.⁴⁴ Activities that endanger essential habitats, particularly mating grounds and migratory passages to and from breeding grounds, must be carefully evaluated to determine whether potential mitigation or outright moratorium occurs.⁴⁵ These restrictions will remain in place until the marine mammal population reaches the “optimum sustainable population,” meaning the number that will result in maximum population productivity considering the relevant ecosystem.⁴⁶

Absent a permit or permitted incidental take, “taking” a marine mammal in danger of extinction is prohibited.⁴⁷ “Taking” includes harassing, hunting, capturing, killing, or attempting to harass, hunt, capture, or kill any marine mammal. Harassment includes “acts of pursuit, torment, or annoyance,” which can injure a marine mammal or disturb behavioral patterns that include breeding, migration, nursing, and so on.⁴⁸

Incidental takes are permissible during commercial fishing only within the limitations of an ITS as prescribed during the BiOp issued by FWS or NMFS. The purpose of an ITS is to limit any harm to a protected marine mammal to the bare minimum that might occur in concert with a lawful activity. Courts generally defer to agency expertise in assessing potential harm and protecting the goals of the MMPA.⁴⁹ ITSs that overestimate expected take, however, can be challenged and have been successfully defeated in court to remain true to this purpose.⁵⁰

B. Federal Agencies' Attempts to Protect the NARW

Federal agencies have been working for decades to enact policies that specifically protect the NARW based on the behavior and characteristics of the endangered species. Because of the wide-spanning migratory routes of the NARW, it can be challenging to create effective policy to protect them. Protective measures have included increased

35. NOAA Fisheries, *supra* note 17.

36. 50 C.F.R. §222.102.

37. See NOAA Fisheries, *Section 7: Types of Endangered Species Act Consultations in the Greater Atlantic Region*, <https://www.fisheries.noaa.gov/insight/section-7-types-endangered-species-act-consultations-greater-atlantic-region> (last visited July 24, 2023).

38. 16 U.S.C. §1536(a).

39. *Id.* §1536(c).

40. Center for Biological Diversity v. Ross, No. 18-112, 2020 WL 1809465, at *5, 50 ELR 20088 (D.D.C. Apr. 9, 2020).

41. *Id.*

42. *Id.* at *7.

43. *Id.* at *28.

44. 16 U.S.C. §1361.

45. *Id.*

46. *Id.*

47. NOAA Fisheries, *Marine Mammal Protection*, <https://www.fisheries.noaa.gov/topic/marine-mammal-protection> (last visited July 24, 2023).

48. 16 U.S.C. §1362.

49. District 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, 18 F.4th 38, 46, 51 ELR 20198 (1st Cir. 2021).

50. Council for Haw. v. National Marine Fisheries Serv., 97 F. Supp. 3d 1210, 1210 (D. Haw. 2015).

accountability for vessels as well as a specific team dedicated to take reduction and monitoring. Despite these efforts, the NARW population continues to decline.

NARWs migrate along the eastern coast of the United States.⁵¹ The calving grounds are off the coast of Florida, while the whales' feeding grounds are off the coast of Maine and southern Canada.⁵² Studies have shown that an NARW has likely experienced at least one entanglement throughout its life. NARWs' slow speed and sensitivity to "acoustic stressors" leave them vulnerable to vessel strikes.⁵³ Determining a cause of death in individual whales can be tricky, because it is often not immediate and can result from multiple injuries or infections.⁵⁴ Changes in migration routes and feeding grounds make accurate tracking of individual whales more difficult, which in turn makes it challenging to define protected areas.⁵⁵ These unique factors have resulted in a population being unable to recover at the same rates as other whale populations.⁵⁶

NOAA, NMFS, and other agencies have worked since the early 1990s to reduce entanglement and vessel strike incidents. NOAA and the U.S. Coast Guard created the Mandatory Ship Reporting System, which collects data on ship movements and informs vessels about NARWs; these data are used to "define high-risk" areas for the whales.⁵⁷ All vessels greater than 300 gross tons (excluding sovereign immune vessels) must report to U.S. authorities before entering NARW habitats.⁵⁸ NMFS has restricted vessels from approaching whales at a range closer than 500 yards.⁵⁹ However, some scientists believe this has hindered the ability of research vessels to track and identify whales.

In 1996, NMFS created the Atlantic Large Whale Take Reduction Team (Take Reduction Team) to identify even more high-risk areas. Based on reports from this team, NMFS implements "time and area" closures that commercial fisheries opposed.⁶⁰ The agency also regulates line strength and "weak link buoy" requirements.⁶¹ NMFS continues to develop these regulations based on new and emerging data. Whale disentanglement teams have been formed as a hands-on response to entanglement incidents.⁶² As noted above, the efficacy of these teams varies depending on the speed and accuracy of sightings and safety concerns. Modern technological solutions have been effective in helping to track NARWs and alert mariners to their

presence, but they require support from a stronger legal and regulatory framework.⁶³

C. *Transnational Efforts to Protect the NARW*

Because of the transboundary migration of NARWs, it can be challenging to implement regulations that hold responsible parties accountable. Many U.S. fishermen argue that protective measures have unduly burdened and injured their livelihood even though they are not solely responsible for harm to the NARW.⁶⁴

The United States and Canada have a relatively strong and cooperative working relationship in monitoring and protecting marine mammals, specifically the NARW, and have used non-binding instruments to co-manage habitats. Ecosystem-based management enables cooperative enforcement and is supported by regional regulations that exemplify similar shared values.⁶⁵ The Gulf of Maine Council on the Marine Environment includes members from the United States and Canada.⁶⁶ These members are from the government, fisheries, nongovernmental organizations, academia, and other areas, who come together to plan and manage the ecosystem and marine economic resources.⁶⁷ International bodies, such as the International Maritime Organization and the International Whaling Commission, have imposed restrictions on vessel speed and mandatory recording.⁶⁸

The area at issue in recent litigation, the Gulf of Maine, is not listed as a "particularly sensitive area" and lacks the increased protective measures attached to such a designation.⁶⁹ Conservation groups decided the most effective way to address the inadequate protective measures was to attack NMFS for failing to meet its statutory obligations. Choosing to litigate over violations of the ESA and the MMPA has proven successful on paper, but ineffective overall.

III. Testing the Waters: How the ESA and the MMPA Previously Held Up in Court

A. *Prior Litigation and the 2014 BiOp*

Prior to the most recent adjudications, the conflict between the lobster industry and conservationists began with a 2014 BiOp, issued by NMFS, that was held to have not met statutory requirements when it failed to provide a valid ITS. The 2014 BiOp, and NMFS' subsequent attempts to update it, formed the basis of the past near-decade of litigation. NMFS has never been able to put forth a compliant BiOp adequately addressing the threat to the NARW, despite issuing permits allowing continued fishery operations.

51. John Duff et al., *On the Right Way to Right Whale Protections in the Gulf of Maine*, 16 J. INT'L WILDLIFE L. & POL'Y 229, 230 (2013).

52. *Id.*

53. *Id.* at 231.

54. *Id.*

55. *Id.* at 236-237.

56. See Peter Corkeron et al., *The Recovery of North Atlantic Right Whales, Eubalaena Glacialis, Has Been Constrained by Human-Caused Mortality*, 5 ROYAL SOC'Y OPEN SCI. 2 (2018) (comparing the recovery rates of three species of *Eubalaena*).

57. Duff et al., *supra* note 51, at 243.

58. *Id.*

59. *Id.* at 258.

60. *Id.* at 232.

61. EUGENE H. BUCK, CONGRESSIONAL RESEARCH SERVICE, RL30907, THE NORTH ATLANTIC RIGHT WHALE: FEDERAL MANAGEMENT ISSUES (2001).

