

# THE WRONG TARGET FOR THE RIGHT WHALE: WHY NEW FEDERAL FISHING REGULATIONS IMPROPERLY TARGET THE MAINE LOBSTER INDUSTRY

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As a lifelong Maine lobsterman, I understand the inherent dangers of my job. I keep watch on the forecast knowing that sudden weather changes can make the difference between a successful day at work and putting my crew's life at risk. These days, however, the hazard posed by Mother Nature does not compare with the perfect storm of regulations coming out of Washington that threaten my job, our way of life and may eventually sink a fishery that has supported communities and generations of families here in Maine.<sup>1</sup>

## I. INTRODUCTION

On August 31, 2021, the National Oceanic and Atmospheric Administration (“NOAA”) and the National Marine Fisheries Service (“NMFS”) announced new regulations aimed at reducing the threat that longstanding lobster fishing techniques pose to the critically endangered North Atlantic right whale<sup>2</sup> population.<sup>3</sup>

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1. Kristen Porter, *Federal Rules Are Sinking Maine's Lobster Industry*, DARIK NEWS USA (Oct. 23, 2021, 3:25 AM), <https://darik.news/usa/maine/federal-rules-are-sinking-the-lobster-industry-in-maine.html>.

2. The terms “North Atlantic right whale” and “right whale” are used interchangeably throughout this Article, but they are intended to refer to the same species of right whale.

3. *NOAA Fisheries Announces New Lobster and Jonah Crab Fisheries Regulations to Help Save Endangered North Atlantic Right Whales*, NOAA FISHERIES (Aug. 31, 2021), <https://www.fisheries.noaa.gov/media-release/noaa-fisheries-announces-new-lobster-and-jonah-crab-fisheries-regulations-help-save>. The use of the terms “regulations,” “rules,” and “rule changes” throughout the Article are all intended to refer to these regulations.

Specifically, these new regulations target the Northeast United States lobster and Jonah crab fishery and seek to weaken and eventually eliminate the rope that lobstermen use to trap the valuable crustaceans, with the hope being that less rope in the water will result in fewer right whale entanglements and deaths.<sup>4</sup>

The new regulations have been celebrated by environmentalists and marine mammal activists alike, with some believing even stricter protections are warranted.<sup>5</sup> Those opposing the regulations, however, argue that the new measures will do little if anything to save the waning right whale population.<sup>6</sup> Instead, they argue that the rules will destroy the lobster fishery and, by extension, the livelihoods of all those who depend on it.<sup>7</sup>

While the new regulations target multiple geographic areas, impact numerous industries, and will likely have wide-reaching consequences across the globe, this Article focuses on the impact the regulations will have on the Maine lobster fishing industry and Maine coastal communities. In doing so, this Article argues that the new regulations should be rescinded and recast because they overwhelmingly target an industry that is not endangering right whales.<sup>8</sup> To understand this argument, it is necessary to review the legal decisions that lead to the creation of the new rules, and further to discuss why the flawed scientific reasoning underlying the new regulations must result in their invalidation through judicial review. Should reviewing courts allow these rules to stand, the Maine lobster industry and the communities that rely on it will suffer catastrophic damage from which they may not recover.

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4. *Id.*

5. David Abel, *After Years of Delay, Federal Regulators Issue Sweeping Fishing Rules to Protect Right Whales*, THE BOS. GLOBE (Aug. 31, 2021), <https://www.bostonglobe.com/2021/08/31/metro/after-years-delay-federal-regulators-issue-sweeping-fishing-rules-protect-right-whales/>; Erica Fuller, *Commentary: Healthy Right Whale Population, Healthy Maine Lobster Fishery Can Coexist*, THE PORTLAND PRESS HERALD (Dec. 26, 2021), <https://www.pressherald.com/2021/12/26/maine-voices-30/>.

6. Fred Bever, *New Federal Lobster Rules Call for Seasonal Closures Off Maine, Weak Rope to Help Protect Right Whales*, ME. PUB. (Aug. 31, 2021), <https://www.mainepublic.org/business-and-economy/2021-08-31/new-federal-lobster-rules-call-for-seasonal-closures-off-maine-weak-rope-to-help-protect-right-whales>.

7. *Id.*

8. The state of Maine boasts the largest lobster fishery in the United States and therefore has the most to lose from the implementation of the new rules. *New England, Mid-Atlantic States Lead Nation in Volume and Value of Several Key Fisheries*, NOAA FISHERIES (Nov. 1, 2017), <https://www.fisheries.noaa.gov/feature-story/new-england-mid-atlantic-states-lead-nation-volume-and-value-several-key-fisheries>.

But before beginning a discussion of the legal struggles involving the Maine lobster industry and the endangered right whale population, it is necessary to delve into an in-depth discussion regarding the histories of each. Doing so will help illustrate how we have come to a point that necessitates legal intervention, and why an urgent need to protect the endangered right whales exists today.

## II. *HISTORY: A TALE OF TWO SPECIES*

The Maine lobster industry and the North Atlantic right whale have not always been at odds with one another. To understand how the two ended up on opposite sides of a regulatory and legal struggle in which each of their survival hangs in the balance, it is crucial to explore the histories of both. To begin, let us sail back in time to colonial America and the beginning of the Maine lobster industry.

### A. *A Tale of Triumph: A Brief History of the Maine Lobster Industry*

The Maine lobster industry has a long and storied history culminating in its ultimate development into one of the nation's most lucrative seafood enterprises.<sup>9</sup> In order to understand how the industry came to be at odds with the right whale population, we must first explore the industry's humble beginnings. We will then discuss the techniques used to trap the valuable crustaceans, review how the industry is regulated, and finally canvas the economic impact the industry has on the state of Maine and beyond to understand why many believe this is a battle worth fighting.

#### 1. *Chasin' Tail: The Past and Present of the Maine Lobster Industry*

The first recorded catch of a lobster in North America by English settlers took place in the 1600s.<sup>10</sup> In the colonial period and throughout the early years of the United States, both colonists

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9. *Id.*

10. Megan Willett-Wei, *The Remarkable Story of How Lobster Went from Being Used as Fertilizer to a Beloved Delicacy*, BUS. INSIDER (Aug. 16, 2013), <https://www.businessinsider.com/the-history-of-gourmet-lobster-2013-8>.

and Native Americans used lobsters mainly for bait and fertilizer.<sup>11</sup> Public demand for consuming the crustaceans did not reach a level high enough to support a commercial industry until the middle of the 19th century.<sup>12</sup> As the industry grew, distributors encountered the critical issue of how exactly to keep the seafood fresh, since lobsters must be cooked before or immediately after they die.<sup>13</sup> Because efficient transportation methods of live lobster were not in wide use during the early stages of the industry, processors used canning methods to keep cooked lobster meat fresh.<sup>14</sup>

As time progressed, demand for the crustaceans grew, and by the 1880s overfishing became an issue.<sup>15</sup> To curb the problem of overfishing, the state of Maine instituted a number of fishing regulations including a shortened fishing season, limitations on the harvest of female lobsters, and a restriction on the allowable size range for harvested lobsters.<sup>16</sup> Further growth in demand for fresh lobster meat combined with continued transportation innovations allowed for the eventual preservation and shipment of live lobster over greater distances.<sup>17</sup> No longer were those who lived far from the ocean forced to settle for canned lobster meat; there were now options such as “fresh, frozen lobster tails, vacuum packed whole lobster, fresh, frozen meat in cans, and lobster tomalley and roe.”<sup>18</sup> These developments eventually led to lobster, once considered a “poor-man’s meal,” now ranking as Maine’s most harvested seafood by a wide margin.<sup>19</sup>

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11. *Lobster Fishing in Maine*, PENOBSCOT MARINE MUSEUM, <https://penobscotmarinemuseum.org/pbho-1/fisheries/lobster-fishing-maine> (last visited Feb. 17, 2023).

12. *A Historic Fishery*, LOBSTER FROM ME. (May 26, 2015), <https://lobsterfrommaine.com/maine-lobster-history/>.

13. Luis Villazon, *Why Are Lobsters Cooked Alive and Do They Feel Pain?*, SCI. FOCUS, <https://www.sciencefocus.com/nature/why-are-lobsters-cooked-alive-and-do-they-feel-pain/> (last visited Feb. 17, 2023). If not immediately cooked, harmful bacteria immune to destruction by the cooking process can rapidly grow, making the meat toxic to humans. *Id.*

14. *Lobster Fishing in Maine*, *supra* note 11.

15. *Id.*

16. *Id.*

17. Willett-Wei, *supra* note 10.

18. *History of Lobster Fishing and Processing*, THE AM. LOBSTER, <http://www.parl.ns.ca/lobster/history.htm> (last visited Feb. 17, 2023).

19. Willett-Wei, *supra* note 10; *Preliminary 2021 Commercial Maine Landings by Live Pounds*, ME. DEP’T OF MARINE RES. (2021), <https://www.maine.gov/dmr/sites/maine.gov/dmr/files/docs/PoundsBySpecies.Pie.Graph.pdf>.

In 2020, Maine's annual lobster haul totaled over ninety-six million pounds, breaking a nine-year streak during which lobstermen had consecutively hauled in over 100 million pounds annually.<sup>20</sup> The 2020 lobster haul marked another year in which lobster was the most lucrative seafood in the state of Maine.<sup>21</sup> The 2020 catch was worth more than \$405 million of the \$516 million total seafood catch in Maine.<sup>22</sup>

These numbers represent a healthy lobster population for Maine's commercial lobster fishery, at a time when other New England lobster fisheries seem to be struggling. A 2020 American lobster stock assessment from the Atlantic States Marine Fisheries Commission shows that while both the catch and the abundance of lobster in the Gulf of Maine and George's Bank (two key fishing areas for Maine lobstermen) have increased significantly over the last twenty-five years, the same two metrics have decreased sharply in southern New England.<sup>23</sup> The decline in southern New England is not believed to be caused by overfishing, but is instead attributed to the gradual warming of the water temperatures to a level above which lobsters can maintain good health and growth.<sup>24</sup> Now that we have examined the historical development of Maine's lobster fishing industry, it is next necessary to consider how current lobster trapping techniques might pose a threat to other marine life.

## 2. *Haulin' Pots: Lobster Trapping Techniques Explained*

When European settlers in Maine first started to target lobster, the crustaceans were significantly larger than those

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20. Patrick Whittle, *Happy Tail: Maine Lobstermen Crack a Good Year Despite Virus*, ASSOCIATED PRESS PORTLAND (Mar. 24, 2021), <https://apnews.com/article/lobsters-coronavirus-pandemic-maine-2bcee17444b90a26ed991ca7ae0b6784>. Despite this dip, the 96-million-pound total was better than many had feared given the pandemic related uncertainty in demand and price. *Id.*

21. *2017-2021 Commercial Maine Landings by Species*, ME. DEP'T OF MARINE RES. (2021), <https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/LandingsBySpecies.Table.pdf>.

22. *Id.*; Whittle, *supra* note 20. The next closest species was the softshell clam at \$15,671,473. *In Tough Year, Maine Seafood Landings Top \$500 Million*, ISLAND INST. (Dec. 20, 2021), <https://www.islandinstitute.org/working-waterfront/24628/>.

23. *ASMFC Stock Assessment Overview: American Lobster*, ATL. STATES MARINE FISHERIES COMM'N 2 (Oct. 2020), [https://asmfc.org/uploads/file/63e51a7dAmericanLobsterStockAssmtOverview\\_RevisedJan2021.pdf](https://asmfc.org/uploads/file/63e51a7dAmericanLobsterStockAssmtOverview_RevisedJan2021.pdf).

24. *Id.*

typically harvested today.<sup>25</sup> Averaging over five pounds, the lobsters could be found easily in shallow water and gaffed<sup>26</sup> into small boats.<sup>27</sup> However, as demand for lobster meat grew, fishermen developed methods that were more efficient and enabled them to harvest lobsters from far greater depths.<sup>28</sup> Instead of gaffing, fishermen began hauling up wooden cages by hand that had been baited with fish and set on the sea floor which, after being left for a period of time, would attract and entrap the lobsters.<sup>29</sup>

Today, lobstermen generally use these same methods, although modern technological advancements make the process much more efficient.<sup>30</sup> The process can be summarized as follows: wire cages known as “traps” or “pots” (typically 3–4 feet in length and weighing on average 45–60 pounds each<sup>31</sup>) are filled with mesh bags full of baitfish and other attractants, and then set to the sea floor where they sit for usually less than a week.<sup>32</sup> These traps have an opening through which the crustaceans enter to feed on the bait, and once inside the lobsters move to the opposite side of the trap where they remain until the trap is retrieved.<sup>33</sup> These traps are required by Maine law to have unobstructed “escape vents” which allow undersized lobsters to eat and flee the trap as they please rather than remain with the larger lobsters, who have been known to cannibalize their smaller relatives.<sup>34</sup>

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25. *Lobster Fishing in Maine*, *supra* note 11.

26. A gaff is a handled hook often used for holding large fish. *Gaff*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/gaff> (last visited Feb. 17, 2023).

27. *Lobster Fishing in Maine*, *supra* note 11.

28. *History of Lobster Fishing and Processing*, *supra* note 18.

29. *Id.*

30. *Lobstering Basics*, UNIV. ME. LOBSTER INST., <https://umaine.edu/lobsterinstitute/educational-resources/lobstering-basics/> (last visited Feb. 17, 2023).

31. Patrice McCarron & Heather Tetreault, *Lobster Pot Gear Configurations in the Gulf of Maine*, CONSORTIUM FOR WILDLIFE BYCATCH REDUCTION 5 (2012), [https://www.bycatch.org/sites/default/files/Lobster\\_Gear\\_Report\\_0.pdf](https://www.bycatch.org/sites/default/files/Lobster_Gear_Report_0.pdf); *Lobster 2.4: All About Traps*, ME. LOBSTERMEN'S CMTY. ALL., <https://mlcalliance.org/all-about-lobster-2-4-all-about-traps/> (last visited Feb. 17, 2023).

32. *Lobstering Basics*, *supra* note 30.

33. *Lobster Trap Ensures You Fun of Catching Lobsters Yourself*, ROBUST LOBSTER TRAP CO., LTD., <https://www.lobstertraps.org/lobstertrap/lobster-trap.html> (last visited Feb. 17, 2023).

34. ME. REV. STAT. TITLE 12, § 6433 (2022) (amended 2012); Michaeleen Doucleff, *Caught: Lobster Cannibals Captured On Film Along Maine Coast*, NPR (Dec. 3, 2012), <https://www.npr.org/sections/thesalt/2012/12/03/166235228/caught-lobster-cannibals-captured-on-film-along-maine-coast>.

Lobster Trap Diagram<sup>35</sup>

As the trap rests on the sea floor, it is connected to rope that runs vertically through the water column and attaches to a floating buoy that is uniquely colored to distinguish which fisherman it belongs to.<sup>36</sup> The number of traps attached to the bottom end of each vertical line can differ depending on many factors including the size of the boat, the number of crew-members on board, and the type of bottom being fished.<sup>37</sup> When a fisherman returns to retrieve a trap, the floating buoy is collected from the surface with a gaff and the attached rope is brought on board and put into a hydraulic hauler that hoists up the trap (or traps) from the sea floor.<sup>38</sup> The trap is then lifted onto the boat by hand and the fishermen on board open a latch on top of the trap and pick out and sort through the lobsters inside.<sup>39</sup> Female lobsters that have eggs or visible “v-notches”<sup>40</sup> and lobsters that do not fit in the allowable size range<sup>41</sup> are thrown back, while legal-sized lobsters have plastic bands placed around their claws before they are deposited

35. Illustration of Escape Vents, in *Lobster Trap Ensures You Fun of Catching Lobsters Yourself*, *supra* note 33.

36. *Lobstering Basics*, *supra* note 30.

37. McCarron & Tetreault, *supra* note 31.

38. *Lobstering Basics*, *supra* note 30.

