

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**CENTER FOR BIOLOGICAL
DIVERSITY, *et al.*,**

Plaintiffs,

v.

**GINA RAIMONDO, in her official capacity
as Secretary of Commerce, *et al.*,**

Defendants,

and

**MAINE LOBSTERMEN'S
ASSOCIATION, *et al.*,**

Defendant-Intervenors.

Civil Action No. 18-112 (JEB)

MEMORANDUM OPINION

The lives of our vast oceans may appear timeless. Indeed, at the end of Moby-Dick, “the great shroud of the sea rolled on as it rolled five thousand years ago.” Not so, however, for many creatures who live there, including its greatest leviathans. For example, just around 370 North Atlantic right whales remain in existence. For centuries, these whales were imperiled by excessive hunting, but today the greatest human-caused threat comes from entanglement in fishing gear.

Much of that gear is dropped into the ocean by crews fishing for lobster. Since the gear harms right whales, the Endangered Species Act requires that before Defendant National Marine Fisheries Service authorizes the fisheries under its management, it must issue a Biological Opinion finding that the fishery operations will not jeopardize the continued existence of the

right whale. As part of such a “no-jeopardy” BiOp, NMFS must issue an “incidental take statement” (ITS) authorizing the number, if any, of anticipated future killings or injuries of right whales.

This Court has already once found a previous version of NMFS’s BiOp invalid for lack of an ITS and sent the agency back to the drawing board. In 2021, the Service released a new BiOp addressing how lobster and crab fishing off the Atlantic coast would affect the dwindling right-whale population. In this most recent BiOp, NMFS concluded that the fisheries under review would not jeopardize the continued existence of the whale despite acknowledging the expected potential harm to the species. In reaching this determination, the Service included an ITS in which it authorized no lethal taking of the whales, even though it projected that, at least in the near future, nearly three whales could be killed annually. NMFS, in consultation with a variety of stakeholders, and as mandated by the Marine Mammal Protection Act, also released a Final Rule that amended the specific rules that constituted the Atlantic Large Whale Take Reduction Plan.

Three conservation groups have renewed their suit against the Department of Commerce, of which NMFS is a part. They argue that the new BiOp still does not satisfy the ESA and MMPA’s requirements, just as the Final Rule flunks the MMPA’s. Although the Court will not reach every shortcoming that Plaintiffs allege, it concurs that NMFS violated the ESA by failing to satisfy the MMPA’s “negligible impact” requirement before setting the authorized level of lethal take in its ITS. NMFS also breached the time requirements mandated by the MMPA in the 2021 Final Rule. The Court will thus hold the 2021 Biological Opinion and the 2021 Final Rule to be invalid.

Cognizant of the potential effects of this ruling on the lobster industry — and on the economies of Maine and Massachusetts — and given the highly complex statutory and regulatory environment that this case involves, the Court orders no remedy here. Instead, it will offer the parties the opportunity for further briefing to articulate alternatives the Court may select.

I. Background

The Court starts by laying out the framework of the two statutes most relevant to this case — the Marine Mammal Protection Act and the Endangered Species Act — before describing the factual and procedural background. As will be explained in more depth below, Plaintiffs’ Complaints rely on the ESA, the MMPA, and the Administrative Procedure Act for different counts.

Within this statutory scheme, NMFS plays an important role, as it is the agency within the Department of Commerce that “is responsible for the stewardship of the nation’s ocean resources and their habitat.” NOAA FISHERIES, About Us, <https://bit.ly/3Nd7HP1> (last accessed June 22, 2022). This work includes implementing fishery-management plans and working to protect endangered marine species. See Oceana, Inc. v. Raimondo, 35 F.4th 904, 906 (D.C. Cir. 2022). The American lobster and Jonah Crab fisheries fall under NMFS’s auspices as the Service adopts and implements “regulations compatible with the interstate fishery management plans” required by statute. See ECF No. 216-3 (Joint Appendix Vol. 3 “JA3”) at ECF p. 80. This implementation process includes “a federal permitting process for fishermen harvesting lobster in federal waters,” which are waters over three nautical miles from the shore extending to around two hundred nautical miles. See ECF No. 198-1 (State of Maine Cross-MSJ) at 4; see also 16 U.S.C. § 5103 (requirements for state-federal cooperation in managing Atlantic coastal

fisheries). State waters, conversely, lie in the three nautical miles closest to shore. See ECF No. 188-1 (Pls. MSJ) at 13. NMFS also issues and implements regulations under plans designed to reduce the killing and injury of certain marine mammals, including right whales. See 16 U.S.C. § 1387(f).

A. Statutory Framework

1. *Marine Mammal Protection Act*

The MMPA was passed in 1972 in acknowledgment of the fact that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities” and “should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management.” 16 U.S.C. § 1361(1) & (6). To that end, the Act “generally prohibits any individual from ‘taking’ a marine mammal.” Winter v. NRDC, 555 U.S. 7, 15 (2008). The MMPA defines to “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13); see also 50 C.F.R. § 216.3 (explaining that “[t]ak[ing]” also includes “the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal”).

Although the MMPA places “a moratorium on the taking and importation of marine mammals,” 16 U.S.C. § 1371(a), there are “several enumerated exceptions.” In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litig., 720 F.3d 354, 357 (D.C. Cir. 2013). Two in particular govern the incidental taking of marine mammals “in the course of commercial fishing operations” under the MMPA. See 16 U.S.C. § 1371(a)(2); see also 140 Cong. Rec. 8609, 8761 (April 26, 1994) (statement of Senator Stevens that “in the case of threatened or endangered marine mammals, both section 101(a)(5)(E) and section 118 apply”).

Section 101(a)(5)(E)(i) permits the taking incidental to commercial fishing operations “of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species” under the ESA if certain elements are satisfied. See 16 U.S.C. § 1371(a)(5)(E)(i). Such taking may be allowed for a period of three years only if “after notice and opportunity for public comment,” NMFS finds that “the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock.” Id. § 1371(a)(5)(E)(i)(I) (emphasis added). Negligible impact, in this context, is “an impact resulting from [a] specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” 50 C.F.R. § 216.103. This negligible impact will be one significant issue here. Section 101(a)(5)(E) also requires that a species-recovery plan be developed or be in process and that any monitoring program, vessel registration, or take-reduction plan required under section 118 of the MMPA be in place. See 16 U.S.C. § 1371(a)(5)(E)(i)(II)–(III).

Section 118, meanwhile, imposes additional requirements governing the taking of marine mammals incidental to commercial fishing. For example, the Secretary must “develop and implement a take reduction plan designed to assist in the recovery or prevent the depletion of each strategic stock which interacts with [the relevant] commercial fisher[ies].” Id. § 1387(f)(1).

These take-reduction plans are developed by take-reduction teams and must include information on the number of animals being killed or seriously injured annually, recommended measures to reduce M/SI (mortality and serious injury) takings, and dates for achieving these goals. Id. §§ 1387(f)(4)–(f)(6). In this case, the plan is entitled the Atlantic Large Whale Take Reduction Plan (ALWTRP) and seeks to lower the incidental entanglement of several types of large whales, including right whales, in fishing gear. The MMPA requires that “[t]he immediate

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