62. *Id.*

63. Duff et al., *supra* note 51, at 238.

64. BUCK, *supra* note 61, at 10.

65. Duff et al., *supra* note 51, at 240.

66. *Id.*

67. *Id.*

68. *Id.* at 244.

69. *Id.* at 248.

In 2014, NMFS issued a BiOp that spawned controversy between federal lobster fisheries and conservationists concerned with NARW mortality.⁷⁰ The BiOp acknowledged the likelihood that federal fisheries would kill or injure an estimated 3.25 NARW per year.⁷¹ This number exceeded the potential biological removal (PBR) level of 0.9.⁷² NMFS found itself in an uncomfortable position. It could not issue an ITS because the projected takings would have a greater than negligible impact on the endangered species. Attempting to overcome this hurdle, NMFS created a system of “numerical triggers” that, when exceeded, would reinitiate consultation under §7 of the ESA.⁷³ During a five-year period, if actual takings met or stayed below the species trigger of 3.25 for the NARW, then survival and recovery would not “appreciably reduce,” and fisheries could continue to operate.⁷⁴

NMFS’ creative solution to providing an ITS troubled the waters for several conservation groups, who then filed suit. In *Center for Biological Diversity v. Ross*, the court held that NMFS’ numerical triggers were not a substitute for the legally required ITS.⁷⁵ By issuing a no jeopardy opinion with the knowledge that any ITS would be unlawful under the requirements set by the MMPA and the ESA, the 2014 BiOp was found legally invalid.⁷⁶ The court wrestled with delivering an equitable remedy, and finally decided that the rule would be vacated but stayed until May 31, 2021.⁷⁷

B. *The New 2021 BiOp and Amended Atlantic Large Whale Take Reduction Plan*

The newly issued 2021 BiOp and the amended Atlantic Large Whale Take Reduction Plan were held to have yet again failed to meet statutory requirements.

On May 27, 2021, NMFS issued a new BiOp that addressed updated goals for reducing NARW mortality, but still authorized the continued operation of federal lobster fisheries.⁷⁸ The revised BiOp addressed the 2017 UME and the reduced population of NARWs, and created the North Atlantic Right Whale Conservation Framework for Fisheries in the Greater Atlantic Region (Conservation Framework) that laid out actions NMFS would take to reduce mortality and serious injury over 10 years.⁷⁹ Unlike the 2014 BiOp, this one included an ITS, which authorized some nonlethal takes and no lethal takes of the NARW based on the 0.9 PBR.⁸⁰ Federal fisheries were not

protected from liability if their gear or vessels were to cause mortality, but they were also not shuttered and prohibited from operating under the updated guidelines.⁸¹

In September 2021, NMFS also amended the Atlantic Large Whale Take Reduction Plan to reduce mortality and serious injury incidents for the NARW.⁸² The Take Reduction Team includes representatives from various stakeholders, and consults to meet conservation goals and needs. In 2017, the Take Reduction Team met and decided on new regulations to reduce NARW take, which make up the 2021 Final Rule. New provisions include new seasonal restricted areas.⁸³ It also establishes new standards for “weak rope requirements.”⁸⁴ All buoy lines in the fisheries must include weak rope or weak inserts that break at 1,700 pounds.⁸⁵ Gear must also be marked with state-specific colors.⁸⁶ Finally, it revises the Interstate Fishery Management Plan for American Lobster to change lobster trap trawl requirements on number of traps and length.⁸⁷

Shortly after the 2021 BiOp and Final Rule were issued, a wave of legal challenges from conservation groups and fishermen commenced. Two of the cases that were recently decided are discussed below.

C. *Center for Biological Diversity v. Raimondo*

In 2022, conservationists challenged the updated 2021 BiOp for failing statutory compliance. The court awarded plaintiffs a sweeping victory on six counts, speaking at length to the failures of the federal agency under the ESA and the MMPA. However, the court again refused to revoke the lobster fisheries’ permits. This case is significant for its lengthy discussion of the many failings of the revised 2021 BiOp in meeting federal standards, while also refusing to mete out any repercussions. Thus continued a pattern of undermining the efficacy of existing environmental statutes in favor of commercial fishing interests.

The Center for Biological Diversity and several other conservation groups were not impressed by the updated 2021 BiOp. They viewed its conclusion that federal fishery operations “will not result in an appreciable reduction in the likelihood of survival and recovery of North Atlantic right whales compared to the no federal fishery scenario” as particularly untenable.⁸⁸

The court considered two claims: (1) the lawfulness of the ITS under the ESA and the MMPA, and (2) the validity of the 2021 Final Rule under the MMPA.⁸⁹ The court found that the intent of Congress respecting the ESA and

70. NMFS, NER-2014-11076, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION BIOLOGICAL OPINION 5 (2014).

71. *Id.* at 35.

72. *Id.*

73. *Id.* at 161.

74. *Id.* at 35-36.

75. *Center for Biological Diversity v. Ross*, 480 F. Supp. 3d 236, 243, 50 ELR 20201 (D.D.C. 2020).

76. *Id.*

77. *Id.*

78. NMFS, GARFO-2017-00031, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION BIOLOGICAL OPINION 1 (2021).

79. *Id.* at 1-9.

80. *Id.* at 390.

81. *Id.*

82. NMFS, Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery, 86 Fed. Reg. 51970 (Sept. 17, 2021).

83. *Id.* at 51973.

84. *Id.* at 51973-74.

85. *Id.*

86. *Id.*

87. *Id.* at 51975.

88. NMFS, *supra* note 78, at 340.

89. *Center for Biological Diversity v. Raimondo*, No. 18-112, 2022 U.S. Dist. LEXIS 120283, at *28, 52 ELR 20082 (D.D.C. July 8, 2022).

the MMPA was “unambiguously expressed,” and therefore it need not give deference to the agency’s interpretation.⁹⁰ The court held that these two issues were enough to find both the 2021 BiOp and the Final Rule invalid.⁹¹

1. A “Zero Take” ITS Does Not Meet Statutory Requirements

The plaintiffs’ complaint that the lack of a valid ITS violated the MMPA and the ESA held no less water for being recycled from their 2014 complaint. In the 2014 BiOp, the numerical triggers were held not to be equivalent to an ITS.⁹² But authorizing zero lethal take of the NARW did not correct the original error.⁹³ NMFS was required to issue an ITS, but was again confronted with the issue it had in 2014. By authorizing its “zero take” solution, NMFS claimed it had fulfilled its obligations under the ESA and the MMPA because the permitted take satisfied the PBR for the NARW.⁹⁴

Contrary to this assertion, the 2021 BiOp projected that commercial fisheries would exceed the PBR and result in mortality and serious injury of the NARW that are more than “negligible.”⁹⁵ NMFS and other defendants, including fishing industry associations, argued that this was the only solution that allowed the agency to comply with the court’s previous order and meet its statutory obligations.⁹⁶ Conservation groups decried this creative work-around as NMFS evading statutory obligations, and citing “its inability to comply with the MMPA as an excuse for violating the ESA.”⁹⁷

The court agreed with the conservation groups, holding that NMFS did not satisfy the “negligible impact” requirement by simply lowering the authorized take to zero.⁹⁸ NMFS failed to work with stakeholders as required to create an actual plan that would satisfy §101(a)(5)(E) of the MMPA.⁹⁹ The court admitted that this was a tough ask for a species whose numbers are so low that any take is likely to be more than negligible, but refused to excuse NMFS from its duty under the law.¹⁰⁰ Simply put, if the “action under review could not be authorized under the MMPA,” then NMFS should have revised the action.¹⁰¹