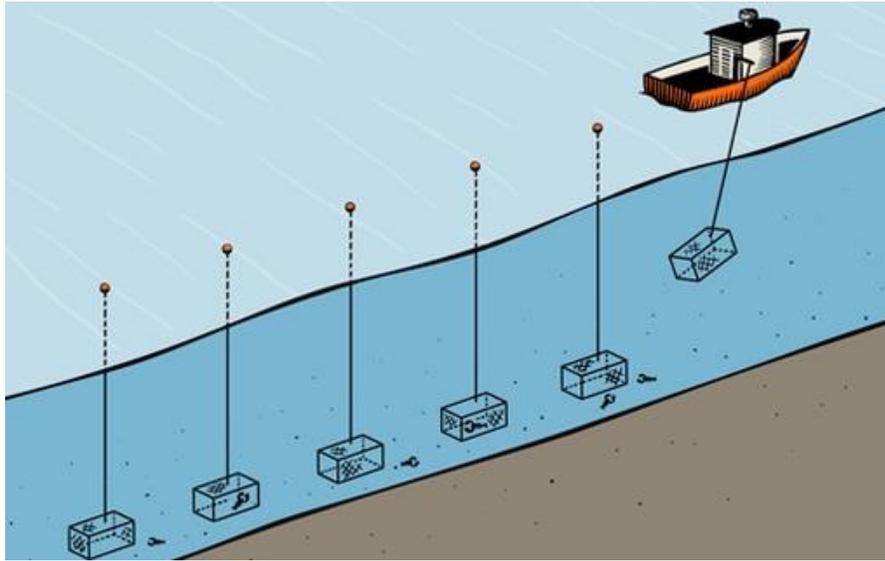
39. *Id.*

40. A V-notch is mark made by lobstermen on the tail of a female lobster indicating that the lobster has previously been caught with eggs. *Id.*

41. “A legal lobster in the State of Maine has a carapace or body shell length that measures between 3 1/4 inches and 5 inches.” *A Guide to Lobstering in Maine*, ME. DEP’T OF MARINE RES. 9 (July 2017), <https://www.maine.gov/dmr/sites/maine.gov/dmr/files/docs/GuideToLobstering2019.pdf>.

into a salt-water holding tank on board the lobster boat where they remain until sold.<sup>42</sup>

Lobster Fishing Diagram<sup>43</sup>



Now that we have reviewed the lobster trapping techniques, it is important to next discuss the regulation of the lobster industry to understand how the new regulations will hinder the Maine lobster industry's ability to operate moving forward.

### 3. *The Laws of Lobstering: How the Industry is Regulated*

Like many industries, the Maine commercial lobster fishing industry is regulated by both state and federal governments.<sup>44</sup> Under the Interstate Fishery Management Plan for American Lobster, individual states have jurisdiction to regulate fisheries located between the state's shoreline and up to three miles offshore.<sup>45</sup> Within this territory, it is up to each state to decide

42. *Lobstering Basics*, *supra* note 30.

43. A visual representation of how lobster gear is set and hauled. Illustration of Lobster Traps, in *Ghost Fishing Gear: A Major Source of Marine Plastic Pollution*, LIBR. OF PARLIAMENT (Jan. 30, 2020), <https://hillnotes.ca/2020/01/30/ghost-fishing-gear-a-major-source-of-marine-plastic-pollution/>.

44. *American Lobster*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species/american-lobster> (Nov. 18, 2022).

45. *Id.*

what restrictions or measures to implement.<sup>46</sup> States differ from one another on many regulations, including the allowable size range of harvested lobsters, the type of fishing gear permitted to catch lobster, and reporting requirements among others.<sup>47</sup>

In Maine, state government agencies oversee and enforce the law in the area from the coastline to three miles offshore.<sup>48</sup> A fisherman must hold a Maine commercial lobster license in order to harvest lobster commercially in Maine waters from the coast to three miles offshore.<sup>49</sup> There are roughly 4,500 commercial lobster fishermen in the state of Maine, and about two-thirds of the lobster fleet are older than forty years old.<sup>50</sup> An additional 1,085 students in the state of Maine hold student lobster licenses, positioning themselves to one day make a living on the water trapping the treasured crustaceans.<sup>51</sup> Maine limits commercial lobster fishermen to 800 traps per vessel in a conservation effort to ensure the health and longevity of its lobster fishery.<sup>52</sup>

From the three mile line to two-hundred miles offshore, NOAA implements American lobster industry regulations under the Atlantic Coastal Fisheries Cooperative Management Act.<sup>53</sup> This area outside the three mile line to two-hundred miles offshore is divided into two stock areas and seven management areas.<sup>54</sup> In order to set lobster traps in any of these areas outside of the three-

46. *Id.*

47. *Id.* The state of Maine has the strictest harvesting rules and the harshest punishments if those rules are not followed. Diane Cowan, *Lobster Limits Show Short-Term Thinking*, N.Y. TIMES, <https://www.nytimes.com/roomfordebate/2013/03/03/too-few-fish-in-the-sea/lobster-limits-show-short-term-thinking> (Mar. 3, 2013, 6:01 PM); Taylor Bigler Mace, *Penalties for Fishing Violations Stiffened*, ELLSWORTH AM. (July 25, 2017), <https://www.ellsworthamerican.com/maine-news/waterfront/penalties-fishing-violations-stiffened/>.

48. ME. REV. STAT. TITLE 12, § 6021 (2022).

49. *A Guide to Lobstering in Maine*, *supra* note 41, at 8.

50. Shannon Mullen, *Maine's Next Generation of Lobstermen Brace for Unprecedented Change*, NPR (Sept. 19, 2021, 7:00 AM), <https://www.npr.org/2021/09/19/1036328606/maines-next-generation-of-lobstermen-brace-for-unprecedented-change>.

51. Susan Cover, *Maine Lobstermen Win Expedited Review of Whale Rules*, SPECTRUM NEWS (Oct. 19, 2022, 4:22 PM), <https://spectrumlocalnews.com/me/maine/news/2022/10/19/court-grants-expedited-review-of-rules-on-maine-lobstermen>.

52. *A Guide to Lobstering in Maine*, *supra* note 41, at 6.

53. 16 U.S.C. § 5101 (2018).

54. *American Lobster*, *supra* note 44; Greater Atl. Reg'l Fisheries Off., *Lobster Management Areas*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/resource/map/lobster-management-areas> (Dec. 30, 2020) [hereinafter *Lobster Management Areas*].

mile line, the vessel being used must hold a federal lobster permit.<sup>55</sup> The entire three mile line off the Maine coast leads into Area 1, which boasts nearly ten times the amount of federal lobster licenses as any other area.<sup>56</sup> As of 2017, NOAA recognized 3,288 federal lobster permit holders.<sup>57</sup> In December of 1999, a moratorium was put on the issuance of new federal commercial lobster permits, but existing permits can still be bought and sold between entities.<sup>58</sup>

#### 4. *Keeping Communities Afloat: The Industry's Impact on the Local and Global Economies*

Now that we have covered how the industry is regulated, it is important to next discuss the industry's economic impact. Doing so will help us understand why so many both inside and outside of the lobster industry believe that the legal battle over the new rules is a battle worth fighting. In addition to the fishermen that trap the highly sought-after seafood, the Maine lobster fishing industry also supports a multitude of businesses both in the state and around the world.<sup>59</sup> Much of the value that the Maine lobster fishing industry generates stays within the state, moving from business to business and from community to community.<sup>60</sup> Distributors, bait providers, restaurants, boat mechanics, and the tourism industry among others all have a stake in the continued well-being of the lobster fishery.<sup>61</sup>

Along with the roughly 4,500 licensed commercial lobster fishermen, the Maine lobster industry is estimated to support an

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55. *Lobster Management Areas*, *supra* note 54.

56. Greater Atl. Reg'l Fisheries Off., *American Lobster - Permitting Information*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/permit/american-lobster-permitting-information> (Apr. 12, 2022).

57. *Id.*

58. *Id.*

59. Melissa Waterman, Me. Lobstermen's Ass'n, *The Lobster Industry in 2022*, 2022 NE. AGRIC. INSIGHTS & PERSPS. Apr. 12, 2022, at 19, 19, [https://issuu.com/farmcrediteast/docs/22-0026\\_insightsperspectives\\_final\\_pgs](https://issuu.com/farmcrediteast/docs/22-0026_insightsperspectives_final_pgs).

60. Esperanza Stancioff, *Maine's Lobster Fishing Community Confronts Their Changing Climate*, U.S. CLIMATE RESILIENCE TOOLKIT, <https://toolkit.climate.gov/case-studies/maines-lobster-fishing-community-confronts-their-changing-climate> (Feb. 10, 2020).

61. *Fighting For Maine's Lobster Industry*, SUSAN COLLINS (Aug. 15, 2018), <https://www.collins.senate.gov/newsroom/fighting-maine's-lobster-industry>.

additional 35,000 jobs in and around coastal Maine communities.<sup>62</sup> In 2019, the last full tourism season unaffected by the COVID-19 pandemic, 57% of tourists who visited the state of Maine and stayed overnight ate lobster or other local seafood.<sup>63</sup> Additionally, 54% of day tourists who visited the state reported that they ate lobster or other local seafood.<sup>64</sup>

As well as the support it provides to Maine's local economy, the Maine lobster fishing industry is also critical to businesses beyond state borders as well. According to NOAA, American lobster was the country's single most valuable harvested species in 2015, 2016, and 2017, and the Maine lobster catch made up approximately 80% of the total catch in each of those years.<sup>65</sup> American lobster is also popular beyond United States borders as well, with international exports totaling \$548.4 million in 2019 and \$426.9 million in 2020.<sup>66</sup> China is the biggest international buyer of American lobster, purchasing \$127 million worth of the crustaceans in 2020, despite some in the country blaming the coveted crustaceans for sparking the COVID-19 pandemic.<sup>67</sup>

As one can see, the history of the Maine lobster industry, including the management of its lobster population through protective measures, is one of relative success. Unfortunately, at least up to this point, the same cannot be said of the dwindling North Atlantic right whale population.

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62. Mullen, *supra* note 50; Madeline Greene et al., *Diversifying Maine's Coastal Economy: A Transition from Lobster Fishing to Kelp Aquaculture?*, ME. J. CONSERVATION & SUSTAINABILITY (Mar. 19, 2020), <https://umaine.edu/spire/2020/03/19/kelp/>.

63. *Visitor Tracking Research 2019 Annual Report*, ME. OFF. TOURISM 64 (Feb. 2020), <https://motpartners.com/wp-content/uploads/2020/06/2019-MOT-Annual-Visitors-Research.pdf>.

64. *Id.* at 100.

65. *Maine Commercial Landings Top 600 Million Dollars for Only the Third Time*, ME. DEPT. OF MARINE RES., <https://content.govdelivery.com/accounts/MEDMR/bulletins/233623a#.XHmGvxfSjN0.twitter> (last visited Feb. 17, 2023).

66. Hannah LaClaire, *U.S. Lobster Exports to China Rebounded in 2020*, PORTLAND PRESS HERALD (Feb. 21, 2021), <https://www.pressherald.com/2021/02/21/u-s-lobster-exports-to-china-rebounded-in-2020/>. The sharp decrease is likely attributable to the global COVID-19 pandemic. *Id.*

67. *Id.*; Olivia Solon et al., *China-Linked Disinformation Campaign Blames Covid on Maine Lobsters*, NBC NEWS, <https://www.nbcnews.com/news/china-linked-disinformation-campaign-blames-covid-maine-lobsters-rcna3236> (Oct. 22, 2021); Mark Godfrey, *Chinese Media Claiming Origins of COVID-19 Pandemic Stem from Maine Lobster Company*, SEAFOOD SOURCE (Oct. 1, 2021), <https://www.seafoodsource.com/news/supply-trade/chinese-media-linking-origins-of-covid-19-pandemic-to-maine-lobster-company>.

B. A Tale of Tragedy: The Disastrous Decline of the Right Whale Population

The history of the right whale, although vastly different from the Maine lobster industry, is equally as important to explore in order to understand the ongoing legal struggle. In exploring its history, we will start with an overview of how the North Atlantic right whale population fell to the critically low level at which it currently exists, and then discuss those industries that do, and those that do not, pose a continued threat to the right whale today.

1. *The Right Whale for the Wrong Reasons: An Overview of Right Whale Population Decline*

Today, there exist three different right whale species: the North Pacific right whale, the Southern right whale, and the North Atlantic right whale.<sup>68</sup> This Article focuses solely on the North Atlantic right whale because it is the only right whale species that interacts with the northeast American lobster fishery.<sup>69</sup> The North Atlantic right whale can grow up to fifty-two feet in length, and is identifiable by its black stocky body and patches of rough white skin on its head known as “callosities.”<sup>70</sup> The marine mammals migrate seasonally between their calving grounds, which range as far south as Cape Canaveral, Florida, and their foraging areas off the coast of New England and into Canadian coastal waters.<sup>71</sup>

The North Atlantic right whale was historically one of the most sought after targets for whalers.<sup>72</sup> These whales have a docile nature, feed on the surface, tend to stay in coastal waters near land, and when killed have a tendency to float thanks to their high blubber content.<sup>73</sup> Their high reserves of oil and unique thin, bristle-like teeth known as baleen made the whales extremely valuable.<sup>74</sup> Taken together, these properties made the species especially desirable to hunters, and even led to their namesake as

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68. *North Atlantic Right Whale*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (Nov. 7, 2022).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Right Whales*, NAT'L GEO., <https://www.nationalgeographic.com/animals/mammals/facts/right-whales> (last visited Feb. 17, 2023).

73. *Id.*

74. *Id.*

the right whale because many whalers viewed them as the “right whale” to target.<sup>75</sup> Because of their popularity among whalers, by the late 1800s the species had been hunted to the point of near extinction.<sup>76</sup>

As the 21st century began, however, it appeared that the species was poised for a slow but steady recovery. From 2000 to 2010, the right whale population was growing at a relatively steady rate.<sup>77</sup> Unfortunately, this recovery was short lived, and “[i]n 2010, the population entered a period of decline that appears to be continuing due to high levels of human-caused mortality and declining calf production.”<sup>78</sup> NOAA data also shows that the number of newborn whales has been below average in recent years.<sup>79</sup> Today, the North Atlantic right whale is critically endangered with current population estimates ranging from upwards of 350 individuals to as low as 336.<sup>80</sup> Of the remaining population, less than 100 of those individuals are classified as breeding females.<sup>81</sup> Despite mitigation efforts, including the United States officially outlawing whaling in 1971, the right whale still faces numerous threats to its survival today.<sup>82</sup>

## 2. *The Precarious Path Ahead: Threats to the Remaining Right Whale Population*

Beginning in 2017, the North Atlantic right whale population began suffering an elevated number of reported fatalities.<sup>83</sup>

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75. *Id.*

76. *Id.*

77. *North Atlantic Right Whale*, MARINE MAMMAL COMM’N, <https://www.mmc.gov/priority-topics/species-of-concern/north-atlantic-right-whale/> (last visited Feb. 17, 2023).

78. *Id.*

79. *North Atlantic Right Whale*, *supra* note 68.

80. *Id.*; James Ashworth, *Numbers of North Atlantic Right Whales Fall by Almost 10%*, NAT’L HIST. MUSEUM (Oct. 28, 2021), <https://www.nhm.ac.uk/discover/news/2021/october/numbers-of-north-atlantic-right-whale-fall.html>; Hannah Chanatry, *The State of the Whales: 4 Takeaways from This Year’s Right Whale Consortium Meeting*, WBUR (Oct. 27, 2021), <https://www.wbur.org/news/2021/10/27/north-atlantic-right-whale-consortium-2021-meeting>.

81. *North Atlantic Right Whale*, *supra* note 68.

82. Stuart Thornton & Meghan E. Marrero, *Big Fish: A Brief History of Whaling*, NAT’L GEO., <https://www.nationalgeographic.org/article/big-fish-history-whaling/> (May 13, 2022).

83. Off. Protected Res., *2017–2022 North Atlantic Right Whale Unusual Mortality Event*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event> (Feb. 9, 2022) [hereinafter *2017–2022 North Atlantic Right Whale Unusual Mortality Event*].

According to NOAA, these deaths have been primarily documented in Canada, but “some” were documented in the United States, and in response an “Unusual Mortality Event” was declared.<sup>84</sup> This declaration of an “Unusual Mortality Event,” during which thirty-five right whale deaths have been observed, is evidence that the North Atlantic right whale continues to face a multitude of threats to its survival.<sup>85</sup> Many of these deaths came from apparent ship strikes and entanglements in fishing gear, two threats that continue to put a successful recovery of the right whale population in jeopardy.<sup>86</sup>

a. A Titanic Threat: How Ship Strikes Contribute to the Declining Right Whale Population

One of the main challenges hindering the recovery of the right whale population is the threat of serious injury and death caused by ship strikes.<sup>87</sup> Ship strikes involving right whales are hard to avoid due to the right whale’s nature of surfacing abruptly to breathe, giving vessel operators little time to react.<sup>88</sup> Additionally, like many whales, right whales often “feed, play, migrate, rest, nurse, mate, give birth, and socialize in urbanized marine highways, putting them at risk of being struck by passing vessels.”<sup>89</sup> It is not only large shipping vessels that are a threat to right whales; if traveling fast enough, ships of any size can cause

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84. *Id.*; Marine Mammal Protection Act of 1972, 16 U.S.C. § 1421h(6) (“The term ‘unusual mortality event’ means a stranding that . . . (A) is unexpected . . . (B) involves a significant die-off of any marine mammal population; and . . . (C) demands immediate response.”).