Next, the court addressed the discrepancy between the authorized and anticipated take. The 2021 BiOp predicted that federal fisheries operations will result in 2.56 mortality and serious injury entanglements with trap/pot gear annu-

ally.¹⁰² The numbers reflected changes to the Atlantic Large Whale Take Reduction Plan implemented by the 2021 Final Rule.¹⁰³ The court dismissed defendants’ claim that NMFS was allowed to issue an ITS with a lethal take of zero as a misunderstanding of case law.¹⁰⁴ In other instances, NMFS set a lethal take at zero when it had determined that incidental takings of NARWs would not and had not occurred in the area.¹⁰⁵ In this instance, takings were likely to occur and had before in the area in question, based on the BiOp.¹⁰⁶

The ITS-authorized takes should be roughly proportionate to the actual anticipated takes.¹⁰⁷ It did not help defendants’ case that the 2014 BiOp set its numerical trigger at 3.25 NARWs and admitted that lobster fisheries had the potential to kill that many NARWs per year.¹⁰⁸ NMFS’ argument that the zero lethal take statement was still practical, because a single mortality or serious injury incident would trigger reinitiation of consultation, similarly fell flat with the court.¹⁰⁹ NMFS gave no indication of what the consultation would look like and how it would affect fishery operations if a take occurred. The court did not allow NMFS to escape its statutory obligations.¹¹⁰ NMFS was again held to have failed its burden under the ESA and the MMPA when it created an invalid ITS, thus rendering the 2021 BiOp invalid.

2. Timing Requirements for a Take Reduction Plan Are Not Aspirational

The second issue the court considered was the plaintiffs’ claim that the 2021 Final Rule failed to meet specific timing requirements under the MMPA. Where incidental mortality and serious injury from the activity of federal fisheries exceeds the PBR, a corrective plan must include measures that reduce incidents to a level below the PBR within six months.¹¹¹ By its projections, NMFS had shown that the annual take of NARWs would be 2.6 due to the operation of federal fisheries.¹¹² In fact, the levels would not fall below the PBR until 10 years following the introduction of the 2021 Final Rule, when it predicts there will be 0.135 mortality and serious injury incidents annually.¹¹³ NMFS disputed this claim by asserting that the six-month time frame only applied to the initial take plan of 1997, and that it was merely aspirational and not mandatory.¹¹⁴

An agency is required to amend a take reduction plan to meet the requirements of §118 of the MMPA.¹¹⁵ The

90. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842, 14 ELR 20507 (1984).

91. *Raimondo*, 2022 U.S. Dist. LEXIS 120283, at *28.

92. *Center for Biological Diversity v. Ross*, 480 F. Supp. 3d 236, 243, 50 ELR 20201 (D.D.C. 2020).

93. *Raimondo*, 2022 U.S. Dist. LEXIS 120283, at *29-30.

94. *Id.* at *31.

95. *Id.*

96. *Id.* at *32.

97. *Id.*

98. *Id.* at *34.

99. See 16 U.S.C. §1371(a)(5)(E)(iii) (requiring no incidental take that “has resulted or is likely to result in an impact that is more than negligible on the endangered or threatened species or stock”).

100. *Raimondo*, 2022 U.S. Dist. LEXIS 120283, at *33.

101. *Id.* at *34.

102. NMFS, *supra* note 78, at 226.

103. *Id.*

104. *Raimondo*, 2022 U.S. Dist. LEXIS 120283, at *35.

105. *Id.* at *36.

106. NMFS, *supra* note 78, at 226.

107. *Raimondo*, 2022 U.S. Dist. LEXIS 120283, at *36.

108. *Id.* at *37.

109. *Id.* at *38.

110. *Id.*

111. 16 U.S.C. §1387(f)(5)(A).

112. NMFS, *supra* note 78, at 226.

113. *Id.* at 230.

114. *Raimondo*, 2022 U.S. Dist. LEXIS 120283, at *47.

115. 16 U.S.C. §1387(f)(7)(F).

court took this to mean that all amendments must meet the section's requirements and the six-month time frame.¹¹⁶ NMFS' attempt to separate "the plan" from amendments to said plan was tossed overboard. The court held that take reduction plans, according to the purpose of the legislation enabling them, are meant to be evolving documents that reflect current conditions and population changes.¹¹⁷ Accordingly, plaintiffs were not barred from bringing this claim by the statute of limitations because each amendment is a new administrative action that resets the clock.¹¹⁸

Based on language within the statute and ordinary meaning, the court held that the time frame was indeed an obligation and not an aspirational goal that is nonbinding.¹¹⁹ The court noted that while §118 of the MMPA does use the word "goal," a subsection uses the word "shall" when referring to the measures that must be included in a plan to reduce mortality and serious injury incidents below the PBR within six months.¹²⁰ The plain meaning of the word "implement" was also found to support the time frame, despite defendants protesting the "nebulous" nature of the section requirements.¹²¹ A plan has been implemented when it has been "put into effect," and the court was not convinced by NMFS' suggestion that it could not find a concrete date for when that occurred with respect to its 2021 Final Rule.¹²²

As the six-month time frame was found to apply to amendments and the 2021 Final Rule did not contain measures that satisfied these requirements, the court found it invalid. However, again the court did not order the lobster fishery to close; instead, it requested additional briefings on potential remedies.¹²³ In its opinion, the court ruminated on the meaning and effect of its holding. The court highlighted its commitment to upholding the letter of the law, and that no actor "operates free from the strict requirements imposed by the MMPA and the ESA."¹²⁴

Despite what many considered to be a sweeping victory for plaintiffs, the lobster industry was allowed to continue operating as before. The court's opinion begs the question: if a clear violation of the ESA or the MMPA results in complete inaction, what is the value of the statutes in future litigation?

D. Maine Lobstermen's Association v. National Marine Fisheries Service

Conversely, the lobster industry attacked the revised 2021 BiOp for being too restrictive. Again, the court wrote at length of NMFS' failure to meet statutory requirements, much to the delight of conservation groups. But again, the

permits remained valid and lobster fishing continued while the agency was given even more time to revise.

Approaching from the other side, two lobstering associations filed suit alleging that the 2021 BiOp should be invalidated for very different reasons than the same court held in *Raimondo*. Where the previous suit determined that NMFS had not gone far enough to protect NARWs, the lobstermen contended the agency went too far and overstated the risks lobstering poses to the NARWs.¹²⁵ The court disagreed with plaintiffs' claims of over-regulation, and held that the 2021 BiOp was not a result of arbitrary and capricious agency action.¹²⁶

After finding that plaintiffs had standing and also refusing to consider claims asserted during a motion for summary judgment, the court examined three claims.¹²⁷ First, it considered whether the 2021 BiOp was arbitrary and capricious when plaintiffs alleged it contained a "slew of scientific errors" and overestimated the danger to NARWs.¹²⁸ Second, the court considered the Conservation Framework and whether it arbitrarily "lowballed" the amount of whales that could be killed by fisheries per year.¹²⁹ Third, the court considered plaintiffs' claim that the 2021 Final Rule was invalid because it arbitrarily relied on the flawed BiOp.¹³⁰

1. NMFS' Actions Did Not Violate the APA

Under the Administrative Procedure Act (APA), the courts must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹³¹ The party attempting to get a court to find an agency action "arbitrary and capricious" carries the burden.¹³² A reviewing court holds an agency to "certain minimal standards of rationality" during an APA review.¹³³

The lobstering associations believe that NMFS' substantive analyses were arbitrary and capricious because they disregarded scientific data.¹³⁴ The ESA requires an agency to "use the best scientific and commercial data available" when predicting "reasonably certain" effects in a BiOp.¹³⁵ In creating the 2021 BiOp, NMFS used the best available data where possible, and where they found a range of options they selected the species-protective option.¹³⁶ The court held that this satisfactorily met statutory obligations.¹³⁷

116. *Raimondo*, 2022 U.S. Dist. LEXIS 120283, at *50.