85. 2017–2022 *North Atlantic Right Whale Unusual Mortality Event*, *supra* note 83; Greater Atl. Reg’l Fisheries Off., *Right Whales and Entanglements: More on How NOAA Makes Decisions*, WAYBACK MACH. (Aug. 12, 2022), <https://web.archive.org/web/20220812014047/https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/right-whales-and-entanglements-more-how-noaa> (this citation refers to the WayBack machine because NOAA has removed the webpage originally used for this citation). The Author of this Article encourages readers to visit the following resource to see where recent right whale deaths have been documented and compare these locations to where the new rules discussed below are targeted. *See 2017-2021 North Atlantic Right Whale Unusual Mortality Event Dead Animal Locations*, NOAA FISHERIES, <https://noaa.maps.arcgis.com/apps/webappviewer/index.html?id=e502f7daf4af43ffa9776c17c2aff3ea> (last visited Feb. 17, 2023).

86. Greater Atl. Reg’l Fisheries Off., *supra* note 85.

87. *North Atlantic Right Whale*, *supra* note 68.

88. *The Threat from Vessel Strikes*, WDC, <https://us.whales.org/our-4-goals/create-healthy-seas/the-threat-from-vessel-strikes/> (last visited Feb. 17, 2023).

89. *Id.*

serious injury or death to the marine mammals.<sup>90</sup> These collisions can cause devastating cuts from propellers, broken bones, and deadly internal injuries.<sup>91</sup> In recent years ship strikes have been a major threat to right whale populations, and “[b]etween 1999 and 2018 a total of 57 confirmed right whale vessel collisions were documented as United States events or first detected in United States waters.”<sup>92</sup>

In 2008, the NMFS implemented new regulations aimed at reducing vessel strikes.<sup>93</sup> Examples of some of these mitigation efforts include the movement of shipping lanes, establishment of areas to be avoided, restrictions on approaching a right whale any closer than 500 yards without a permit, and seasonal speed-restricted areas in which vessels greater than sixty-five feet are required to travel at a low rate of speed when in areas known to be frequented by right whales.<sup>94</sup> After implementation of the 2008 NMFS rules, “the number of documented vessel strike mortalities and serious injuries decreased from [twelve] during the [ten] years prior to the rule’s implementation to [eight] in the [ten] years since implementation.”<sup>95</sup> Despite this decrease, the NMFS noted that it was impossible to find a causal link between the implementation of the rules and the reduction in collisions.<sup>96</sup> A 2020 report reviewing the effectiveness of the 2008 rules indicated that further enforcement and regulation is necessary to mitigate right whale vessel collisions.<sup>97</sup>

A report by the conservation group Oceana “analyze[d] vessel speeds from 2017 to 2020 in speed zones established by [NOAA] along the United States Atlantic coast, and found non-compliance was as high as almost 90% in mandatory speed zones, and non-cooperation was as high as almost 85% in voluntary

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90. *North Atlantic Right Whale*, *supra* note 68.

91. *Id.*

92. Off. Protected Res., *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment*, NOAA FISHERIES, OFF. OF PROT. RES. 22 (June 2020), [https://media.fisheries.noaa.gov/2021-01/FINAL\\_NARW\\_Vessel\\_Speed\\_Rule\\_Report\\_Jun\\_2020.pdf?null](https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf?null).

93. *Id.* at i.

94. *The Threat from Vessel Strikes*, *supra* note 88.

95. Off. Protected Res., *supra* note 92, at i.

96. *Id.*

97. *Id.*

areas.”<sup>98</sup> Given these statistics, and the fact that “[c]ollisions with vessels are a leading cause of injury and death for North Atlantic right whales,” regulatory focus should be directed away from drafting and implementing fishing regulations in areas where right whales may no longer frequent (which will be discussed below) and instead should be directed towards the enforcement of vessel speed limits in areas where the whales are known to congregate.<sup>99</sup>

Ship strikes are also a tremendous threat to right whales in Canadian waters, especially as climate change forces the marine mammals to travel farther north in search of food.<sup>100</sup> In 2019 alone, “nine right whales were found dead in and around the Gulf of St. Lawrence.”<sup>101</sup> In a two-month span that year from June through July, four of the five right whales found dead in the Gulf of St. Lawrence were determined to have been caused by ship strikes, with the remaining death classified as undetermined.<sup>102</sup>

While ship strikes continue to be one of the major contributors to right whale deaths and injuries, they are not the only threat to the species’ survival. Another challenge facing the dwindling right whale population is the threat of entanglement in commercial fishing gear.<sup>103</sup> While it is important to impose rules and regulations that reduce the chances that right whales will become entangled, it is imperative that those regulations do not have an outsized effect on industries that are not endangering, entangling, and killing right whales, like the Maine lobster industry.

b. Entangled and in Danger: The Threat of Commercial Fishing Gear

According to NOAA, from 2012 to 2016, “an average of 5.15 right whales were killed or seriously injured annually by

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98. *Speeding Toward Extinction: Vessel Strikes Threaten North Atlantic Right Whales*, OCEANA (July 2021), <https://usa.oceana.org/reports/speeding-toward-extinction-vessel-strikes-threaten-north-atlantic-right-whales/>.

99. *Id.*; see *infra* pt.IV.A.

100. NAT’L MARINE FISHERIES SERV., GREATER ATL. REG’L FISHERIES OFF., GARFO-2017-00031, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION: BIOLOGICAL OPINION 198 (2021).

101. Hadeel Ibrahim, *4 North Atlantic Right Whale Deaths Investigated Last Year Were Caused by Ship Strikes*, CBC (June 24, 2020), <https://www.cbc.ca/news/canada/new-brunswick/north-atlantic-right-whales-ship-strikes-2019-incident-report-1.5625140>.

102. *Id.*

103. Greater Atl. Reg’l Fisheries Off., *supra* note 85.

entanglement in fishing gear.”<sup>104</sup> During that period, no gear was recovered from 70% of the documented entanglements.<sup>105</sup> Of remaining entanglements in which gear was recovered, 40% of that gear has been attributed to United States fisheries and 40% to Canadian fisheries.<sup>106</sup> Despite these numbers, NOAA acknowledges that *no right whale death has ever been attributed to entanglement in Maine lobster gear*.<sup>107</sup> In fact, nearly two decades have passed since a right whale entanglement was last attributed to Maine lobster gear.<sup>108</sup>

Given the recent increase in right whale entanglements and the aforementioned Unusual Mortality Event, calls for stricter fishing regulations in the United States and abroad have grown louder. Canada is making efforts to protect right whales from entanglement in fishing gear, but up to this point these efforts have failed to include gear modifications to ensure that if a right whale is entangled, it has a chance to break free of the fishing gear.<sup>109</sup> Canada has committed to implementing safety measures such as sinking rope and weak insertions in the rope (measures that have been in effect in Maine for well over a decade<sup>110</sup>) so that an entangled whale has a chance of freeing itself.<sup>111</sup> The implementation efforts, however, have been stalled due to the COVID pandemic.<sup>112</sup> While the Canadian government stalls in implementing these gear modifications (again, modifications that have been in place in the Maine lobster fishery for well over a decade), right whales continue to become entangled and die in Canadian waters.<sup>113</sup>

In summation, the right whale population faces several man-made threats in both the United States and Canada. Patrice

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* In 2015, a right whale trailing line was seen in offshore Maine waters. *Id.* The gear was not retrieved, and the original entanglement site was not determined. *Id.*

109. Transp. Can., *Backgrounder: Protecting North Atlantic Right Whales*, GOV'T OF CAN. (Feb. 18, 2021), <https://tc.canada.ca/en/backgrounder-protecting-north-atlantic-right-whales-0>; 2022 *Fishery Management Measures*, GOV'T OF CAN. (May 17, 2022), <https://www.dfo-mpo.gc.ca/fisheries-peches/commercial-commerciale/atl-arc/narw-bnan/management-gestion-eng.html>.

110. Bill Trotter, *The Bottom Line*, BANGOR DAILY NEWS (Mar. 20, 2009), <https://bangordailynews.com/2009/03/20/uncategorized/the-bottom-line/?ref=search>.

111. Transp. Can., *supra* note 109.

112. *Id.*; 2022 *Fishery Management Measures*, *supra* note 109.

113. 2017–2022 *North Atlantic Right Whale Unusual Mortality Event*, *supra* note 83.

McCarron, executive director of the Maine Lobstermen's Association, attributed the instances of "serious injury and mortality of right whales from known human causes as follows:

- U.S. and Canadian vessel strikes — 48[%] (with 17[%] of ship strikes coming in Canadian waters).
- Canadian snow crab fishery — 31[%].
- Gillnet and netting gear — 13[%].
- Unknown trap/pot gear — [4%].
- U.S. trap/pot gear — [4%]."<sup>114</sup>

It is clear from this, and from the other data discussed, that the North Atlantic right whale is in grave danger of extinction should the man-made threats to its survival continue to operate uninhibited. That being the case, this same data shows that the Maine lobster industry is not the culprit responsible for the recent spike in right whale entanglements and deaths. Despite this, government regulators and right whale activists initiated legal actions with the hope of protecting the decimated right whale population, with their number one target being the Maine lobster industry.

### III. *SETTING THE STAGE: THE LEGAL LANDSCAPE SURROUNDING RIGHT WHALE PROTECTIONS*

To fully grasp the lawsuits and new regulations affecting the Maine lobster industry, it is first necessary to explore the legal landscape in which they came about. Existing laws afford regulatory agencies the ability to enact strict rules aimed at protecting endangered species like the North Atlantic right whale, while federal courts have the power and discretion to overturn regulatory actions should they deem them inappropriate under current law.<sup>115</sup> The legal landscape surrounding the battle between

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114. Paul Withers, *Maine Lobster Group Blames Canada for Most Right Whale Deaths, Injuries*, CBC (Sept. 5, 2019), <https://www.cbc.ca/news/canada/nova-scotia/maine-lobster-fisherman-right-whale-1.5270893>.

115. 16 U.S.C. § 1531(c)(1) (It is the "policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of [this] purpose[.]"); *id.* § 1361(1)–(2) ("[C]ertain species

the Maine lobster industry and those who seek to protect the dwindling right whale population is relatively complex and warrants a detailed discussion. To best understand it, we will first explore the legal protections offered to the marine mammals, then analyze the recent court decisions that prompted new regulations, and finally survey the new regulations themselves.

A. Uncle Sam's Safety Net: The United States Government's Attempt to Safeguard the Right Whale Through Legislation

The North Atlantic right whale, due to its classification as a marine mammal and its decimated population numbers, is subject to protection in state and federal waters by a number of United States laws.<sup>116</sup> The most relevant and expansively protective of these laws are the Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA").<sup>117</sup>

The ESA was passed in 1973 with the goal to provide a means to classify native species as endangered and hence offer them protection.<sup>118</sup> The ESA seeks to protect and help facilitate the recovery of at-risk species as well as the ecosystems they rely on.<sup>119</sup> The United States Fish and Wildlife Service ("Service") along with the Commerce Department's NMFS bear the responsibility of administering the ESA.<sup>120</sup> The Service is primarily responsible for "terrestrial and freshwater organisms," while the NMFS bears responsibility for "marine wildlife such as whales and anadromous fish such as salmon."<sup>121</sup> Under the ESA, a species can either be

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and population stocks of marine mammals [] . . . should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population."); 5 U.S.C. § 702 (creating a right to challenge an agency action in court).

116. *North Atlantic Right Whale*, *supra* note 68.

117. 16 U.S.C. § 1531; *id.* § 1361.

118. *Endangered Species Act*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/> (last visited Feb. 17, 2023).

119. *Id.*; *Endangered Species Conservation*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/endangered-species-conservation/overview> (last visited Feb. 17, 2023).

120. *Listing and Classification*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/program/listing-and-classification/about-us> (last visited Feb. 17, 2023).

121. *Id.*

classified as “threatened” or “endangered.”<sup>122</sup> Currently, the North Atlantic right whale is classified as endangered under the ESA.<sup>123</sup>

The MMPA was originally passed in 1972 in response to concerns that human activities resulted in the decline of marine mammals.<sup>124</sup> The MMPA seeks to “maintain the health and stability of the marine ecosystem.”<sup>125</sup> This legislation was significant because it was the first to “mandate an ecosystem-based approach to marine resource management.”<sup>126</sup> NOAA Fisheries, the United States Fish and Wildlife Service, and Marine Mammal Commission are responsible for implementing the MMPA.<sup>127</sup> The ESA protects some marine mammals, while the MMPA protects all marine mammals.<sup>128</sup>

The endangered North Atlantic right whale enjoys protections under both of these governmental acts. Specifically, the ESA provides that “[e]ach Federal agency [] . . . insure that any action authorized, funded, or carried out by such agency [] . . . is not likely to jeopardize the continued existence of any endangered species [] . . .”<sup>129</sup> Likewise, the MMPA provides a general prohibition on the “taking” of a marine mammal.<sup>130</sup> In order to ensure that these goals are achieved, federal regulations require that “[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.”<sup>131</sup> If a determination is made that a specific federal action may in fact affect a listed species, then the agency (called the

122. 16 U.S.C. § 1533. A species is considered “threatened” under the ESA if the species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). A species is considered “endangered” under the ESA if the species “is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.” *Id.* § 1532(6).

123. *North Atlantic Right Whale*, *supra* note 68.

124. *Laws & Policies: Marine Mammal Protection Act*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/laws-policies#marine-mammal-protection-act> (last visited Feb. 17, 2023).

125. 16 U.S.C. § 1361(6).

126. *Laws & Policies: Marine Mammal Protection Act*, *supra* note 124.

127. *Id.*

128. *Id.*

129. 16 U.S.C. § 1536 (a)(2).

130. *Id.* § 1372(a). Under the MMPA, the term “take” is defined as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” *Id.* § 1362(13). Under the ESA, “take” is similarly defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

131. 50 C.F.R. § 402.14(a) (2021).

“action agency”) must engage in consultation with an expert agency.<sup>132</sup> These consultations ultimately result in what is known as a Biological Opinion (“BiOp”), which determines whether the federal action violates the ESA.<sup>133</sup>

The ESA goes on to require that if, after consultation, a conclusion is made that the “taking” of a protected species is involved in the federal action, the Secretary of Commerce must provide in the BiOp a written statement known as an Incidental Take Statement (“ITS”).<sup>134</sup> The ITS must contain information related to the impact of the incidental taking on the species, “reasonable and prudent” measures to reduce such impact, specific measures in the case of marine mammals to comply with the MMPA, and other terms and conditions aimed at implementing such measures.<sup>135</sup>

Thanks in particular to the ESA, which contains a citizen-suit provision “of remarkable breadth,” marine mammal activists have the ability to pursue litigation against private citizens as well as local and federal governments in an effort to alleviate man-made pressures on the endangered right whales.<sup>136</sup> While these types of lawsuits are frequently used to protect the marine mammals, no single case in recent memory has affected the relationship between right whales and the Maine lobster fishing industry more than the recent decisions in *Center for Biological Diversity v. Ross*.<sup>137</sup>

#### B. The Critical Case: *Center for Biological Diversity v. Ross*

In *Center for Biological Diversity v. Ross*, right whale activists filed suit in the United States District Court for the District of Columbia against then Secretary of Commerce Wilbur Ross, alleging that the NMFS’s 2014 BiOp for the American lobster fishery and subsequent agency actions violated the ESA.<sup>138</sup> In particular, plaintiffs took issue with the agency’s 2014 BiOp finding that the lobster fishery “[was] not likely to reduce

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132. *Id.*

133. 50 C.F.R. § 402.14(e)–(h).

134. 16 U.S.C. § 1536(b)(4).

135. *Id.*

136. *Bennett v. Spear*, 520 U.S. 154, 164 (1997); 16 U.S.C. § 1540(g).

137. *Ctr. for Biological Diversity v. Ross*, Civil Action No. 18-112 (JEB), 2020 WL 1809465, at \*1 (D.D.C. Apr. 9, 2020); *Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236, 240–41 (D.D.C. 2020).

138. Complaint for Declaratory & Other Relief at 1–3, *Ctr. for Biological Diversity*, 480 F. Supp. 3d 236 (No. 1:18-cv-00112).

appreciably the likelihood of both survival and recovery of North Atlantic right whales . . . .”<sup>139</sup> The case was bifurcated to first determine liability, and then, if necessary, a remedy.<sup>140</sup>

In determining the issue of liability, the court reviewed the NMFS’s 2014 BiOp, which stated that “the lobster fishery ha[d] the potential to seriously injure or kill an average of 3.25 right whales per year.”<sup>141</sup> Based on data submitted in discovery, the court found this number to be well over the species potential biological removal level (“PBR”) of 0.9 whales a year.<sup>142</sup> The PBR is “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.”<sup>143</sup>

Since the fishery had the potential to kill right whales at a pace that would not allow for the marine mammals to maintain a sustainable population, plaintiffs argued the BiOp violated the ESA because it did not include an ITS.<sup>144</sup> The NMFS, despite the fact that the number of potential right whale deaths exceeded the species’ PBR, argued that it did not include an ITS in its 2014 BiOp because:

- (1) an incidental take statement cannot be lawfully issued under the ESA for a marine mammal unless incidental take authorization exists for that marine mammal under the MMPA and
- (2) the incidental take of ESA-listed whales by the American lobster fishery has not been authorized under section 101(a)(5) of the MMPA.<sup>145</sup>

Instead of an ITS, the BiOp contained a number of numerical “triggers” which, if reached, would cause the “reinitiation of ESA section 7 consultation.”<sup>146</sup> Plaintiffs countered this argument and argued that these numerical triggers were not a sufficient substitution for the ITS called for by the ESA.<sup>147</sup>

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139. NAT’L MARINE FISHERIES SERV., GREATER ATL. REG’L FISHERIES OFF., GARFO-2014-00013, ENDANGERED SPECIES ACT SECTION 7 CONSULTATION: BIOLOGICAL OPINION 149 (2014).

140. *Ctr. for Biological Diversity*, 2020 WL 1809465, at \*6.

141. *Id.* at \*5.

142. *Id.*

143. 16 U.S.C. § 1362(20).

144. *Ctr. for Biological Diversity*, 2020 WL 1809465, at \*6.

145. *Id.* at \*5.

146. *Id.*

147. *Id.* at \*6.

The court found the plaintiffs' arguments persuasive and held that the numerical "triggers" that the NMFS implemented were just one of many parts required in a proper ITS.<sup>148</sup> In summarizing its reasoning in the simplest terms possible, the court held "[t]he ESA and its regulations require an ITS when the taking of an endangered species is anticipated. Take was anticipated here, and NMFS did not produce an ITS. The 2014 BiOp therefore violates the ESA."<sup>149</sup> The court then ordered a briefing from the parties with regard to an injunctive remedy to take place at a later date.<sup>150</sup>

On August 19, 2020, after being briefed on the issue of remedy, the court handed down its opinion.<sup>151</sup> Because the NMFS's BiOp was no longer valid, the court was faced with a trio of dilemmas:

First, should the Court vacate the 2014 BiOp or remand it to the agency without vacatur? Second, should the agency be required to complete the new rule and accompanying BiOp by January 31, 2021 (as Plaintiffs propose), or should it be given until May 31, 2021 (as Defendants ask)? Finally, should the Court grant Plaintiffs' request for an interim injunction ordering the immediate cessation of lobstering in a substantial area south of Nantucket Island off the Massachusetts[]coast until the new rule is implemented?<sup>152</sup>

With regard to the first issue, the court acknowledged that it is "ordinary practice [] to vacate unlawful agency action."<sup>153</sup> The court noted that this practice also applies when rendering an action unlawful under the ESA.<sup>154</sup> In determining whether to vacate the 2014 BiOp, the court implemented a two-part test set forth in *Allied-Signal v. United States Nuclear Regulatory Commission*.<sup>155</sup> The first part of the test examines "the seriousness of the [action's] deficiencies" which, in this case, was the promulgation of the 2014 BiOp without an ITS.<sup>156</sup> The court found

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148. *Id.* at \*9.

149. *Id.* at \*8.

150. *Id.* at \*10.

151. *Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236 (D.D.C. 2020).

152. *Id.* at 240.

153. *Id.* at 244. (citing *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019)).

154. *Id.*; *see, e.g., Humane Soc'y of the U.S. v. Jewell*, 76 F. Supp. 3d 69, 136 (D.D.C. 2014), *aff'd sub nom. Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017); *Humane Soc'y of the U.S. v. Kempthorne*, 579 F. Supp. 2d 7, 21 (D.D.C. 2008).

155. *Allied-Signal v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

156. *Id.* at 150.

that this “straightforward . . . violation of the ESA’ . . . is not the sort of ‘deficienc[y] . . . [that] can be redressed on remand’ because ‘the defects in the challenged [BiOp] go far beyond a mere failure in explanation.’”<sup>157</sup>

The second part of the test examines the potential “disruptive consequences” of a vacatur, which in this case would be the closure of the lobster fishery.<sup>158</sup> As will be discussed below, the court determined ultimately to stay vacatur until May 3, 2021, when the NMFS would be required to put out its new BiOp,<sup>159</sup> meaning there would be no interim closure of the fishery and therefore no disruptive consequences.<sup>160</sup> Based on this analysis, the court determined that vacatur of the 2014 BiOp was appropriate.<sup>161</sup>

With regard to the second issue the court faced, and as was just mentioned, the court chose to stay its vacatur until May 31, 2021, the same day it determined the NMFS’s new BiOp must be promulgated.<sup>162</sup> The court made this determination based on a timeline put forth by the NMFS, a deferral to the NMFS’s judgment that the right whale situation did not require immediate action, the lack of plaintiffs’ calls for swifter action up until this point (in fact, the plaintiffs conceded that a fourteen month delay in promulgating a new BiOp would have been appropriate), and finally the impacts that the COVID-19 pandemic had on the rulemaking process.<sup>163</sup>

With the first two questions answered, the court turned toward the final, and for some the most important question: what should happen to the fishery while the new BiOp is being formulated?<sup>164</sup> Plaintiffs argued that immediate action was necessary and that the court should impose “an immediate effective closure of a sizeable swath of the lobster fishery south of Nantucket Island.”<sup>165</sup> The court ultimately found that the requested closure was unwarranted because of the great potential

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157. *Ctr. for Biological Diversity*, 480 F. Supp. 3d at 245 (first quoting *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013); and then quoting *Jewell*, 76 F. Supp. 3d at 137).

158. *Allied-Signal*, 988 F.2d at 150–51.

159. *Ctr. for Biological Diversity*, 480 F. Supp. 3d at 256.

160. *Id.* at 246.

161. *Id.*

162. *Id.*

163. *Id.* at 246–50.

164. *Id.* at 240.

165. *Id.* at 250.

harm to public interest and the scarcity of any precedent for the requested relief.<sup>166</sup>

With the liability and remedy portions of the litigation behind them, all interested parties turned their attention to May 2021, when a new BiOp that would account for impacts of the American lobster fishery on right whales was scheduled to be released.<sup>167</sup> The hopes of right whale activists and livelihoods of tens of thousands who rely on the Maine lobster industry depended on the results of this BiOp and the potential rule changes that could follow.

### C. Change on the Horizon: The 2021 BiOp and Subsequent Rule Changes

On May 27, 2021, the NMFS released the highly anticipated BiOp.<sup>168</sup> Unlike the 2014 BiOp, this new version contained an ITS.<sup>169</sup> The ITS addressed the potential effects that the American lobster fishery, among others, would have on protected species.<sup>170</sup> With regard to the critically endangered North Atlantic right whale, the BiOp authorized “zero lethal take of these whales because the lethal incidental take of ESA-listed whales has not been authorized under section 101(a)(5) of the MMPA.”<sup>171</sup>

The 583-page BiOp includes a framework of changes to the American lobster fishery under the Atlantic Large Whale Take Reduction Plan (“ALWTRP”), the goal of which is to reduce the potential threat of right whale mortalities and serious injury (“M/SI”) in Northeast United States commercial lobster and Jonah crab fishing gear by 60% in the year 2021, an additional 60% in 2025, and an additional 87% by the year 2030.<sup>172</sup> In total, the ALWTRP’s plan seeks to reduce right whale M/SI by nearly 98% by the year 2030.<sup>173</sup> Contained in this framework are possible measures to reduce the potential of entanglements including line reduction requirements, seasonal buoy line closures, weak

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166. *Id.* at 250–56.

167. *Id.* at 249.

168. *Section 7: Biological Opinions in the Greater Atlantic Region*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-biological-opinions-greater-atlantic-region> (Feb. 8, 2023).

169. NAT’L MARINE FISHERIES SERV., *supra* note 100, at 389.

170. *Id.*

171. *Id.* at 390.

172. *Id.* at 478–79.

173. *Id.*

line/insert requirements, and gear marking requirements.<sup>174</sup> This BiOp and its proposed changes were a signal to Maine lobster fishermen that there were likely big changes on the horizon, but it was not until the final rule changes were announced later that year that these potential industry-upending rules became a reality.<sup>175</sup>

On August 31, 2021, the NMFS and NOAA announced the new regulations containing modifications to the ALWTRP in an effort to reduce the threat of right whale M/SI.<sup>176</sup> The stated goal of implementing these new modifications is “to reduce the incidental mortality and serious injury to North Atlantic right whales, [] . . . fin whales, [] . . . and humpback whales [] in northeast commercial lobster and Jonah crab trap/pot fisheries to meet the goals of the Marine Mammal Protection Act and the Endangered Species Act.”<sup>177</sup> NOAA Fisheries anticipates these new regulations will achieve an estimated 60% reduction in the risk of M/SI caused by entanglement in these fisheries in the first year alone.<sup>178</sup>

The regulations achieve this goal by implementing several changes. First, the rule changes seek to reduce the number of vertical lines (lines that link the fisherman’s floating surface buoy to the pot or trap on the ocean floor) in the water that right whales could potentially become entangled in.<sup>179</sup> To achieve this, fishermen will be required to do what is known as “trawling up,” which entails adding more traps to the bottom of each vertical line depending on the area fished and the distance the gear is located from shore.<sup>180</sup> Trawling up greatly increases the danger to the fishermen hauling in these traps because it involves more rope and more traps on board at one time.<sup>181</sup> More rope on board means a

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174. *Id.* at 225–29.

175. Allison Ferreira, *NOAA Fisheries Announces New Lobster and Jonah Crab Fisheries Regulations to Help Save Endangered North Atlantic Right Whales*, NOAA FISHERIES (Aug. 31, 2021), <https://www.fisheries.noaa.gov/media-release/noaa-fisheries-announces-new-lobster-and-jonah-crab-fisheries-regulations-help-save>.

176. *Id.*

177. 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) [hereinafter *Atlantic Coastal Fisheries Cooperative Management Act Provisions*] (to be codified at 50 C.F.R. pt. 229, 697).

178. *Id.* at 51971.

179. *Id.* at 51972.

180. *Id.*

181. Nat’l Inst. for Occupational Safety & Health, *Dangers of Entanglement During Lobstering*, CTRS. FOR DISEASE CONTROL (Aug. 2005), <https://www.cdc.gov/niosh/docs/wp-solutions/2005-137/pdfs/2005-137.pdf?id=10.26616/NIOSHPUB2005137>.

greater chance of crew members becoming entangled and dragged overboard when the traps are set back down to the ocean floor.<sup>182</sup>

The below table, which is taken directly from the new rules, illustrates the large number of traps that are required to be trawled on a single line at one time:

Line Reduction Measures<sup>183</sup>

Area	Traps/trawl
ME 3 nm (5.56 km)–6 nm*, Zone A West .....	8 traps/trawl per two buoy lines or 4 traps/trawl per one buoy line.
ME 3 nm (5.56 km)–6 nm*, Zone B .....	5 traps/trawl per one buoy line.
ME 3 nm (5.56 km)–6 nm*, Zones C, D, E, F, G .....	10 traps/trawl per two buoy lines or 5 traps/trawl per one buoy line.
ME 3 nm (5.56 km)–12 nm (22.22 km), Zone A East .....	20 traps/trawl per two buoy lines or 10 traps/trawl per one buoy line.
ME 6*–12 nm, Zone A West .....	15 traps/trawl per two buoy lines or 8 traps/trawl per one buoy line.
ME 6*–12 nm, Zone B, D, E, F .....	10 traps/trawl per two buoy lines or 5 traps/trawl per one buoy line (status quo in D, E, & F).
ME 6*–12 nm, Zone C, G .....	20 traps/trawl per two buoy lines or 10 traps/trawl per one buoy line.
MA Lobster Management Area (LMA) 1, 6*–12 nm .....	15 traps/trawl.
LMA 1 & Outer Cape Cod (OCC) 3–12 nm (5.56–22.22 km) .....	15 traps/trawl.
LMA 1 over 12 nm (22.22 km) .....	25 traps/trawl.
LMA3, North of 50 fathom line on the south end of Georges Bank .....	45 traps/trawl, increase maximum trawl length from 1.5 nm (2.78 km) to 1.75 nm (3.24 km).
LMA3, South of 50 fathom line on the south end of Georges Bank .....	35 traps/trawl, increase maximum trawl length from 1.5 nm (2.78 km) to 1.75 nm (3.24 km).
LMA3, Georges Basin Restricted Area .....	50 traps/trawl, increase maximum trawl length from 1.5 nm (2.78 km) to 1.75 nm (3.24 km).

\*ME 6 is a line offshore of Maine that is approximately 6 nm (11.1 km) from the coast.

The second change the new rules require is the modification of existing fishing gear with the goal of weakening the remaining vertical lines in hopes that whales who do become entangled can break free before suffering serious injury.<sup>184</sup> The new rules call for either rope designed to break at no more than 1,700lbs of pressure, or the implementation of “weak insertion configurations that break at no more than 1,700 lb[s]. . . .”<sup>185</sup>

Additionally, the new rules implement a third change by requiring fishermen to add additional markings to their fishing gear using uniquely colored rope depending on what state they fish out of and what waters they fish in.<sup>186</sup> These rules require Maine lobstermen to further alter their gear for identification purposes, despite the fact that gear marking is a regulation that the state of

182. *Id.*

183. Atlantic Coastal Fisheries Cooperative Management Act Provisions, 86 Fed. Reg. at 51972.

184. *Id.* at 51973.

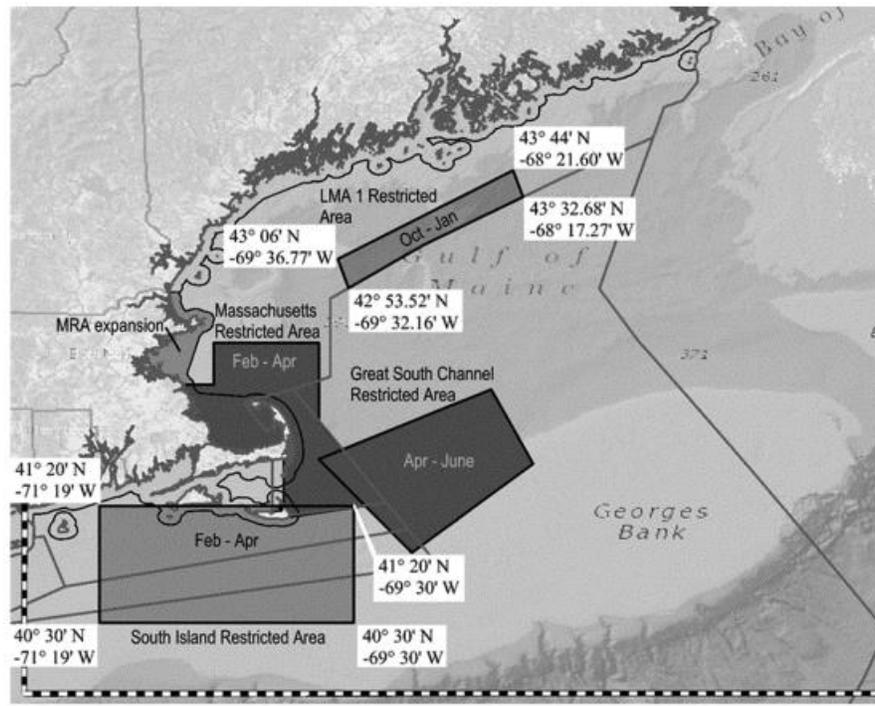
185. *Id.* at 51971.

186. *Id.* at 51974.

Maine already requires for its lobster fishermen.<sup>187</sup> The goal of this gear marking requirement is to enable observers to identify where certain fishing gear originates from should a right whale become entangled in it.<sup>188</sup>

Fourth and finally, the new regulations require seasonal closure areas that prohibit lobstermen using traditional fishing techniques from operating.<sup>189</sup> The northernmost closure area (labeled “Oct – Jan” in the diagram below), which affects Maine lobstermen and is in effect annually from October through January, prohibits lobstering in a roughly 967 square-mile area of productive fishing territory during what are typically some of the most profitable months of the year.<sup>190</sup>

#### Seasonal Closures<sup>191</sup>



187. *September 2020 Tarp Gear Marking Requirements*, ME. DEP'T OF MARINE RES., [https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/2020%20Gear%20Marking%20Requirements%204.27.20%20\(1\).pdf](https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/2020%20Gear%20Marking%20Requirements%204.27.20%20(1).pdf) (last visited Feb. 17, 2023).

188. Ferreira, *supra* note 175.

189. Atlantic Coastal Fisheries Cooperative Management Act Provisions, 86 Fed. Reg. at 51972.

190. Kimberly Holland, *When is Lobster Season?*, S. LIVING (July 10, 2020), <https://www.southernliving.com/food/seafood/lobster/lobster-season>.