117. *Id.* at *51.

118. *Id.*

119. *Id.* at *61.

120. *Id.* at *57.

121. *Id.* at *59.

122. *Id.*

123. *Id.* at *63.

124. *Id.*

125. *Maine Lobstermen's Ass'n v. National Marine Fisheries Serv.*, No. 21-2509, 2022 U.S. Dist. LEXIS 169246, at *4, 52 ELR 20107 (D.D.C. Sept. 8, 2022).

126. *Id.*

127. *Id.* at *13.

128. *Id.* at *16.

129. *Id.* at *37.

130. *Id.* at *46.

131. 5 U.S.C. §706(2)(A).

132. *Transmission Access Pol'y Study Grp. v. Federal Energy Regul. Comm'n*, 225 F.3d 667, 714 (D.C. Cir. 2000).

133. *Ethyl Corp. v. Environmental Prot. Agency*, 541 F.2d 1, 6 ELR 20267 (D.C. Cir. 1976).

134. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *10.

135. 16 U.S.C. §1536(a)(2).

136. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *19.

137. *Id.*

The lobstering associations specifically took issue with the BiOp for evenly allocating the NARW entanglements of unknown origin between the United States and Canada.¹³⁸ NMFS followed the approach of the Atlantic Large Whale Take Reduction Plan, and assigned mortality and serious injuries of unknown origin based on the percentage of time NARWs were in each country's waters.¹³⁹ A 50/50 split assigns a lower portion of mortality and serious injury incidents to the United States because NMFS also factored in a recent distribution shift and known risk.¹⁴⁰ While Canada's snow crab gear posed a greater mortality risk than lobster buoy lines, there were a larger number of lines in the U.S. waters and long traps/trawl configurations.¹⁴¹ The court held that this represented the use of the best available data, and cited the fact that NMFS had its approach peer-reviewed by an unbiased party.¹⁴² As the court stated, "perfect accuracy" is not the required standard.¹⁴³

The allocation of unknown gear entanglements was also a point of contention for the lobstering associations. NMFS cited data that showed entanglements with trap/pot gear were predominant and more likely to be lethal.¹⁴⁴ Vertical lines are the primary cause of mortality and serious injury in gear entanglements.¹⁴⁵ Further, 99.7% of vertical lines in the action area were from trap/pot lines.¹⁴⁶ The agency decided to allocate 100% of unknown gear entanglements to trap/pot gear based on the available data, and the court held that this was not arbitrary or capricious.¹⁴⁷ The data in the 2021 BiOp and plaintiffs' failure to identify any overlooked data led the court to this conclusion.¹⁴⁸

Next, plaintiffs attacked the agency's calculation of "cryptic mortality," which means an NARW death has occurred but no carcass was found.¹⁴⁹ NMFS calculated this value by subtracting observed mortality from the estimated annual mortality.¹⁵⁰ Plaintiffs argued that this did not account for migration to other regions or NARW deaths from natural causes.¹⁵¹ The court referred to the lobstering associations' claim as "pull(ing) up an empty trap."¹⁵² Vague assertions that individual whales migrated or were no longer present for reasons other than death did not stack up against the "peer-reviewed method developed by leading right-whale researchers and based on record studies."¹⁵³

Whale population dynamics are determined primarily by adult-female survival rates.¹⁵⁴ Claiming that the numbers were invalid because they did not account for natu-

ral deaths of calves is not relevant, because calf deaths are considered "non-additions" to a population and are only counted once they reach six months old.¹⁵⁵ The court disregarded similar arguments about deaths due to other predators like killer whales and sharks, and natural deaths, because these numbers did not constitute a statistically significant component of population change.¹⁵⁶ Again, NMFS was held to have met its burden under the APA by using the best available data.

The lobstering associations also took issue with the 2021 BiOp for not accounting for harm-reduction measures the industry had already put in place. The lobstermen pointed to ship-strike reduction programs, weak inserts in vertical lines designed to break more easily, and other protective measures employed by Canada.¹⁵⁷ However, NMFS was only required to rely on *available* data. The agency was optimistic about measures currently in place and their potential to reduce mortality and serious injury, but the current available data did not reflect the changes.¹⁵⁸ The court held that this met the arbitrary and capricious standard because the agency "rationally reasoned" that it would be inappropriate to assume outcomes.¹⁵⁹ NMFS is not required to factor that data in until the data are available.

Plaintiffs' final attack on the nature of the data used in the 2021 BiOp was also unsuccessful. NMFS used the "Linden model" to evaluate the effect of reductions in mortality and serious injury incidents on the population trajectory of the NARW.¹⁶⁰ Plaintiffs claimed the decision support tool the agency used was flawed. The court did not bite. Returning to its well-worn refrain that peer-reviewed models representing the current best available scientific data meet the APA standard, it dismissed the claims.¹⁶¹

2. The Conservation Framework PBR Reduction Goals Were Sufficient

The second major claim brought by the lobstering associations challenged the Conservation Framework, which was deemed reviewable as an agency action approved by the 2021 BiOp.¹⁶² The Conservation Framework aims to reduce NARW mortality and serious injury below the PBR in its final phase, which concludes in 2030.¹⁶³ In *Center for Biological Diversity v. Raimondo*, the court held that the short-term measures were invalid under the MMPA as they exceeded the six-month time frame.¹⁶⁴ Here, plaintiffs argued that the Conservation Framework was arbitrary and capricious because the long-term measures go beyond

138. *Id.*

139. NMFS, *supra* note 78, at 216.

140. *Id.* at 217.

141. *Id.*

142. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *22.

143. *Id.* at *24.

144. NMFS, *supra* note 78, at 218.

145. *Id.*

146. *Id.* at 219.

147. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *24.

148. *Id.* at *26.

149. *Id.*

150. NMFS, *supra* note 78, at 212.

151. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *27.

152. *Id.*

153. *Id.*

154. NMFS, *supra* note 78, at 328.

155. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *30.

156. *Id.* at *31.

157. *Id.*

158. *Id.* at *32.

159. *Id.*

160. *Id.* at *33.

161. *Id.* at *35.

162. *Id.* at *39.

163. NMFS, *supra* note 78, at 476.

164. *Center for Biological Diversity v. Raimondo*, No. 18-112, 2022 U.S. Dist. LEXIS 120283, at *63, 52 ELR 20082 (D.D.C. July 8, 2022).

the necessary reductions in mortality and serious injury without an acceptable explanation.¹⁶⁵

The court found NMFS' logical explanation both clear and sufficient to support the Conservation Framework. The numbers aim to fall below the PBR by 2030, because federal fisheries are not the only cause of mortality and serious injury in NARWs.¹⁶⁶ The agency was not obligated to provide an explanation because it was self-evident that one of many anthropogenic sources of NARW deaths should be lower than the PBR.¹⁶⁷ More to the point, the MMPA requires that the end goal of an agency's efforts is to reduce mortality and serious injury incidents to zero.¹⁶⁸

The court considered plaintiffs' argument that the Conservation Framework should not have been included in the 2021 BiOp slightly more favorably, but ultimately disagreed. Plaintiffs claimed that the Conservation Framework was not introduced through one of two appropriate channels.¹⁶⁹ It was not a "reasonable and prudent alternative" following a jeopardy opinion or a "reasonable and prudent measure" following a no jeopardy opinion.¹⁷⁰ Reasonable and prudent measures "may involve only minor changes."¹⁷¹ Plaintiffs contended that the Conservation Framework must be a reasonable and prudent measure because NMFS issued a no jeopardy opinion, but the changes it made were not minor.¹⁷² However, the rules apply to consulting agencies, and here NMFS was an action agency proposing a multipart action, of which the Conservation Framework was one part.¹⁷³ Consulting agencies may be limited, but action agencies do not have a defined scope and therefore the Conservation Framework is valid.¹⁷⁴

3. The 2021 Final Rule Appropriately Relied on the 2021 BiOp

In the third major claim brought by the lobstering associations, plaintiffs properly pled a challenge that the 2021 Final Rule arbitrarily relied on the 2021 BiOp.¹⁷⁵ However, the court dismissed the claim succinctly by stating that reliance on the BiOp is "thus *a fortiori* lawful."¹⁷⁶ Because the court did not find that the 2021 BiOp was arbitrary and capricious in the earlier claims, plaintiffs were not able to use this argument to invalidate the 2021 Final Rule.

The court granted summary judgment in favor of defendants, while reminding NMFS to continue to diligently incorporate the best available data and concerns of all stakeholders.¹⁷⁷ *Maine Lobstermen's Association* stands as a warning to activist groups considering lengthy and expen-

sive litigation. After losing on every substantial count, the lobstermen returned home to continue routine operations. In the future, conservation groups might consider another approach before committing their time and resources to a lawsuit, even where "a win" is likely.

IV. Between the Devil and the Deep Blue Sea: Congress and the 2023 Omnibus Bill

While conservation groups contemplated their next moves in litigation, Congress quietly and definitively decided the fate of legal challenges to continued lobster fishery operations in a late draft of the 2023 Omnibus Bill. The last division in the lengthy legislation unilaterally ended any challenges to the continuing operations of the federal lobster fisheries for the next six years. Without providing commentary or additional information, legislators "deemed" the issued permits sufficient under federal law.¹⁷⁸ Again, commercial interests prevailed over environmental regulations.

On Monday December 19, 2022, Patrick Leahy (D-Vt.), the U.S. Senate Appropriations Committee chairman, released the \$1.7 trillion Omnibus Appropriations Bill for the 2023 fiscal year.¹⁷⁹ The bill allocated \$772.5 billion for nondefense discretionary programs and \$858 billion in defense funding.¹⁸⁰ The bill addressed several incredibly important concerns, such as increasing benefits and disability compensation for military veterans, a bipartisan concern.¹⁸¹ It allocated \$58.7 billion to fund the programs created by the Infrastructure Investment and Jobs Act.¹⁸² At a time when inflation is drastically altering the ability of American families to stay afloat, the bill provides billions of dollars in support of housing assistance, child care, combating increased energy costs, and education.¹⁸³

The chair of the Interior, Environment, and Related Agencies Subcommittee, Jeff Merkley (D-Or.), lauded the inclusion of funds to "promote healthy forests and ecosystems."¹⁸⁴ In fact, the bill allocates \$40.45 billion to environmental programs that support wildfire suppression, land and water conservation, and a novel advance appropriation for the Indian Health Service.¹⁸⁵ All of these provisions are significant.

165. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *41.

166. *Id.* at *42.

167. *Id.* at *43.

168. 16 U.S.C. §1387(f)(2).

169. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *45.

170. *Id.*

171. 50 C.F.R. §402.14(i)(2).

172. *Maine Lobstermen's Ass'n*, 2022 U.S. Dist. LEXIS 169246, at *45.

173. *Id.* at *46.

174. *Id.*

175. *Id.* at *47.

176. *Id.* at *48.

177. *Id.* at *50.

178. Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. (2022).

179. *Chairman Patrick Leahy (D-Vt.) Releases Fiscal Year 2023 Omnibus Appropriations Bill*, U.S. SENATE COMM. ON APPROPRIATIONS (Dec. 20, 2022), <https://www.appropriations.senate.gov/news/majority/chairman-patrick-leahy-d-vt-releases-fiscal-year-2023-omnibus-appropriations-bill>.

180. *Id.*

181. Press Release, Senate Committee on Appropriations, Summary Military Construction, Veterans Affairs, and Related Agencies Fiscal Year 2023 Appropriations Bill 1-3 (Dec. 17, 2022), <https://www.appropriations.senate.gov/imo/media/doc/MilCon%20VA%20FY%2023.pdf>.

182. Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. (2022).

183. *Id.*

184. Press Release, Senate Committee on Appropriations, Summary Department of the Interior, Environment, and Related Agencies Fiscal Year 2023 Appropriations Bill 1-4 (Dec. 12, 2022), <https://www.appropriations.senate.gov/imo/media/doc/Interior%20FY%2023.pdf>.

185. *Id.*

On December 22, 2022, the Senate passed the measure with a 68-29 vote.¹⁸⁶ The next day, the U.S. House of Representatives followed with a 225-201 vote.¹⁸⁷ President Joseph Biden signed the bill into law on December 29, 2022.¹⁸⁸

As described above, there is no doubt that the passage of this bill keeps essential programs running. However, obtaining enough votes to secure passage of the bill is where Congress muddied the waters. Following the disappointment of successive failed legal challenges, the lobster industry and the Maine delegation (Sen. Susan Collins (R), Sen. Angus King (I), Rep. Jared Golden (D), Rep. Chellie Pingree (D), and Gov. Janet Mills (D)) successfully lobbied Congress to receive special accommodations contrary to the legal analysis of the prior judicial opinions.

The last of 35 divisions is titled “Division JJ—North Atlantic Right Whales.”¹⁸⁹ This final addition to the bill states:

Notwithstanding any other provision of law except as provided in subsection (b), for the period beginning on the date of enactment of this Act and ending on December 31, 2028, the Final Rule amending the regulations implementing the Atlantic Large Whale Take Reduction Plan (86 Fed. Reg. 51970) shall be deemed sufficient to ensure that the continued Federal and State authorizations of the American lobster and Jonah crab fisheries are in full compliance with the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) and the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).¹⁹⁰

In two pages of a 4,155-page fiscal year appropriations bill, Congress upended a near-decade of legal battles.¹⁹¹ The 2023 Omnibus Bill allows the lobster industry to continue its operation, relatively unchecked for the next six years.¹⁹²

The conduct of the fishing industry that was deemed insufficient to satisfy the basic requirements of the ESA and the MMPA are suddenly “sufficient” in one quick stroke of what is presumably a very expensive presidential pen.¹⁹³ The probable harm and risk of mortality and serious injury to the NARW at the hands of the lobster industry, detailed at length in the judicial opinions outlined above, are suddenly permissible.¹⁹⁴ This minuscule section of the 2023 Omnibus Bill is concise, and offers no justification or new information that would alter the previous designation of “insufficient.” In a handful of additional pages, the bill goes on to *encourage* NMFS to promote innovative gear technology, promulgate new rules consistent with the

ESA and the MMPA, and submit annual reports, all of which will not be considered until 2028.¹⁹⁵ However, these deceptively weightless assertions are a fancy suggestion that NMFS do exactly what it has been doing up until now—actions that were deemed insufficient in federal court.

It is unsurprising that passage of such a large appropriations bill requires concessions and compromise from its political actors. But it would be unwise to assume that every concession is merely a drop in the ocean. From a seat on the floor of the Senate or House, this might appear as just another minor compromise in the face of the greater need to secure essential funds. But Congress should not minimize this particular special interest group or the consequences of this decision on the overall efficacy of environmental regulation. This is not a minor, localized issue concerned with supporting generational lobstermen, but a swift step in a direction further ignoring the critical underpinnings of the ESA and the MMPA.