191. Atlantic Coastal Fisheries Cooperative Management Act Provisions, 86 Fed. Reg. at 51973. The closure area affecting the Maine lobster fishery is marked on the diagram by the light gray blocks containing the words “Oct – Jan.” *Id.*

While some of these changes were anticipated, the closure of such a large portion of the Maine lobster fishery during a critical time of the year caught many fishermen, including Maine State Representative Billy Bob Faulkingham, off guard:

I was contacted yesterday by someone from the media to ask me about the closure, and that was the first I heard of a closure because a closure wasn't even on the table for us. It wasn't even supposed to be thought of . . . . It came as a surprise to everybody. It came as a surprise to the fishermen, it came as a surprise to everybody in the state of Maine, every politician. No one saw this 950 square mile closure coming.<sup>192</sup>

After the new rules were announced, a flurry of fresh litigation commenced from parties on both sides of the issue. Some right whale activists argued that the new rules do not go far enough in protecting the endangered right whales.<sup>193</sup> On the other hand, proponents of the Maine lobster industry argued that the new rules are based on a misguided BiOp and unjustly punish an industry that has never been found responsible for a single right whale death:

This is incredulous. Maine lobstermen and women are not killing right whales. Why would you penalize an iconic Maine industry for the sake of being able to say you are saving right whales? It's like cutting off an arm when it's the foot that is the problem and pretending you have fixed the problem.<sup>194</sup>

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192. Jacob Posik, *Maine Lobster Industry Rocked by New, Unworkable Federal Regulations*, THE ME. WIRE, (Sept. 2, 2021) <https://www.seafoodsource.com/news/environment-sustainability/noaa-fisheries-has-announced-a-set-of-new-regulations-intended-to-protect-the-highly-endangered-north-atlantic-right-whale-from-entanglement-related-incidents-regulations-that-are-estimated-to-cost-the-northeast-lobster-fis>.

193. Katharine Deuel, *New Rules to Protect Endangered Right Whales Fall Short*, THE PEW CHARITABLE TRS. (Nov. 17, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/11/17/new-rules-to-protect-endangered-right-whales-fall-short>.

194. Chris Chase, *NOAA Fisheries Rules Limiting Lobstering Draw Harsh Criticism from Fishing, Environmental Groups*, SEAFOOD SOURCE (Aug. 31, 2021), <https://www.seafoodsource.com/news/environment-sustainability/noaa-fisheries-has-announced-a-set-of-new-regulations-intended-to-protect-the-highly-endangered-north-atlantic-right-whale-from-entanglement-related-incidents-regulations-that-are-estimated-to-cost-the-northeast-lobster-fis>.

D. Batten Down the Hatches: How the 2021 BiOp and the New Rules Prompted Additional Litigation

The 2021 BiOp and subsequent rule changes did little to appease parties on either side of the issue. In response to the release of the 2021 BiOp and the promulgation of the new rules previously discussed, multiple lawsuits were filed both by proponents of the lobster industry who argue that the rules are too restrictive, and by right whale activists who argue that the new rules do not go far enough.<sup>195</sup>

1. *Challenging the Closure of Critical Fishing Grounds*

In response to the announcement of the new rules, proponents of the Maine lobster fishing industry filed a lawsuit specifically targeting the previously discussed seasonal closure from October to January.<sup>196</sup> A Maine district court, after reviewing the lawsuit and the 2021 BiOp, found that the science put forth by the NMFS did not support the new seasonal closure:

NMFS expresses the understanding that right whales tend to forage in waters in and around the Gulf of Maine in spring and summer . . . The LMA 1 Restricted Area, however, is to be implemented in fall and winter. These findings related to right whale migratory patterns do not appear to justify the closure of LMA 1 because they do not demonstrate “an overlap of the fisheries and large whales in space and time.”<sup>197</sup>

As a result, the Maine court issued a temporary restraining order and preliminary injunction on October 16, 2021, two days before the closure was to take effect.<sup>198</sup> This victory, however, was short lived for opponents of the seasonal closure and the new rules in general. The government appealed the district court’s decision to halt the seasonal closure and moved the First Circuit Court of

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195. *Dist. 4 Lodge of Int’l Ass’n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo*, No. 1:21-CV-00275-LEW, 2021 WL 4823269 (D. Me. Oct. 16, 2021); *Ctr. for Biological Diversity v. Raimondo*, No. CV 18-112 (JEB), 2022 WL 2643535 (D.D.C. July 8, 2022); *Maine Lobstermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, No. CV 21-2509 (JEB), 2022 WL 4392642 (D.D.C. Sept. 8, 2022).

196. *Dist. 4 Lodge of Int’l Ass’n of Machinists*, 2021 WL 4823269, at \*1–2.

197. *Id.* at \*6 (citations omitted).

198. *Id.* at \*27.

Appeals to stay the preliminary injunction pending the appeal.<sup>199</sup> The court used a four-factor test to determine whether to grant the government's motion.<sup>200</sup> The four factors, of which the first two are the most important, included:

(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether [the] issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.<sup>201</sup>

After walking through the four-factor test using the facts at hand, the court ultimately concluded that a stay was warranted.<sup>202</sup> The result of this stay was the reinstatement of the seasonal closure pending a full briefing on the merits of the dispute.<sup>203</sup> Deferring to Congress's intent to protect the right whale by any means necessary, the court held that "while there are serious stakes on both sides, Congress has placed its thumb on the scale for the whales."<sup>204</sup>

Seven months later on July 12, 2022, after having been fully briefed on the merits of the dispute regarding the seasonal closure, the First Circuit Court of Appeals issued its ruling vacating the preliminary injunction.<sup>205</sup> In explaining its reasoning, the court stated that, "since we consider basically the same factors when reviewing a preliminary injunction on the merits as we do in considering a stay motion . . . the handwriting was on the wall for the appeal, so to speak."<sup>206</sup> The court noted that the plaintiffs failed to file a brief explaining why the court's previous opinion to stay the preliminary injunction was based on factual or legal error, and instead "they [] filed a brief that makes nearly no effort to engage with [the court's] prior opinion."<sup>207</sup> After walking through the same

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199. Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, 18 F.4th 38, 40 (1st Cir. 2021).

200. *Id.* at 42 (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)).

201. *Id.*

202. *Id.* at 49–50.

203. *Id.*

204. *Id.* at 40.

205. Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, 40 F.4th 36, 38–39 (1st Cir. 2022).

206. *Id.*

207. *Id.*

four factor test used in its previous decision to stay the preliminary injunction, and faced with no new arguments from the plaintiffs, the court came to the predictable decision of vacating the preliminary injunction and allowing the seasonal closure to remain in effect.<sup>208</sup>

2. *Back with a Vengeance: Right Whale Activists Renew their Lawsuit*

Despite the extensive restrictions, seasonal closures, and gear modifications that will likely cripple the Maine lobster fishery, not all right whale activists were pleased with the new 2021 BiOp and the subsequent rule changes. Shortly after the 2021 BiOp was released, defendants in the aforementioned *Center for Biological Diversity v. Ross* lawsuit motioned the court for entry of final judgment, arguing that the “completion of the superseding biological opinion effectively ended this litigation, and there is no further action for the Court to take.”<sup>209</sup> Plaintiffs right whale activists, however, opposed this motion, asserting that the new 2021 BiOp still does not contain a lawful ITS under the ESA and MMPA.<sup>210</sup>

This conflict came to a head on July 8, 2022, when the United States District Court for the District of Columbia ruled on the legality of the 2021 BiOp and subsequent rule changes.<sup>211</sup> This ruling came from the same court and the same judge as the 2020 *Center for Biological Diversity v. Ross* decisions that prompted the promulgation of the new BiOp and rule changes.<sup>212</sup> In the renewed lawsuit, plaintiffs raised six claims regarding their dissatisfaction with the 2021 BiOp and subsequent rule changes.<sup>213</sup>

The court found it necessary to address only two of the plaintiffs’ six claims to resolve the case and hold the 2021 BiOp

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208. *Id.* at 43.

209. Defendants’ Motion for Entry of Final Judgment at \*3, *Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236, 256 (D.D.C. 2020) (No. 1:18-CV-00112).

210. Plaintiffs’ Motion to Enforce Opinions and Orders and Opposition to Federal Defendants’ Motion for Entry of Judgment at \*7–8, *Ctr. for Biological Diversity*, 480 F. Supp. 3d at 256 (No. 1:18-CV-00112).

211. *Ctr. for Biological Diversity v. Raimondo*, No. CV 18-112 (JEB), 2022 WL 2643535, at \*2 (D.D.C. July 8, 2022).

212. *Ctr. for Biological Diversity v. Ross*, Civil Action No. 18-112 (JEB), 2020 WL 1809465, at \*1 (D.D.C. Apr. 9, 2020); *Ctr. for Biological Diversity*, 480 F. Supp. 3d at 240–56 (D.D.C. 2020).

213. *Ctr. for Biological Diversity*, 2022 WL 2643535, at \*15.

and subsequent rule changes invalid: (1) whether the 2021 BiOp's ITS appropriately authorized zero lethal take of right whales under the ESA and MMPA, and (2) whether the final rules following the 2021 BiOp conformed to certain timeline requirements spelled out in the MMPA.<sup>214</sup>

a. Still Lacking on the Second Try: The Court Again Invalidates the Biological Opinion

As a reminder, the court in the April 2020 *Center for Biological Diversity* decision ruled that the NMFS violated the ESA by failing to issue an ITS despite the fact that lethal take of the endangered right whale was expected.<sup>215</sup> In the instant case, plaintiffs right whale activists argued that the 2021 BiOp likewise violated the ESA and the MMPA by allowing the lobster fishery to operate without first making the appropriate findings under the MMPA, and also argued that the new regulations were unlawful because they violated the MMPA.<sup>216</sup>

You will recall that since the lobster fishery is expected to cause at least some incidental take of right whales, the ESA requires that the NMFS produce an ITS as part of its 2021 BiOp.<sup>217</sup> Before issuing the ITS, however, the NMFS was required under the ESA to find that the lobster fishery's taking of the right whale was authorized pursuant to the MMPA.<sup>218</sup> Section 101(a)(5) of the MMPA allows for the incidental (but not intentional) taking of right whales only if it is determined that "the incidental mortality and serious injury from commercial fisheries will have a *negligible impact* on such species or stock."<sup>219</sup>

However, under the new 2021 BiOp, the expected annual take of right whales by the American lobster fishery was 2.56, which is more than three times the right whale's updated PBR of 0.8.<sup>220</sup> The NMFS therefore found itself in the legal quagmire of being unable to satisfy the "negligible-impact threshold" of the MMPA needed to issue an ITS, while at the same time being instructed to issue an

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214. *Id.* at \*19.

215. *Ctr. for Biological Diversity*, 2020 WL 1809465, at \*1.

216. *Ctr. for Biological Diversity*, 2022 WL 2643535, at \*2.

217. *Id.* at \*4.

218. *Id.* at \*9.

219. 16 U.S.C. § 1371 (a)(5)(E)(i)(I) (emphasis added).

220. *Ctr. for Biological Diversity*, 2022 WL 2643535, at \*13.

ITS by a prior court decision.<sup>221</sup> In order to try and wriggle out of the regulatory rock and a hard place it found itself between, the NMFS decided to issue an ITS that authorized zero lethal take of the right whales because lethal incidental take of the endangered right whales had not been authorized under the MMPA.<sup>222</sup>

The plaintiffs argued, and the court agreed, that it was improper for the NMFS to “simply cite its inability to comply with the MMPA as an excuse for violating the ESA by failing to issue the required ITS for anticipated legal take.”<sup>223</sup> The court recognized that the NMFS was “caught between the devil and the deep blue sea” because the allowance of virtually any lobster fishery would have more than a “negligible impact” on the right whale population given its low numbers.<sup>224</sup> Despite the court’s sympathies, it ruled that the 2021 BiOp was invalid because the NMFS clearly did not satisfy the MMPA’s “negligible impact” requirement.<sup>225</sup> In invalidating the 2021 BiOp for want of a properly issued ITS, the court offered no guidance to the NMFS on how to proceed in issuing a proper ITS in an environment where it is virtually impossible to do so without effectively closing the lobster fishery altogether, and instead stated that “[p]otential fixes are an issue for another day.”<sup>226</sup>

In addition to the improper ITS, the court also took issue with the discrepancy between the lethal take of right whales authorized by the ITS (which was zero) and the actual anticipated lethal take of right whales (which was 2.56 annually until the year 2025).<sup>227</sup> While the court commended the NMFS for significantly reducing the expected M/SI events in the coming years as compared to previous years, it remarked that “2.56 M/SI incidents remains quite a bit more than the zero authorized under the [2021] BiOp.”<sup>228</sup> The NMFS argued that the authorization of zero lethal take actually operated as a safe harbor for right whales because if a single right whale is killed by the fishery then the ESA Section 7 consultation is reinitiated.<sup>229</sup>

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221. *Id.* at \*21.

222. *Id.* at \*13.

223. *Id.* at \*22.

224. *Id.*

225. *Id.* at \*23.

226. *Id.*

227. *Id.*

228. *Id.* at \*24.

229. *Id.* at \*25.

The court did not find this argument persuasive since the fishery would not have to cease operations while a new BiOp arising from an additional round of Section 7 consultation was issued.<sup>230</sup> Finding it likely that right whales would continue to be seriously injured or killed during the consultations, the court held that the NMFS's decision to "authorize zero lethal take while in fact anticipating that such take will continue to occur [ran] counter to the evidence before the agency' and is arbitrary and capricious" in violation of the Administrative Procedures Act ("APA").<sup>231</sup> In sum, the court invalidated the 2021 BiOp for want of a proper ITS and for the arbitrary and capricious decision to authorize zero lethal take of right whales despite the fact that the 2021 BiOp anticipated the annual right whale M/SI to be 2.56.

b. "Shall" is Not a Suggestion: The Six-Month Requirement

The court next dealt with the issue of whether the 2021 amendments to the ALWTRP failed to comply with certain timing requirements enshrined in the MMPA.<sup>232</sup> Specifically, plaintiffs alleged that the new rules failed to comply with Section 118 of the MMPA which states that:

For any stock in which incidental mortality and serious injury from commercial fisheries exceeds the potential biological removal level[,] . . . the plan *shall* include measures the Secretary expects will reduce, *within 6 months of the plan's implementation*, such mortality and serious injury to a level below the potential biological removal level.<sup>233</sup>

Since the current PBR of the right whale was 0.8, but the 2021 final rule was expected to reduce right whale M/SI only to 2.56 until the year 2025, the plaintiffs argued that the final rules failed to reduce the M/SI below the right whale's PBR within the required six months.<sup>234</sup>

The NMFS asserted two arguments as to why its noncompliance with this six-month requirement was permitted.

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230. *Id.* at \*26.

231. *Id.* at \*27 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); see *infra* pt.IV.A. for a detailed discussion of the arbitrary and capricious standard.

232. *Ctr. for Biological Diversity*, 2022 WL 2643535, at \*30.

233. *Id.* (citing 16 U.S.C. § 1387(f)(5)(A)).

234. *Id.* at \*31.

First, the NMFS argued that this requirement applied only to the original take-reduction plan issued in 1997 and not to the 2021 final rule, which was considered an amendment.<sup>235</sup> Second, the NMFS argued that this six-month requirement was an aspirational goal as opposed to a mandatory duty.<sup>236</sup> Not persuaded by either of these arguments, the court summarized its ruling as follows:

Having concluded that 1) the six-month deadline applies to plan amendments as well as to the ALWTRP itself, 2) that NMFS had to include measures expected to reduce M/SI to below PBR by that deadline, and 3) that NMFS did not do so, the Court finds that the 2021 Final Rule amending the ALWTRP is invalid.<sup>237</sup>

Eerily similar to the dilemma it faced following its invalidation of the previous BiOp, the court's decision holding the 2021 BiOp and final rule invalid caused the court to once again be faced with the issue of remedy. In what felt like a déjà vu moment to the April 2020 *Center for Biological Diversity v. Ross* decision holding the previous BiOp invalid, the court declined to immediately rule on a remedy and instead ordered additional briefing on the issue.<sup>238</sup> In what appeared to be a lifeline to the lobster industry, the court signaled it was open to remand with or without vacatur, and explicitly stated that remand "need not be equivalent to a shutdown."<sup>239</sup>

As was the case following the invalidation of the previous BiOp, this impending decision has the potential to be catastrophic to the lives of thousands of fishermen and hundreds of thousands in the industries and communities they support. If history is any indicator, the court will likely take roughly four to five months to issue its remedy ruling, meaning that a decision is expected to come before the end of 2022.<sup>240</sup> In the meantime, the same court and the same judge was called to rule on another lawsuit

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235. *Id.*

236. *Id.* at \*31–32.

237. *Id.* at \*19.

238. *Id.* at \*20.

239. *Id.*

240. This estimate is formulated based on the fact this same court issued its remedy decision in the previously discussed *Center for Biological Diversity v. Ross* decision four months after it invalidated the previous BiOp. *Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236 (D.D.C. 2020).

challenging the 2021 BiOp and final rule, but this time it was brought by those individuals who have the most to lose in this battle.