Agency actions and decisions about regulating activities that pose significant threats to the environment are frequently challenged under the ESA, the MMPA, and the APA. However, most legislative attacks on such statutes are unsuccessful. The passage of the 2023 Omnibus Bill is the first successful attempt to curtail the ESA since 2019, where a provision was also attached to a Consolidated Appropriations Act.¹⁹⁶ There have been 91 legislative challenges between the two successful attempts.¹⁹⁷ There are currently four more legislative attacks on the ESA that Congress is considering in 2023.

The success of the lobster industry in escaping the statutory protections required under the ESA will only bolster blatant attacks on the foundation of environmental statutes. The hard-won legal victories achieved on behalf of the NARW in the many years since the 2014 BiOp was published have been diminished and devalued in a way that will embolden industry lobbyists and discourage activists and conservation groups. The Center for Biological Diversity’s government affairs director, Brett Hartl, called the decision to sacrifice the NARW in favor of special interests “heartless” and “immoral.”¹⁹⁸

Congress’ actions endorse the pattern laid out by the judiciary in *Ross*, *Raimondo*, and *Maine Lobstermen’s Association*. Despite winning consecutive legal challenges in which the opinions spoke at length to the fishing industry’s failure to meet the legal requirements protecting the NARW, the D.C. District Court refused to require the lobster fishery to close. Citing the economic difficulties, and sympathizing with the struggles of a burdened livelihood, the court continually granted more and more time to become compliant, while simultaneously recognizing

186. U.S. Senate, *Roll Call Vote 117th Congress—2nd Session*, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00421.htm (last visited July 24, 2023).

187. U.S. House of Representatives Clerk, *Roll Call 549—Bill Number: H.R. 2617*, <https://clerk.house.gov/Votes/2022549> (last visited July 24, 2023).

188. *Funding Bill Biden Signed Last Week Will Support Public Services in 2023*, AM. FED’N STATE CNTY. & MUN. EMPS. (Jan. 4, 2023), <https://www.afscme.org/blog/funding-bill-biden-signed-last-week-will-support-public-services-in-2023>.

189. Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. (2022).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Center for Biological Diversity Action Fund, *Attacks on the Endangered Species Act*, <https://centeractionfund.org/endangered-species-act/> (last visited July 24, 2023).

197. *Id.*

198. Chris D’Angelo, *Government Funding Bill Includes 11th-Hour Carve-Out for Lobster Industry*, HUFFPOST (Dec. 20, 2022), https://www.huffpost.com/entry/omnibus-lobster-rules-right-whales-maine_n_63a1bdcae4b0aeb2ace79d25.

that any continued activity would likely result in NARW mortality above the legal limit.¹⁹⁹

In passing the 2023 Omnibus Bill, Congress has gone even further and opened the floodgates to what is likely to become an overwhelming wave of legal and legislative challenges seeking to undermine necessary environmental regulations and protections. The Act has shown the futility of future legal challenges, even when successful under the ESA or the MMPA. This 11th-hour addition to an appropriations bill reinforces the dangerous trend of letting political actors dip their toes in the waters of shortsighted political expediency that elevate commercial over environmental concerns.

Beyond conservationists' continued lobbying and pursuit of legal challenges to BiOps that fail to protect endangered species and marine mammals, there is an alternative, if unlikely, opportunity for dispute resolution. It is undeniable now that climate change will have a significant impact on the ocean biome.²⁰⁰ This will negatively harm both the NARW population and the commercial fishing industry's ability to succeed in the future. Overcoming the fixed "us" versus "them" trope that has settled upon fishermen and activists alike is a necessary first step.

This can be aided by statutes aimed at incentivizing the cooperative relationship between government agencies, like NOAA, and commercial fishing groups, among which there has already been minimal cooperation.²⁰¹ Strengthening the relationship between conservation groups and commercial fisheries might enable scientists and engineers to develop further extensive testing on the "innovative gear" that Congress has asked NMFS to "promote."²⁰² The rifts and rivalries between these groups can be recast as opportunities for both groups to achieve their respective end goals. Everyone will need to adapt as the waters become increasingly hostile to all living organisms. Kicking the can down the road for six years in the case of the NARW may be good politics, but is shortsighted and a sign of continued poor stewardship of our biomes and species.

V. Scuttling the ESA: The Appeal of Maine Lobstermen's Association v. NMFS

The passage of the 2023 Omnibus Bill was not the final blow struck in the battle between lobstermen and protective regulations this year. In a dramatic shift from the opinions issued by the lower court, the D.C. Circuit issued an opinion that effectively shuts the ability of an action agency to create a BiOp relying on any predictive models for assessment of jeopardy. The court alternated between

decrying the potential harm to the lobster industry and shaming NMFS for giving the "benefit of the doubt" to the NARW.²⁰³ The court also oscillated between calling out NMFS' "shifting" reasoning as arbitrary and capricious, while then itself waffling and claiming that the statutory standard is "beside the point."²⁰⁴ According to the opinion, NMFS never stood a chance of meeting its statutory requirements where the entirety of its BiOp was "tainted" by a tendency to favor the NARW.²⁰⁵

A. The D.C. Circuit Rejects Validity of the 2021 BiOp

The D.C. Circuit addressed three primary issues in its June opinion. First, it pushed back on NMFS' complaint that the lobstermen lacked standing to bring the appeal, due to the recently passed 2023 Omnibus Bill.²⁰⁶ Second, the court dismissed the value of legislative history and denied that NMFS was ordained by Congress to give the "benefit of the doubt" to protected species where there is any uncertainty in data used to predict potential harm.²⁰⁷ Third, it argued that NMFS acted arbitrarily and capriciously when it constructed the 2021 BiOp and relied on "worst-case scenario" data predictions.

1. The Lobstermen Have Standing Despite Passage of the Omnibus Bill

The court first addressed the concern that the lobstermen lacked standing to bring the issue on appeal based on the passage of the 2023 Omnibus Bill. The court held that the lobstermen's constitutional standing was "self-evident" in challenging the phase one rule as well as the 2021 BiOp itself.²⁰⁸ Citing the \$50-\$90 million cost projected by NMFS, the court acknowledged a "concrete particularized pocketbook injury" that the lobstermen would incur, at the hands of the agency, that is redressable by vacating or remanding the rule.²⁰⁹ According to the court, the finding of "no jeopardy" inextricably ties the 2021 BiOp to the phase one rule, which would require the fishery to close if allowed to stand.²¹⁰ Because a BiOp has a "powerful coercive effect" on an action agency, the injury is fairly traceable enough to allow standing.²¹¹

The court also dismissed any claims that mootness invalidated the appeal.²¹² NMFS argued that the timeline and targets required by the Conservation Framework are no longer relevant, as the agency will "support the next rule

199. Maine Lobstermen's Ass'n v. National Marine Fisheries Serv., No. 21-2509, 2022 U.S. Dist. LEXIS 169246, at *48, 52 ELR 20107 (D.D.C. Sept. 8, 2022).

200. Intergovernmental Panel on Climate Change, *supra* note 29, at 3-33.

201. See *Draft Ropeless Roadmap: A Strategy to Develop On-Demand Fishing Available for Public Input*, NOAA FISHERIES (July 29, 2022), <https://www.fisheries.noaa.gov/bulletin/draft-ropeless-roadmap-strategy-develop-demand-fishing-available-public-input> (detailing the current and future efforts to increase use of ropeless fishing gear).

202. Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong. (2022).

203. Maine Lobstermen's Ass'n v. National Marine Fisheries Serv., No. 22-5238, 2023 U.S. App. LEXIS 14987, at *2, 53 ELR 20093 (D.C. Cir. June 16, 2023).

204. *Id.* at *36.

205. *Id.* at *35.

206. *Id.* at *14.

207. *Id.* at *27.

208. *Id.* at *14.

209. *Id.*

210. *Id.*

211. *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 168-69, 27 ELR 20824 (1997)).

212. *Id.* at *15.

with a new formal consultation” and BiOp.²¹³ The court responded that the 2023 Omnibus Bill ratifies and insulates the phase one rule from further legal challenges; thus, the intervening law has not resolved the issue from which litigants seek relief.²¹⁴ The court held that the rule itself was at issue, because the lobstermen claimed it overstepped regulatory authority.²¹⁵

Accordingly, addressing the legality of said rule is appropriate.²¹⁶ A “future plan” to change a regulation does not effectively moot a present claim.²¹⁷ The court uniformly ignored any and all arguments for dismissal as “unavailing,” leaning heavily on what will become its central creed in this judicial attempt to curtail the ESA’s grant of agency authority, that any policy or regulation flowing from the 2021 BiOp is “infected” and tainted by inherent “legal and analytical errors.”²¹⁸

2. No Presumption in Favor of Protected Species

Departing from decades of precedent, the court presented its primary argument that the ESA does not require, and has never required, “substantive presumption in favor” of the protected species at issue.²¹⁹ This argument rests on a summary dismissal of the value of legislative history for interpreting congressional intent. Prior to 1979, the language of §7 of the ESA only allowed permitting of activities that “do not jeopardize” a protected or listed species.²²⁰ In 1979, the language was changed to “not likely to jeopardize the continued existence of a protected species.”²²¹ According to the court, the plain meaning of this language requires an action agency to “avoid acts that will more likely than not jeopardize a species.”²²²

The court interpreted this change to signal Congress’ intent to “lighten the load to avoid paralysis” that the “do not jeopardize” language created in *Tennessee Valley Authority v. Hill*.²²³ In the same 1979 update, agencies were required to use the “best scientific and commercial data *available*” and not the best possible.²²⁴ The court went even further in its assessment of congressional intent and asserted that this shift showed congressional aversion to halting economic activity where complete data were lacking.

However, the 1979 changes were accompanied by a statement in the conference report that constitutes a significant part of the legislative history of the ESA. This statement specifically provided that due to the reality of limited data on how an endangered species might be affected by

proposed activities, any uncertainty must be “resolved in favor of the species.”²²⁵ To invalidate this obvious expression of legislative intent, the court claimed that legislative history cannot be used to ordain “a precautionary principle in favor” of protecting a listed species.²²⁶

3. The BiOp Was “Arbitrary and Capricious”

The court used the opportunity presented by this appeal to take a firm stance against what it called an “aggressive reading of *Chevron*.”²²⁷ Claiming that the district court “bought the gambit” that silence in how an agency decides to handle data uncertainties allows agencies to exercise discretion in their actions, the court condemned the granting of such “wide latitude.”²²⁸ Further, not only did the district court fall victim to this supposedly unfashionable *Chevron* analysis, NMFS misconceived the law enough to render its actions contrary to the law.²²⁹ According to the court, not only was this legal reasoning wrong, it was “egregiously wrong.”²³⁰

The dismissal of the use of legislative history formed the foundation of the court’s intolerance toward NMFS’ actions. Citing the U.S. Court of Appeals for the Eleventh Circuit’s reluctance to “read into the words that Congress has enacted as law words that it did not enact as law,” the opinion concludes that NMFS cannot use the intent expressed in the conference report to support a presumption in favor of the NARW.²³¹ Further, NMFS was accused of inconsistency because it had previously acknowledged that the ESA does not require it to use “worst-case scenario” projections, and now has apparently flipped.²³² According to the court, this rendered its behavior arbitrary and capricious despite acknowledging that an agency is free to change its position at any time given a reasoned explanation.²³³

However, regardless of any prior reasoning, the court maintained it would find the BiOp contrary to law because it was created using the most “pessimistic” scientific data and not the best available.²³⁴ NMFS was accused of “picking whales over people,” when it failed to consider equally the negative effects of the fisheries on the NARW alongside the harm to the fisheries if denied the ability to continue operating free of protective regulations.²³⁵ The court used a broad brush to create a novel requirement and change the function of the ESA.

213. *Id.* at *16.

214. *Id.*

215. *Id.* at *17.

216. *Id.*

217. *Id.*

218. *Id.* at *20.

219. *Id.* at *21.

220. *Id.* at *23.

221. 16 U.S.C. §1536(a)(2).

222. *Maine Lobstermen’s Ass’n*, 2023 U.S. App. LEXIS 14987, at *22.

223. *Id.* at *24; *see generally* *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 8 ELR 20513 (1978).

224. *Maine Lobstermen’s Ass’n*, 2023 U.S. App. LEXIS 14987, at *24 (emphasis added).

225. H.R. CONF. REP. NO. 96-697, at 12, *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576.

226. *Maine Lobstermen’s Ass’n*, 2023 U.S. App. LEXIS 14987, at *27.

227. *Id.* at *25 (citing *Buffington v. McDonough*, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari)).

228. *Id.* at *24, *25 (citing *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 368 (D.C. Cir. 2022)).

229. *Id.* at *26.

230. *Id.*

231. *Id.* at *28 (citing *Micosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1266-67, 39 ELR 20097 (11th Cir. 2009)).

232. *Id.* at *29.

233. *Id.* at *30.

234. *Id.*

235. *Id.* at *33.

B. The Court's Opinion Undermines the Efficacy of the ESA

The court effectively undermines the efficacy of the ESA by eviscerating the use of legislative history as a source of guidance. Apparently, reliance on the conference report constituted a “casual disregard of statutory interpretation,” because “legislative history is not the law.”²³⁶ This is a fundamental mischaracterization of the use of legislative history in a specific instance. The language of the conference report is not being used to supplant the language of the law, but to provide guidance and clarification on the legislative intent behind the 1979 changes made to the ESA. The purpose of the clarification was likely to avoid this very outcome.

The court, in its opinion, seemed more confident asserting the superiority of a 1979 edition of *Black's Law Dictionary* than it was accepting an explicit statement from an official conference report.²³⁷ This is not the abuse of interpretation that the court suggests. In fact, “(c)ongressional reports . . . are generally accepted as most reflective of legislative intent since they are the summation of activity that has preceded the final bill content.”²³⁸ An analysis from 1982 (published only three years after the relevant changes to the ESA) found that “House Reports, Senate Reports, and Congressional Record citations” constituted the majority of legislative history citations used by the U.S. Supreme Court.²³⁹ And unlike records of floor debates, House reports, like the conference report at issue here, reflect the presumably final word of the primary parties involved in passing the legislation, and should be given more weight.

Instead, the D.C. Circuit supplanted clearly stated congressional intent with its own determination to favor a self-serving opinion that agency expertise is not as sufficient as its own judicial authority. In the same breath that the court shamed NMFS for its failure to consider the negative effects plaguing the lobstermen and the commercial fishing industry, an obligation not derived from any statutory requirements, it confidently asserted that “vacating the opinion will have no adverse consequences,” like perhaps the demise of an entire species.²⁴⁰ Interestingly, the court felt empowered to read a novel obligation into a statute while dismissing an express statement of legislative intent contained in the record.