3. *The Maine Lobstermen’s Association Lawsuit: A Bug Picker’s Bid to Save His Livelihood*

In response to the release of the 2021 BiOp and subsequent rule changes, the Maine Lobstermen’s Association (“MLA”) filed suit in the United States District Court for the District of Columbia against the NMFS, Gina Raimondo (in her official capacity as Secretary of Commerce), and Janet Coit (in her official capacity as Assistant Administrator for Fisheries).<sup>241</sup> The suit sought declaratory and injunctive relief relating to the 2021 BiOp and asserted that the BiOp made a number of scientific errors that caused it to overstate the lobster industry’s potential effects on the right whale population.<sup>242</sup> The MLA argued that the NMFS’s reliance on this flawed data was arbitrary and capricious in violation of the APA, and asserted that the BiOp did not follow the “best available science,” which is required under the ESA in order to “avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”<sup>243</sup> In its complaint, the MLA alleged:

The 2021 BiOp is divorced from [] reality. It is premised on the single erroneous assumption that all fishing rope presents equally deadly risk to North Atlantic right whales and, therefore, all rope must be eliminated regardless of what the best available information actually shows about the relative risks to right whales. When operating upon this false premise, the Maine lobster fishery becomes an easy regulatory target for NMFS because it is the largest U.S. fishery addressed by the 2021 BiOp and, as such, has the most rope in the water.<sup>244</sup>

Despite the logic behind the MLA’s argument, the previously discussed decision by the court to invalidate the 2021 BiOp and final rules meant the writing was on the wall for the lobster

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241. *Me. Lobstermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, No. 21-2509 (JEB), 2022 WL 4392642, at \*1 (D.D.C. Sept. 8, 2022).

242. *Id.*

243. Complaint at 4–5, *Me. Lobsterman’s Ass’n, Inc.*, No. 21-2509 (JEB) (quoting *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997)).

244. *Id.* at ¶ 8 (emphasis omitted).

industry.<sup>245</sup> In other words, the MLA was hoping for a ruling invalidating the 2021 BiOp and final rules because they were too restrictive on the lobster industry, but the court had already held that the BiOp and final rules were invalid because they *were not restrictive enough*. Those who read the July 8, 2022, *Center for Biological Diversity v. Raimondo* decision recognized that the MLA's arguments were likely to fall on deaf ears. Sure enough, on September 8, 2022, the court issued its ruling in which it declined to hold the challenged portions of the BiOp and final rules invalid for being unlawfully restrictive on the lobster industry.<sup>246</sup>

In doing so, the court pointed out that this was a case in which use of the deferential arbitrary standard of review was warranted.<sup>247</sup> The court explained that the scope of review in an APA action is narrow, and when reviewing an agency action the court is not permitted to substitute its judgement for that of the agency, so long as the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."<sup>248</sup> Using the deferential arbitrary and capricious standard, the court addressed the MLA's challenges to the 2021 BiOp and the final rules.<sup>249</sup>

With respect to the MLA's challenge to the 2021 BiOp, the court stated that it was not in a position to decide whether the agency's approach to estimating the lobster fishery's effects on the right whale was the only, or even the best way of analyzing data or resolving uncertainty.<sup>250</sup> Instead, the court held that "[a]t this juncture, [] the Court is satisfied that NMFS suitably considered the data available at the time of its action and reasonably explained its scientific conclusions."<sup>251</sup>

Because the court did not find the 2021 BiOp in violation of the APA's arbitrary and capricious standard, the MLA's remaining argument challenging the 2021 final rules also fell to the

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245. *Ctr. for Biological Diversity v. Raimondo*, No. 18-112 (JEB), 2022 WL 2643535, at \*1 (D.D.C. July 8, 2022).

246. *Me. Lobstermen's Ass'n, Inc.*, 2022 WL 4392642, at \*1.

247. *Id.* at \*4.

248. *Id.* (citing *Airmotive Eng'g Corp. v. FAA*, 882 F.3d 1157, 1159 (D.C. Cir. 2018) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 29, 43 (1983))).

249. *Id.* at \*5.

250. *Id.*

251. *Id.*

wayside.<sup>252</sup> In summarizing its holding, the court wrote “the lobstermen’s only argument against the Rule is that it relies on an invalid BiOp. But this Court has just held that the BiOp survives Plaintiffs’ challenges in this case. The Rule’s reliance on the BiOp is thus a *fortiori* lawful.”<sup>253</sup>

Because their very existence rides on it, the MLA and other stakeholders in the Maine lobster industry have decided to continue this legal battle despite the devastating blows dealt by recent court decisions.<sup>254</sup> MLA president Kristen Porter assured the public that the organization is not giving up anytime soon: “When we said we refuse to let a single judge’s decision be the last word and that MLA is preparing to go all the way to the Supreme Court, we weren’t kidding[.]”<sup>255</sup> The MLA appealed the court’s decision, and to help in their appeal they have hired Paul Clement, a former United States Solicitor General under President George W. Bush.<sup>256</sup> Porter went on to express that “[w]e are incredibly grateful that Paul Clement, arguably the most qualified attorney in the nation on these matters, has chosen to stand with us.”<sup>257</sup>

Clement, also passionate about his newfound role at the forefront of the battle for the survival of the fishery, echoed the MLA president’s dissatisfaction with the attack on the Maine lobster industry:

This is a clear case of government overreach. It is no exaggeration to say that the fate of the Maine lobster fishery, a national icon, hangs in the balance. [] The applicable statute requires the agency to apply the best available evidence. The agency instead has resolved every doubt and every disputed issue against an iconic American industry that has gone to great lengths to protect the right whale.<sup>258</sup>

Time will tell whether Clement’s appellate expertise and Supreme Court experience will help turn the lobster industry’s luck around.

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252. *Id.* at \*14.

253. *Id.* (citing *City of Tacoma v. Fed. Energy Regul. Comm’n*, 460 F.3d 53, 75 (D.C. Cir. 2006)).

254. *Maine Lobstermen’s Association Seeks Expedited Federal Appeal*, NAT’L FISHERMAN (Oct. 11, 2022), <https://www.nationalfisherman.com/northeast/maine-lobstermen-s-association-seeks-expedited-federal-appeal>.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

As it stands today, the MLA's appeal to the D.C. circuit court is still pending in the *Maine Lobstermen's Association v. Raimondo* matter, and all interested parties continue to hold their breath as the court contemplates which remedy to issue in the *Center for Biological Diversity v. Raimondo* case.<sup>259</sup> This imminent ruling has the potential to upend the Maine lobster industry and the lives of tens of thousands in the state and beyond who rely on it. Given the First Circuit Court of Appeal's recent reversal regarding the fall/winter closure of a large area of the fishery, the seas ahead look very rough for the Maine lobsterman.<sup>260</sup>

Recognizing how dire the situation is, Maine Governor Janet Mills has petitioned and been granted intervenor status in the lawsuits.<sup>261</sup> Notwithstanding the discouraging results in recent court decisions, and as will be argued below, the United States Circuit Court of Appeals for the District of Columbia should rule in favor of the lobster industry in the pending MLA appeal. To rule otherwise would deal a fatal blow to the Maine lobster industry and the communities that rely on it based solely on the NMFS's arbitrary and capricious reliance on flawed scientific data and worst-case scenario assumptions.

#### IV. ARGUMENT: A LOBSTERMAN'S LAST SHOT – WHY THE PENDING MLA APPEAL SHOULD BE DECIDED IN FAVOR OF THE LOBSTER INDUSTRY

As discussed above, the MLA appealed the D.C. district court's decision that the NMFS did not act arbitrarily and capriciously in promulgating the 2021 BiOp and final rules. On appeal, the United States Circuit Court of Appeals for the District of Columbia should find the MLA's arguments persuasive and hold in favor of the MLA because the agencies involved exhibited flawed reasoning that rises to a threshold warranting judicial intervention. In doing so, the court must invalidate the 2021 BiOp and set aside the

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259. At the time of this Article's publication, new decisions may exist in both of these matters. If that is the case, please see the short Afterword located after the conclusion of this Article.

260. Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo, 40 F.4th 36, 43 (1st Cir. 2022).

261. Katherine Revello, *Maine Granted Intervenor Status in Lawsuit Challenging Federal Lobster Regulations*, THE ME. WIRE (Dec. 31, 2021), <https://www.themainewire.com/2021/12/maine-granted-intervenor-status-in-lawsuit-challenging-federal-lobster-regulations/>.

subsequent rule changes because they are based on agency decisions that cannot be reconciled with the available data. Should the court decline to hold in favor of the MLA, the new rules (which are likely to get exponentially stricter thanks to the court's decision in *Center for Biological Diversity v. Raimondo*) will have catastrophic effects on the Maine lobster industry and Maine coastal fishing communities alike.

A. A Renewed Review: Why the MLA Should Succeed on Appeal

Under the APA, a reviewing court may set aside an agency action if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>262</sup> According to the United States Supreme Court, an agency action is:

[A]rbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>263</sup>

As a reminder, a court is not to substitute its own judgment for that of an agency so long as the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>264</sup> That being the case, agencies have a statutory responsibility to use the best scientific and commercial data available when evaluating whether an agency action is likely to jeopardize the continued existence of an endangered species.<sup>265</sup> The Supreme Court held that this requirement serves to prohibit agencies from guessing about the potential effects from its actions:

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262. *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 154 (D.D.C. 2014) (quoting 5 U.S.C. § 706(2)).

263. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

264. *Me. Lobstermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, No. 21-2509 (JEB), 2022 WL 4392642, at \*4 (D.D.C. Sept. 8, 2022) (citations omitted).

265. 16 U.S.C. § 1536(a)(2).

The obvious purpose of the requirement that each agency “use the best scientific and commercial data available” is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA’s overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.<sup>266</sup>

A party seeking to have a court declare an agency action arbitrary and capricious under the deferential § 706(2)(A) standard carries a heavy burden, and a court must uphold a decision of “less than ideal clarity if the agency’s path may be reasonably discerned.”<sup>267</sup>

Take, for example, the case of *Wild Fish Conservancy v. Irving* as an illustration of what courts consider an arbitrary and capricious agency action.<sup>268</sup> In *Irving*, plaintiff nonprofit conservation group filed suit challenging a BiOp promulgated by the NMFS in consultation with other agencies regarding their oversight activities for the Leavenworth National Fish Hatchery.<sup>269</sup> The *Irving* court found that the NMFS initially included in its BiOp a general discussion of the effects that climate change would have on the recovery of a protected fish species.<sup>270</sup> However, the court took issue with the fact that the agency proceeded to make an assumption without explanation that climate change would not affect the hatchery in question.<sup>271</sup> The NMFS argued that it did not need to consider climate change in making its decision, but the court held that the aforementioned assumption and lack of explanation was a failure to appropriately consider an important part of the problem and further to be arbitrary and capricious in violation of the APA.<sup>272</sup>

Likewise, the 2021 BiOp in the instant case arose out of arbitrary and capricious decision making by the NFMS in violation of the APA. The BiOp is based on inexplicable decisions stemming from repeated “worst case scenario” assumptions, and not objective analysis of the best scientific and commercial data available. These

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266. *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997).

267. *Me. Lobstermen’s Ass’n, Inc.*, 2022 WL 4392642, at \*4 (citations omitted).

268. *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224 (E.D. Wash. 2016).

269. *Id.* at 1227.

270. *Id.* at 1233.

271. *Id.* at 1233–34.

272. *Id.* at 1234.

decisions, which are discussed below, clearly “run[] counter to the evidence before the agency”<sup>273</sup> in violation of the APA’s arbitrary and capricious standard. Because a path to these decisions cannot be “reasonably discerned,”<sup>274</sup> the United States Circuit Court of Appeals for the District of Columbia should decline to uphold the 2021 BiOp as valid.

Perhaps the most egregious, and certainly the most consequential of these “worst case scenario” assumptions made by the NMFS in issuing the 2021 BiOp is the overestimation of the lethal effects that the American (and by extension Maine) lobster fisheries’ have on the right whale population. In its BiOp, the NMFS noted that in the four year time period from 2015 to 2018, fifteen right whale entanglements were noted in Canadian waters (7.75 of which were determined to be M/SI events) while only three were noted in United States waters (none of which were determined to be M/SI events).<sup>275</sup> The NMFS further recognized in the BiOp that “[i]t is clear from recent documented M/SI incidents where gear has been present that heavier [Canadian] snow crab gear poses a *greater mortality risk* than buoy lines associated with most nearshore lobster fisheries.”<sup>276</sup> Also, between 2009 and 2018, an average of five right whale mortalities and serious injuries resulting from entanglement in commercial fishing gear occurred each year.<sup>277</sup> Of these five, only 0.2 per year were attributable to United States fisheries while 0.7 per year were attributable for Canadian fisheries.<sup>278</sup> The remaining four per year were deemed undetermined as to which country’s gear caused the entanglement.<sup>279</sup>

In addition to observation data showing that known right whale entanglements are more often caused by Canadian fisheries than American fisheries (especially the Maine lobster fishery<sup>280</sup>), available data shows that there is another indicator that our neighbors to the north will continue to pose a greater threat to

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273. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

274. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974) (citing *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945)).

275. NAT’L MARINE FISHERIES SERV., *supra* note 100, at 216.

276. *Id.* at 217 (emphasis added).

277. Atlantic Coastal Fisheries Cooperative Management Act Provisions, 86 Fed. Reg. 51970, 51971 (Sept. 17, 2021) (to be codified at 50 C.F.R. pt. 229, 697).

278. *Id.*

279. *Id.*

280. *See* discussion *supra* pt.II.B.2.a.

right whales: climate change. The Gulf of Maine, where many of the new NMFS's rules are targeted, is currently one of the fastest warming bodies of water in the world.<sup>281</sup> In fact, the Gulf of Maine "has warmed faster than 99 percent of the global ocean."<sup>282</sup> This warming is changing the right whale's typical migration patterns, meaning the NMFS's new regulations could be targeted at an area no longer frequented by the marine mammals:

[C]limate change is causing increasing difficulties in protecting North Atlantic right whales. The Gulf of Maine, where right whales are known to congregate, has a surface temperature that is rising faster than almost anywhere else in the world. The change in temperature appears to be having an effect on the North Atlantic right whales breeding and feeding behaviors. Additionally, the change in temperatures may be causing more North Atlantic right whales to travel farther into Canadian waters, where they have not traditionally been common and where strong protections have not previously existed.<sup>283</sup>

Scientists believe the whales are leaving their traditional foraging grounds in search of food that no longer thrives in the rapidly warming Gulf of Maine.<sup>284</sup> Recent studies support this assertion, including a study analyzing "data on plankton, oceanic conditions and whale sightings . . . [which] showed that the whales abandoned their traditional feeding grounds in the Gulf of Maine in 2010, the same year that warming water caused the population of fatty crustaceans they eat to plummet in the area."<sup>285</sup>

As the whales moved further into Canadian waters in search of food, they entered areas that do not offer the same protections as their typical habitat.<sup>286</sup> As Erin Meyer-Gutbrod, a quantitative marine biologist from the University of South Carolina puts it,

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281. *Climate Change in the Northeast U.S. Shelf Ecosystem*, NOAA FISHERIES (May 24, 2021), <https://www.fisheries.noaa.gov/new-england-mid-atlantic/climate/climate-change-northeast-us-shelf-ecosystem>.

282. *Id.*

283. Justin Weatherwax, *The Right to Live: How North Atlantic Right Whales Are Going Extinct Despite Environmental Protections*, 52 U. MIA. INTER-AM. L. REV. 239, 245 (2021).

284. Catrin Einhorn, *New Research Helps Explain a Sudden Population Crash for Rare Whales*, N.Y. TIMES (Sept. 25, 2021) (citing Erin L. Meyer-Gutbrod et al., *Ocean Regime Shift Is Driving Collapse of the North Atlantic Right Whale Population*, 34 OCEANOGRAPHY 22, 23 (2021)), <https://www.nytimes.com/2021/09/01/climate/whales.html>.

285. *Id.*

286. *Id.*

“[the whales] moved so fast that our policies didn’t move with them.”<sup>287</sup> While the 2021 BiOp recognizes that “research is needed on understanding climate change effects on North Atlantic right whale foraging, migration, habitat use, reproduction, and distribution,” it also acknowledges that “baleen whales have experienced a northward shift since 2010, matching the shifts in their prey distribution.”<sup>288</sup>

Despite this climate change data showing that the whales have been and are continuing to move northward away from the Gulf of Maine, and despite data showing that a significantly larger number of whale entanglements are caused by Canadian fisheries and their less protective gear, the 2021 BiOp apportioned 50% of all confirmed entanglements with an unknown country of origin to the United States.<sup>289</sup> It followed from this unfounded assumption that “a 60-percent reduction would be needed to reduce right whale mortality and serious injury in United States commercial fisheries from an annual average PBR of 2.2 to below the current PBR of 0.8 per year.”<sup>290</sup> It is from this 60% reduction target that the new rules were developed; in other words, the unfounded assumption to apportion half of all right whale deaths and entanglements to the American lobster fishery, despite all the data that runs directly contrary to that assumption, is the grounds on which federal agencies are regulating independent, small business owning lobster fishermen out of existence.<sup>291</sup>

Given the fact that the Maine lobster fishery is the largest single-species fishery in North America, and the largest lobster fishery in the U.S., the assumption to apportion 50% of all unknown entanglements to the United States is essentially an indictment of the Maine lobster industry itself.<sup>292</sup> This flies in the face of the aforementioned data, which illustrates that it is not Maine lobstermen who are putting the survival of the endangered right whale at risk, and instead it is the continued threats of ship

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287. *Id.*

288. NAT’L MARINE FISHERIES SERV., *supra* note 100, at 197–99.

289. *Id.* at 216–17.

290. Atlantic Coastal Fisheries Cooperative Management Act Provisions, 86 Fed. Reg. 51970, 51971 (Sept. 17, 2021) (to be codified at 50 C.F.R. pt. 229, 697).

291. *Id.*

292. James Prosek, *Maine’s Having a Lobster Boom. A Bust May Be Coming*, NAT’L GEO. (June 14, 2021), <https://www.nationalgeographic.com/animals/article/lobster-in-the-gulf-of-maine>; *Maine Commercial Landings Top 600 Million Dollars for Only the Third Time*, *supra* note 65.

strikes and entanglement in Canadian fishing gear that poses a “greater mortality risk” to the marine mammals.<sup>293</sup>

This assumption was challenged by the MLA in its lawsuit against the NMFS, but as previously discussed the D.C. district court held that the NMFS did not violate the APA in making this assumption.<sup>294</sup> The court deferred to the agency’s judgment under the deferential arbitrary and capricious standard and held that “[a]t the end of the day, NMFS here considered the relevant data and offered a rational and peer-reviewed explanation for its approach. As attempting to trace the location of mortal entanglements is quintessentially murky water, the [c]ourt declines to displace the expert agency’s judgement.”<sup>295</sup>

On review of the MLA decision, the United States Circuit Court of Appeals for the District of Columbia should reject the lower court’s finding that the assumption to apportion 50% of all right whale entanglements of unknown origin to the United States was not arbitrary and capricious. In order to make this finding, “the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement.”<sup>296</sup> The NMFS’s 50/50 allocation of unknown right whale entanglements is an error of the upmost clarity given the previously discussed data demonstrating that Canadian fishing gear has been and will continue to be a far greater threat to the right whale population.

The BiOp explicitly recognizes that known right whale entanglements occurred in Canadian waters at a rate nearly four times higher than American waters between 2014 and 2018, that the heavier Canadian snow crab gear is more lethal to right whales than American lobster gear, and that climate change is causing a northward shift in the right whale’s migration pattern.<sup>297</sup> While the lower court attempted to justify the agency’s unfounded assumption, the appellate court must decline to do so. Instead, the appellate court must hold that the agency’s 50/50 allocation of right whale entanglements of unknown origin was arbitrary and

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293. NAT’L MARINE FISHERIES SERV., *supra* note 100, at 217.

294. *Me. Lobstermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, No. 21-2509 (JEB), 2022 WL 4392642, at \*7 (D.D.C. Sept. 8, 2022).

295. *Id.*

296. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on unrelated grounds* by *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

297. NAT’L MARINE FISHERIES SERV., *supra* note 100, at 216–17.

capricious, and doing so will “avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”<sup>298</sup>

Because the 2021 BiOp “offered an explanation for its decision that runs counter to the evidence before the agency” and is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise,” the court must rule in favor of the MLA and remand the matter without vacatur so the agency can rewrite the BiOp and final rule.<sup>299</sup> In doing so, the court should use similar reasoning to that used in *Irving* and hold the 2021 BiOp and subsequent rule changes invalid on the grounds that the agencies’ decisions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>300</sup>

The federal appeals court recently approved the MLA’s request for an expedited review of the case, and a final deadline has been set for January 2023.<sup>301</sup> Failure to overturn the lower court’s decision in the MLA matter will not only impose an outsized punishment on the independently operating Maine lobster fishermen who are not entangling and killing right whales, it will also likely result in the decimation of the Maine lobster industry and the communities it supports.

#### B. Caught in the Regulatory Crossfire: The Impact on the Lobster Industry and the Costs for Coastal Maine Communities

The potential positive impact that the new regulations might have on the right whale population is still hotly debated and yet to be seen, but there is little dispute as to what harm will be done to Maine lobster fishing communities should reviewing courts allow for increasingly stricter rules to be put in place. Requiring more traps per trawl and closing a 967 square mile stretch of productive fishing grounds during a lucrative time of year (which will cause displaced fishermen to move out of the area and set traps closer to other fishermen) will increase the likelihood of potentially deadly

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298. *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997).

299. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

300. *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 154 (D.D.C. 2014) (quoting 5 U.S.C. § 706(2)); *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1231–37 (E.D. Wash. 2016).

301. Cover, *supra* note 51.

gear tangles.<sup>302</sup> Some in the industry, like Executive Director of Protect Maine’s Fishing Heritage Foundation Crystal Canney, believe that “[i]nstead of saving right whales, what this decision has done is endanger not only the livelihoods of many of our lobstermen and women, but also their lives.”<sup>303</sup>

In addition to an increase in workplace danger, the new rules increase the economic burden on the small, independent fishermen who operate in an already economically volatile industry. NOAA estimates that the annual cost of compliance with the new regulations could range from about \$9.8 million to more than \$19.2 million.<sup>304</sup> Others estimate it will likely cost somewhere between \$50 million to upwards of \$81 million.<sup>305</sup> Those costs have to be absorbed by someone, and while the NMFS and NOAA expect some of the costs to be passed on to consumers, they recognize that “economic impacts to fishermen are anticipated.”<sup>306</sup> For example, affected lobstermen are required to purchase colored rope and weak rope insertions themselves in order to ensure that all 800 of their allowed traps and accompanying gear comply with the new rules.<sup>307</sup> Additionally, affected fishermen are likely to see a decrease in revenue somewhere in the range of \$15,000–\$30,000.<sup>308</sup>

What is worse is that after the fishermen acquire the federally approved instruments and spend their time and hard-earned money to make the required changes to their existing gear, they have the potential of becoming obsolete at any given moment. All

302. Nat’l Inst. for Occupational Safety & Health, *supra* note 181.

303. Patrick Whittle, *Lobster Fishing Will Face New Restrictions to Try to Save Whales Off Gulf of Maine*, HARTFORD COURANT (Sept. 5, 2021), <https://www.courant.com/news/connecticut/hc-news-whales-new-england-lobster-restrictions-20210905-nin3fsu32zacphgout5c5ge2q-story.html>.

304. Atlantic Coastal Fisheries Cooperative Management Act Provisions, 86 Fed. Reg. 51970, 51971 (Sept. 17, 2021) (to be codified at 50 C.F.R. pt. 229, 697).

305. Christian Wade, *Maine Lawmakers Pitch Relief Fund for Lobstermen*, THE CTR. SQUARE (Feb. 1, 2022), [https://www.thecentersquare.com/maine/maine-lawmakers-pitch-relief-fund-for-lobstermen/article\\_7d0fffee-839f-11ec-ae6f-4f615f6b1bf6.html](https://www.thecentersquare.com/maine/maine-lawmakers-pitch-relief-fund-for-lobstermen/article_7d0fffee-839f-11ec-ae6f-4f615f6b1bf6.html).

306. Atlantic Coastal Fisheries Cooperative Management Act Provisions, 86 Fed. Reg., at 51978–79.

307. Kirk Moore, *Maine Officials Say ‘Weak Rope’ Shortage Requires Delaying Whale Rules*, NAT’L FISHERMAN (Feb. 8, 2022), <https://www.nationalfisherman.com/northeast/maine-officials-say-weak-rope-shortage-requires-delaying-whale-rules> (discussing that the gear needed to comply with the new rules seem to be in such short supply that some are calling for a delay to the May 1, 2022 compliance date).

308. Katherine Revello, *DMR Briefs Legislature on Impact of NOAA’s New Lobstering Rules, Options for Appeal*, THE ME. WIRE (Sept. 17, 2021), <https://www.themainewire.com/2021/09/dmr-briefs-legislature-on-impact-of-noaas-new-lobstering-rules-options-for-appeal/>.

of the time and resources the lobstermen have put into modifying their gear to comply with the 2021 final rule changes might very well be for nothing depending on the court's remedy decision in the pending *Center for Biological Diversity v. Raimondo* case, as a decision may require further gear alterations.<sup>309</sup> The increased costs, lost revenues, and rapidly changing regulatory environment will likely force some fishermen to abandon their efforts trying to make a living in the industry, especially since activists and the courts are already calling for the implementation of stricter regulations.<sup>310</sup> Individual operators abandoning the age-old profession will likely lead to corporate consolidation of the industry since large operators with deeper pockets will be the only ones who can deal with the constantly increasing costs and ever-changing equipment requirements.

Local legislators are doing their best to support the lobstermen and save the iconic Maine industry. The Maine state legislature, in an effort to keep the lobstermen afloat as they try and navigate the constantly changing regulatory landscape, approved a bill that would provide funding for those who are negatively affected by the new rules, and are actively considering allocating additional money to the industry.<sup>311</sup> The funds are intended to help fishermen financially harmed by the new rules keep up with their boat payments or purchase new gear.<sup>312</sup> In addition to the money intended to help fishermen directly, the Maine legislature has also allocated \$3 million to help offset the costs associated with the ongoing legal battle.<sup>313</sup> While this money may help fishermen stay

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309. *Ctr. for Biological Diversity v. Raimondo*, No. 18-112 (JEB), 2022 WL 2643535, at \*20 (D.D.C. July 8, 2022).

310. Fred Bever, *Regulators Say New Whale-Protection Rules for Maine's Lobster Fleet Are on the Horizon*, ME. PUB. (Mar. 23, 2022), <https://www.mainepublic.org/environment-and-outdoors/2022-03-23/regulators-say-new-whale-protection-rules-for-maines-lobster-fleet-are-on-the-horizon>.

311. Christian M. Wade, *State Weighs Relief Fund to Buoy Lobster Industry*, GLOUCESTER DAILY TIMES (May 26, 2022), [https://www.gloucestertimes.com/news/state-weighs-relief-fund-to-buoy-lobster-industry/article\\_f5926f34-dd3a-11ec-8099-f724bf047347.html](https://www.gloucestertimes.com/news/state-weighs-relief-fund-to-buoy-lobster-industry/article_f5926f34-dd3a-11ec-8099-f724bf047347.html).

312. Associated Press Me., *Plan for Lobster Fishing Relief Fund Faces Committee Vote*, SPECTRUM NEWS (Feb. 7, 2022, 6:47 AM), <https://spectrumlocalnews.com/me/maine/news/2022/02/07/plan-for-lobster-fishing-relief-fund-faces-committee-vote>.

313. *Governor Janet Mills: Taking Another Positive Step in Our Fight to Defend the Lobster Industry and Its Hard-Working Men and Women*, STATE OF ME. OFF. OF GOVERNOR JANET T. MILLS (Oct. 14, 2022), [https://www.maine.gov/governor/mills/index.php/news/radio\\_address/governor-janet-mills-taking-another-positive-step-our-fight-defend-lobster](https://www.maine.gov/governor/mills/index.php/news/radio_address/governor-janet-mills-taking-another-positive-step-our-fight-defend-lobster).

afloat for the time being, the continued calls for additional changes to the industry will likely push many fishermen overboard and out of the occupation altogether.

An example of a called-for change that is conceptually brilliant but practically unsound at this point is ropeless fishing.<sup>314</sup> Ropeless fishing is an evolving technique, which employs electronic systems attached to lobster traps that, when signaled, release a buoy that then floats to the surface to be collected by fishermen.<sup>315</sup> This technique eliminates the need for the constant presence of vertical lines in the water column, thus reducing the risk of entanglement to nearby marine life.<sup>316</sup> While this may seem like a solution to the problem on paper, in practice it has yet to show widespread effectiveness, and a multitude of hurdles need to be cleared before any all-embracing implementation of the technology can occur.<sup>317</sup>

One of the major problems with the new technology is its cost of implementation. The current cost of a traditional lobster trap and accompanying gear is roughly a few hundred dollars, while some estimates for ropeless systems range between \$2,500 and \$3,700 per unit.<sup>318</sup> With each Maine commercial lobster fishermen permitted to fish 800 traps, the implementation of ropeless systems will pose a cost that will simply put many operators out of business.<sup>319</sup> The NMFS recognizes that the development of this technology is still ongoing, and it intends (pending appropriations) to “facilitate and support the industry’s development of ropeless gear.”<sup>320</sup> Despite the NMFS’s insistence on ropeless fishing as the future of the lobster fishery, its successful implementation remains to be seen.

Along with the fishermen themselves, coastal Maine communities are likely to suffer as well should these new rules be

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314. Ethan Genter, *Ropeless Fishing Tech Improves, But Not Yet Ready for “Primetime,”* ELLSWORTH AM. (Aug. 6, 2021), <https://www.ellsworthamerican.com/maine-news/ropeless-fishing-tech-improves-but-not-yet-ready-for-primetime/>.

315. Chris Conte, *Could ‘Ropeless’ Lobster Traps Help Save Right Whales from Extinction?*, THE DENVER CHANNEL (Sept. 21, 2021, 11:39 AM), <https://www.thedenverchannel.com/news/national/could-ropeless-lobster-traps-help-save-right-whales-from-extinction>.

316. Genter, *supra* note 314.

317. *Id.*

318. Conte, *supra* note 315.

319. *Id.*

320. Atlantic Coastal Fisheries Cooperative Management Act Provisions, 86 Fed. Reg. 51970, 51972 (Sept. 17, 2021) (to be codified at 50 C.F.R. pt. 229, 697).

implemented. As mentioned previously, the Maine lobster industry supports roughly 35,000 jobs in and around Maine coastal communities.<sup>321</sup> Should these rules stay in effect, they will likely destroy one of the only opportunities for a year-round source of income that coastal and island communities depend on. This loss of opportunity, combined with a housing market that has increased 38% in the last year alone, will likely result in many locals in coastal communities selling their valuable coastline properties and moving inland in search of work elsewhere.<sup>322</sup>

Loss of such a large employment opportunity in one of its most lucrative industries would be damaging to any state, but it is especially likely to have an outsized negative impact on the tourist-reliant state of Maine given the ongoing economic recovery from the COVID-19 pandemic and the tremendous devastation the state's population has already experienced from the ongoing opioid epidemic. For example, in 2020 alone the state of Maine experienced a record number of drug overdose deaths, followed by an additional 23% increase in 2021.<sup>323</sup> Further, recent studies have found that an increase in the local unemployment rate is associated with increases in opioid related deaths.<sup>324</sup> Given the opioid crisis's association with local economic conditions, the potential increase in unemployment that would likely result from allowing the 2021 BiOp and subsequent rule changes to stand should be avoided at all costs.<sup>325</sup>

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321. Greene et al., *supra* note 62.

322. Kelley Bouchard, *Maine's Housing Crisis Is Building a Growing Bipartisan Will to Find Solutions*, PORTLAND PRESS HERALD (Oct. 12, 2021), <https://www.pressherald.com/2022/02/06/maines-housing-crisis-is-building-a-growing-bipartisan-will-to-find-solutions/>.

323. *Drug Overdose Deaths in Maine*, UNIV. OF ME.: MARGARET CHASE SMITH POL'Y CTR., <https://mcspolicycenter.umaine.edu/mcspc-research/drug-overdose-deaths/> (last visited Feb. 17, 2023); Susan Cover, *Funds to Fight Opioid Deaths Coming to Maine This Spring*, SPECTRUM NEWS (Feb. 24, 2022, 2:22 PM), <https://spectrumlocalnews.com/me/maine/news/2022/02/24/funds-to-fight-opioid-deaths-coming-soon>.

324. *Are Opioid Deaths Affected by Macroeconomic Conditions?*, NAT'L BUREAU OF ECON. RSCH. (Sept. 2017), <https://www.nber.org/bah/2017no3/are-opioid-deaths-affected-macroeconomic-conditions>.