The three-justice panel that convened to hear this appeal betrayed its lack of familiarity with the underlying data supporting the 2021 BiOp. The D.C. Circuit claimed that the number of NARW deaths definitively traced back to gear entanglements in U.S. waters exposed inaccuracies in the models used to generate the likely harm to the spe-

cies.²⁴¹ The court claimed, without any support, that “in most realistic cases” NMFS can make a “scientifically defensible decision without resort to a presumption in favor of the species.”²⁴²

NMFS based its predictions and values on peer-reviewed and widely accepted studies that account for the challenges in determining cause of death to NARWs. These models have been accepted by the scientific community at large, and it is only with hubris that a court on any level could suggest an ability to determine the validity of such analyses.²⁴³ Further, the introductory background laid out in the opinion heavily implies and redirects blame to Canada, providing figures and graphs that suggest the discrepancy between attributable NARW deaths in U.S. waters and Canadian waters leaves Canada with the greatest responsibility.²⁴⁴ Again, this ignores the scientific reasoning for the harm attribution that NMFS clearly explains in the 2021 BiOp.²⁴⁵

These mischaracterizations by a judiciary body are a striking example of why agency expertise is critical to meeting the goals of existing environmental statutes like the ESA. The D.C. Circuit has essentially recast the ESA, and crippled the ability of a federal agency to promulgate a satisfactory BiOp if it relies in any part on prospective models of data analysis. Particularly if the results of such analysis might contribute to any amount of “economic dislocation.”²⁴⁶

After spending a great deal of space condemning NMFS for a supposed inconsistent position and clearly arbitrary and capricious actions, the court bizarrely ends its argument by stating that even though NMFS “*may (or may not)*” have met the arbitrary and capricious standard, that does not matter, it is apparently “beside the point.”²⁴⁷ The “tainted” thoughts in favor of the species apparently rendered any data, expertise, or statutory compliance null and void.²⁴⁸

The D.C. Circuit's decision marks yet another strike in the contemporary campaign to curtail agency authority by applying a novel reading under the guise of “ordinary meaning.” This decade will be marked by a tendency for judicial overreach, inserting political opinions into realms they need not reach based on standing, ripeness, and mootness, to effectuate an anti-environmental agenda. The court leaned hard into framing a pro-species strategy as anti-human, feeding the narrative that environmental protections work in opposition to human interests and that people are “casualties” in this grand war against commercial industries.²⁴⁹

236. *Id.* at *28 (citing *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018)).

237. *Id.* at *21.

238. Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 *JURIMETRICS* 294, 299 (1982).

239. *Id.*

240. *Maine Lobstermen's Ass'n*, 2023 U.S. App. LEXIS 14987, at *37.

241. *Id.* at *8.

242. *Id.* at *33.

243. See *NMFS*, *supra* note 78, at 492 (providing the basis for the Linden model used to determine mortality risks).

244. *Maine Lobstermen's Ass'n*, 2023 U.S. App. LEXIS 14987, at *8.

245. *NMFS*, *supra* note 78, at 216-17.

246. *Maine Lobstermen's Ass'n*, 2023 U.S. App. LEXIS 14987, at *32.

247. *Id.* at *36 (emphasis added).

248. *Id.* at *35.

249. *Id.* at *32.

Deliberate misreading of the ESA, Clean Air Act (CAA),²⁵⁰ Clean Water Act (CWA),²⁵¹ and other statutes, veiled as strict interpretations, signals the demise of hard-fought battles to retain environmental protections in a time when they are most needed.²⁵² Is it possible the D.C. Circuit is using this opportunity, not to consider the validity of the work of scientific experts, but to provide political fodder for the upcoming attack against *Chevron* at the Supreme Court level?²⁵³

VI. Conclusion

It is likely that the two whales described at the beginning of this Comment will not survive long enough to procreate. By 2040, the NARW will likely be functionally extinct.²⁵⁴ The future also looks bleak, though perhaps less immediate, for the longevity of commercial fishing. Despite various legal triumphs, nothing has been or will be done for the next six years to increase the responsibility of the lobster fishing industry to protect the NARW.

With the passage of the 2023 Omnibus Bill, Congress has again exposed its shortsighted interest in promoting special interests at the expense of the efficacy of environmental statutes. The opinion issued by the D.C. Circuit signals a continuing partisan war against effective statutes and regulations supported by experts and the best available scientific data. The most recent opinion will only inspire further attacks on necessary protections.

Perhaps bolstered by the lobstermen's victory in the D.C. Circuit, Rep. Buddy Carter (R-Ga.) introduced a bill fighting NOAA's seasonal ship speed restrictions, which would prohibit the agency from spending any federal money to implement the rule change.²⁵⁵ This attempt to derail or deny increased protections runs counter to available accepted data. Erica Fuller, a senior attorney at the Conservation Law Foundation, pointedly asserts that regardless of what the courts claim, "the facts and the science show that U.S. fisheries are killing right whales at grossly unsustainable rates."²⁵⁶

NOAA's attempts to impose speed limits on Atlantic boaters has been opposed by members of both parties in Congress.²⁵⁷ Legislators proposed new bills that would prevent NOAA from spending money implementing these new rules until the agency is able to more accurately track NARWs.²⁵⁸ However, such technology does not yet exist, and waiting to increase protections jeopardizes the dwindling NARW population.²⁵⁹ Representative Garret Graves (R-La.) went so far as to claim that NOAA lacked the understanding necessary to draft the rule, as the agency did not consult "boaters."²⁶⁰

Even in the face of overwhelming scientific evidence, there appears to be no authority willing to shutter commercial fishing or apply necessary limits. One potentially viable option for the feuding clans of NARW conservationists and fisheries, though unlikely to occur, is to recognize their shared interest in surviving these unprecedented times. Until such a partnership is formed, it is up to Congress to demand accountability from those who violate the very laws it passed, and the courts to refrain from overstepping and asserting authority in realms with which they are wholly unfamiliar.

The time has long passed where environmental concerns can be left to the next session, or the next generation. Reforming an industry to protect an ecosystem or biosphere is not equivalent to a human casualty, in fact just the opposite. This is not merely a question of saving some whales, as opponents to increased regulations might believe, but rather an opportunity to demonstrate how climate adaptation is a necessary tool with universal benefits to all species and livelihoods. Special interest groups and shortsighted commercial concerns should not be continually allowed to dictate how statutory environmental protections are understood.

250. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

251. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

252. See generally Blake Emerson, *The Real Target of the Supreme Court's EPA Decision*, SLATE (June 30, 2022), <https://slate.com/news-and-politics/2022/06/west-virginia-environmental-protection-agency-climate-change-clean-air.html> (describing the lack of a live "case or controversy" that would require judicial intervention); Kimberly Wehle, *The Supreme Court's Extreme Power Grab*, ATLANTIC (July 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/west-virginia-v-epa-scotus-decision/670556/> (describing the novel use of the major questions doctrine to confer power unto the judiciary).

253. *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), cert. granted, 598 U.S. ____ (2023) (No. 22-451).

254. Center for Biological Diversity, *North Atlantic Right Whale*, https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/ (last visited July 24, 2023).

255. Russ Num, *Georgia Congressman Wants to Block US Agency From Slowing Boats to Protect Endangered Whales*, AP (June 23, 2023), <https://apnews.com/article/right-whales-endangered-speed-restrictions-boats-bf7077de76770babb0c341459795715b>.

256. Rob Hotakainen, *Court Rules Against NOAA in Dispute With Maine Lobstermen*, E&E NEWS (June 20, 2023), <https://subscriber.politicopro.com/article/eenews/2023/06/20/court-rules-against-noaa-in-dispute-with-maine-lobstermen-00102707>.

257. Rob Hotakainen, *Spending Bill Would Delay NOAA Plan to Save Right Whales*, E&E NEWS (July 14, 2023), <https://subscriber.politicopro.com/article/eenews/2023/07/14/spending-bill-would-delay-noaa-plan-to-save-right-whales-00106377>.

258. *Id.*

259. *Id.*

260. *Id.*