325. This is the type of public interest harm that the court should consider in making its determination regarding the 2021 BiOp and subsequent rule changes. A similar public interest consideration was made by the court in *Center for Biological Diversity v. Ross* when the court considered the effects of the potential closure of the lobster fishery south of Nantucket Island. *Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236, 250–56 (D.D.C. 2020)

Despite all that has been discussed up to this point, the harsh reality exists that regardless of a court ruling in any of the aforementioned lawsuits, North Atlantic right whales will continue to be killed by human activity no matter how many lawsuits are targeted at the Maine lobster fishing industry.<sup>326</sup> The time and resources being spent trying to destroy the Maine lobster industry, which is comprised of small, independent operators, will do little to save right whales.<sup>327</sup> Nearly two decades have passed and countless protective measures have been implemented since a right whale entanglement has been attributed to the Maine lobster industry, and *no right whale death has ever been attributed to it*.<sup>328</sup> These resources would be much more effectively targeted at holding the groups actually responsible for right whale deaths accountable, such as the aforementioned corporate marine shipping and Canadian fishing industries.<sup>329</sup> Maine lobstermen agree with the urgent need to save the right whale, but the 2021 BiOp and final rules in their current form (not to mention the exponentially stricter rules that courts are calling for), as well as the flawed reasoning underlying them, are simply too much for many fishermen to stomach:

[The] NMFS got it wrong. The science does not support the agency's plan. Using worst case scenarios that hold Maine lobstermen accountable for right whale deaths occurring outside our fishing areas won't help protect right whales, but it will decimate Maine's lobster industry. Lobstermen have done everything they have been asked to protect right whales and remain committed to doing their part to save the species.<sup>330</sup>

## V. CONCLUSION

The United States Circuit Court of Appeals for the District of Columbia should exercise its discretionary powers under the APA and declare the NMFS's 2021 BiOp and final rules to be in violation of the APA because they are arbitrary and capricious, and the NMFS offered explanations for its decisions that run counter

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326. *See supra* pt.II.B.2.a–b.

327. *Id.*

328. Greater Atl. Reg'l Fisheries Off., *supra* note 85.

329. *See supra* pt.II.B.2.a–b.

330. Patrice McCarron, *Save Maine Lobstermen*, ME. LOBSTERMEN'S ASS'N, [https://www.maine lobstermen.org/index.php?option=com\\_content&view=article&id=39:legal-defense-fund&catid=20:site-content](https://www.maine lobstermen.org/index.php?option=com_content&view=article&id=39:legal-defense-fund&catid=20:site-content) (last visited Feb. 17, 2023).

to the evidence before the agency. In formulating the BiOp, the government agencies' decision to apportion 50% of all undetermined whale entanglements to American fisheries was arbitrary and capricious. Making this determination based on the data concerning recent entanglements, the difference in fishing gear regulations between the United States and Canada, and the migratory effects climate change is having on the right whale population "[ran] counter to the evidence before the agency [and] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>331</sup>

A healthy right whale population and a vibrant Maine lobster fishery can coexist alongside one another. The first step to achieving this is to roll back the recent rule changes discussed in this Article and refocus regulatory efforts on actions that do not focus on the Maine lobster fishery, but instead on those industries that are provably endangering the survival of the right whale. The effects of not correcting this wrong will include the exposure of Maine lobster fishermen to an exponentially higher risk of injury and death, the destruction of the Maine lobster industry, and the decimation of Maine coastal and island communities, all while failing to protect the North Atlantic right whale from greater dangers far beyond the Maine lobster industry's control.

## AFTERWORD: A LIFELINE FROM LAWMAKERS

Initially submitted for publication nearly a year ago, this Article has gone through multiple updates and revisions to leave the reader with the most up-to-date understanding of the ever-evolving legal landscape concerning the Maine lobster industry. After the Article concluded its final round of revisions in the fall of 2022, and with multiple appeals pending in federal courts, a series of events thrust the battle between the Maine lobstermen and the right whale into the national news cycle.

In early September 2022, the Monterey Bay Aquarium's Seafood Watch program, which rates seafood industries according to the program's estimation of their sustainability and

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331. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

environmental impact, downgraded the American lobster to its “red list.”<sup>332</sup> This designation indicates that consumers should avoid eating the product and seek more sustainable alternatives instead.<sup>333</sup> Shortly thereafter, the London-based Marine Stewardship Council also pulled its well-managed and sustainable certification of the Maine lobster industry.<sup>334</sup> In late November, following the changes in the sustainability ratings by these two groups, the major grocery store chain Whole Foods made the controversial decision to pause its purchases of Maine lobster.<sup>335</sup> While the popular grocer’s decision to pause its business with Maine lobstermen sparked an outcry from many, including the state’s legislators, it was a move less than a week later by President Joe Biden’s White House that gained the most national notoriety for the ongoing legal battle.

On December 1, 2022, President Biden hosted French President Emmanuel Macron and several hundred other guests at the White House for what would be his first state dinner as commander in chief.<sup>336</sup> The controversy arose not from the French president’s presence at the dinner, but instead from what the White House decided to serve the leader of its oldest democratic ally and the hundreds of others in attendance. So, what did the White House serve in an attempt to impress its high-profile guest? Maine lobster.<sup>337</sup> And not just one Maine lobster, but two-hundred fresh-caught live lobsters from Maine’s frigid winter waters.<sup>338</sup>

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332. Max Sullivan, *American Lobster Was Added to Seafood Watch’s ‘Red List.’ Maine Lobstermen Are Fighting Back*, USA TODAY (Sept. 10, 2022), <https://www.usatoday.com/story/news/nation/2022/09/10/lobster-red-list-maine-seafood-watch/8048412001/>.

333. *Recommendation, American Lobster*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <https://www.seafoodwatch.org/recommendation/lobster/american-lobster-24084> (last visited Feb. 17, 2023).

334. *Press Release: MSC certificate Suspended for Gulf of Maine Lobster Fishery*, MARINE STEWARDSHIP COUNCIL (Nov. 16, 2022), <https://www.msc.org/en-us/media-center/news-media/press-release/msc-certificate-suspended-for-gulf-of-maine-lobster-fishery>.

335. Rob Wile, *Whole Foods’ Decision to Pull Maine Lobster Sparks Outcry from State’s Elected Officials and Lobster Industry*, NBC NEWS (Nov. 30, 2022), <https://www.nbcnews.com/business/consumer/why-did-whole-foods-ban-maine-lobster-whats-next-rcna58953>.

336. Dustin Jones, *Celebs and Dignitaries Meet at the White House for Biden’s State Dinner*, NPR (Dec. 2, 2022, 5:00 AM), <https://www.npr.org/2022/12/02/1140173344/biden-macron-state-dinner-white-house>.

337. Nicole Ogrysko, *Maine Lobster at White House Dinner Sparks Debate over Sustainability, Industry Concerns*, ME. PUB. (Dec. 1, 2022, 4:07 PM), <https://www.mainepublic.org/environment-and-outdoors/2022-12-01/maine-lobster-at-white-house-dinner-sparks-debate-over-sustainability-industry-concerns>.

338. *Id.*

This decision to include the controversial crustaceans on the state dinner menu sparked outrage from environmental groups around the world, including international conservation non-profit Oceana, with the organization's campaign director Gib Brogan arguing that “[u]ntil President Biden and the National Marine Fisheries Service takes their responsibility for managing our oceans seriously and put proven, effective safeguards in place to minimize the risk of entangling whales, the lobster on their menu cannot be considered sustainable by any definition.”<sup>339</sup>

While proponents of the Maine lobster fishery were pleased with the White House's decision to serve the deep-water delicacy, they also called for the White House to take action to protect the livelihoods of the men and women who provided the headliner for the state dinner's menu. Maine Governor Janet Mills led these calls by tweeting, “I . . . urge [President Biden] and his Administration to recognize that all Maine lobstermen want is the opportunity to continue providing this product for people to enjoy without the Federal government crushing them under the weight of burdensome, scientifically-questionable regulations.”<sup>340</sup> Jared Golden, the United States Congressman from Lewiston, Maine, echoed this sentiment, tweeting, “If the Biden White House can prioritize purchasing 200 Maine lobsters for a fancy dinner, [President Biden] should also take the time to meet with the Maine lobstermen his administration is currently regulating out of business.”<sup>341</sup> United States Senator from Maine, Susan Collins, also voiced her support for the White House's tacit endorsement of the purchase and consumption of Maine lobster, tweeting “[i]f Maine lobster is good enough for the White House to serve, it's good enough for every seafood retailer—including Whole Foods—to sell.”<sup>342</sup>

Despite this symbolic win for the Maine lobster industry, it did little to help their ongoing legal battles. Federal courts cannot rely on the White House's choice of entrée when weighing whether the fishery's continued operation violates the ESA or the MMPA.

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339. *Id.*

340. Janet Mills (@GovJanetMills), TWITTER (Dec. 1, 2022, 10:36 AM), <https://twitter.com/GovJanetMills/status/1598340258168393729>.

341. Jared Golden (@RepGolden), TWITTER (Nov. 30, 2022, 7:14 PM), <https://twitter.com/RepGolden/status/1598108342396026880>.

342. Susan Collins (@SenatorCollins), TWITTER (Nov. 30, 2022, 7:22 PM), <https://twitter.com/SenatorCollins/status/1598110185876135937>.

Nevertheless, shortly after the White House's dinner party, Maine lobstermen, who by all accounts were adrift in a sea of uncertainty about the future of their livelihood, were thrown a lifeline by lawmakers in Washington, D.C.

On December 23, 2022, just hours before congressmen and women were scheduled to fly home for the Christmas holiday, the United States House of Representatives avoided a government shutdown by passing a \$1.7 trillion spending package.<sup>343</sup> Just under a week later, President Biden signed the bill into law, which became formally known as the Consolidated Appropriations Act of 2023 ("CAA").<sup>344</sup> This bill contains funding provisions for a wide range of issues ranging from support for the Ukrainian war effort to the continued growth of the United States Space Force.<sup>345</sup> Most importantly for Maine lobstermen, however, the CAA contains the following provision:

Notwithstanding any other provision of law . . . 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 . . . and the Endangered Species Act of 1973.<sup>346</sup>

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343. Sarah Ferris et al., *House Sends \$1.7T Government Funding Bill to Biden*, POLITICO (Dec. 23, 2022), <https://www.politico.com/news/2022/12/23/house-omnibus-spending-bill-00075420>.

344. *Bill Signed: H.R. 2617*, WHITE HOUSE (Dec. 29, 2022), <https://www.whitehouse.gov/briefing-room/legislation/2022/12/29/bill-signed-h-r-2617/>.

345. *Id.*; Marcia Smith, *FY2023 Funding Signed, Sealed and Delivered*, SPACE POL'Y ONLINE (Dec. 29, 2022), <https://spacepolicyonline.com/news/fy2023-funding-signed-sealed-and-delivered/>.

346. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. JJ, Tit. I, § 101(a), 136 Stat. 4459 (2022). The CAA also directs the NMFS to (1) promote the innovation and adoption of gear technologies in order to implement additional whale protection measures by December 31, 2028; (2) promulgate new regulations for the American lobster and Jonah crab fisheries consistent with the MMPA and ESA that take effect by December 31, 2028, utilizing existing and innovative gear technologies; and (3) "submit an annual report to Congress on the status of North Atlantic Right Whales, the actions taken and plans to implement measures expected to not exceed Potential Biological Removal by December 31, 2028, the amount of serious injury and mortality by fishery and country, and the proportion of the American lobster and Jonah crab fisheries that have transitioned to innovative gear technologies that reduce harm to the North Atlantic Right Whale." *Id.*

This somewhat unexpected provision in the funding bill prompted outrage from right whale activists, including Center for Biological Diversity attorney Kristen Monsell, who says, “[t]his deadly delay could wipe out these amazing animals.”<sup>347</sup> The passage of the CAA led to a declaration from Greater Atlantic Regional Administrator of the NMFS Michael Pentony in which he made it clear that as a result of the new legislation, the NMFS will no longer seek to implement Phase 3 of ALWTRP which, as previously discussed, called for further rulemaking in 2025 that reduced right whale M/SI by an additional 60% to 1.04.<sup>348</sup> The declaration further states that after the issuance of the 2028 rule mandated by the CAA, the NMFS will evaluate whether or not any additional rulemakings are further required either in 2030 (as was mandated by the ALWTRP) or otherwise.<sup>349</sup>

With the new change in policy, the NMFS now has its sights set on reducing its litigation load. Armed with Administrator Pentony’s declaration and the newly passed CAA, the NMFS filed a motion to dismiss the pending MLA appeal as moot.<sup>350</sup> In its motion, the NMFS argues that:

Given this legislative development, the Service will not pursue the set of remaining rulemakings and associated benchmarks set forth in the [ALWTRP], as they pertain to the lobster and Jonah crab fisheries. It will instead focus on developing the mandated technologies and pursuing the rulemaking Congress identified in the Act . . . Thus, this appeal should be dismissed as moot, and the district court’s judgment on review should be vacated and the case remanded to the district court with directions to dismiss as moot.<sup>351</sup>

As expected, right whale activists oppose the NMFS’s new position. Erica Fuller, a Conservation Law Foundation

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347. Gianna Ferrarin, *Feds Say New Law Renders Lobster Fishery Appeal Moot*, LAW 360 (Jan. 25, 2023, 9:34 PM), [https://www.law360.com/articles/1569110?e\\_id=edad6af1-0b6e-49ab-861d-db03e3eef444&utm\\_source=engagement-alerts&utm\\_medium=email&utm\\_campaign=case\\_updates](https://www.law360.com/articles/1569110?e_id=edad6af1-0b6e-49ab-861d-db03e3eef444&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates).

348. Defendants’ Motion to Dismiss Appeal as Moot at 27–28, *Me. Lobsterman’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, No. 1:21-cv-2509-JEB (D.C. Cir. Jan. 24, 2023); *see also supra* pt.III.B.

349. Defendants’ Motion to Dismiss Appeal as Moot, *supra* note 348, at 28; *see also supra* pt.III.B.

350. Defendants’ Motion to Dismiss Appeal as Moot, *supra* note 348; *see also supra* pt.III.D.2.b.3.

351. Defendants’ Motion to Dismiss Appeal as Moot, *supra* note 348, at 2.

representative, argues that “[a]ttempts by the service to clear its litigation plate should be denied. “We are losing valuable time necessary to establish and implement science-based methods that will recover the species.”<sup>352</sup> Brett Hartl of the Center for Biological Diversity concurs, warning that this move by policymakers may be the death knell for the right whale: “Is there a chance that we can save the right whale still in 2028? Yeah, sure. It maybe was a 50/50 proposition before. Now it’s, like, 95% to 5% again.”<sup>353</sup>

It appears that the Maine lobster industry has been granted a temporary reprieve from the industry-upending decisions by federal courts and regulators in Washington D.C. New fishing regulations scheduled to be implemented by 2025, which would have likely put many fishermen out of business, have been delayed until at least the end of 2028.<sup>354</sup> Although the Maine lobster industry seems to have been spared for the time being, right whale activists show no signs of letting up in what they believe to be a battle for the continued existence of the right whale. In the meantime, North Atlantic right whales continue to suffer ship strikes and entanglements, with three new entanglements spotted in the first month of 2023 alone.<sup>355</sup>

In keeping with this Article’s theme and the Author’s argument, these entanglements have not been spotted in nor have they been found to be caused by the Maine lobster fishery.<sup>356</sup> To the contrary, the most recent right whale entanglement was spotted off the coast of North Carolina, and disentanglement

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352. Ferrarin, *supra* note 347.

353. Kevin A. Miller, *Maine’s Lobster Industry Wins Against Endangered Right Whale Protections*, NPR (Dec. 30, 2022, 4:47 PM), <https://www.npr.org/2022/12/30/1146367811/maines-lobster-industry-wins-against-endangered-right-whale-protections>.

354. NAT’L MARINE FISHERIES SERV., *supra* note 100, at 478–79; *see supra* note 346 and accompanying text.

355. Chris Chase, *Third Entangled Right Whale of 2023 Found; Biden Declines Petition Calling for Measures to Reduce Ship Strikes*, SEAFOOD SOURCE (Jan. 30, 2022), <https://www.seafoodsource.com/news/environment-sustainability/third-entangled-right-whale-of-2023-found-biden-admin-declines-ship-strike-protections>. In addition to the entanglements, a dead right whale was found in Virginia Beach in February 2023 with injuries consistent with a ship strike and no evidence of a recent entanglement. *North Atlantic Right Whale Updates*, NOAA FISHERIES (Feb. 17, 2023), <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates>.

356. *North Atlantic Right Whale Updates*, *supra* note 355.

efforts revealed that the fishing gear entangling the right whale originated from Nova Scotia.<sup>357</sup>

Over the next few years, the critical battleground will shift from the court of law to the laboratory, as the scientific studies and gear innovations promoted by the ACC determine the future of the federal fishery. Meanwhile, Maine lobstermen will continue to brave the hazards of lobster fishing with industry-leading conservation measures in place, while simultaneously waiting with bated breath to see if they can weather the imminent storm of regulations coming from litigators and legislators in the nation's capital.

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357. Chris Chase, *Nova Scotia Lobster Gear Source of Recent Right Whale Entanglement*, SEAFOOD SOURCE (Feb. 7, 2023), <https://www.seafoodsource.com/news/environment-sustainability/nova-scotia-lobster-gear-source-of-recent-right-whale-entanglement>.