

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAINE LOBSTERMEN'S ASSOCIATION,
INC.
2 Storer St., Suite 203
Kennebunk, ME 04043

Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, MD 20910

GINA RAIMONDO, in her official capacity
as Secretary of Commerce,
United States Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

JANET COIT,
in her official capacity as
Assistant Administrator for Fisheries,
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

Case No.: 1:21-cv-2509

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The Maine lobster fishery is essential to Maine's culture, heritage, and economy. For more than 175 years, the fishery has supported communities and generations of families in Maine, while ensuring that this important natural resource is sustainably harvested for generations to come. This conscientious stewardship has been undeniably successful—the Maine

lobster stock continues to thrive at healthy levels and the fishery remains one of the most valuable in the United States.

2. Despite being a model for sustainability success, the Maine lobster fishery itself is now endangered as a result of a misguided federal decision that is directly at odds with both the best available science and ecological knowledge gained from the experience of fishermen.

3. Specifically, in 2021, the National Marine Fisheries Service (“NMFS”) issued a biological opinion (the “2021 BiOp”), pursuant to the Endangered Species Act (“ESA”), that evaluates the impacts of multiple fishery management plans (including for the Maine lobster fishery) on the North Atlantic right whale. Through a “Conservation Framework,” the 2021 BiOp mandates that U.S. fixed gear fisheries (including the Maine lobster fishery) implement *more* conservation measures to achieve an *additional* 98% reduction in the incidence of “serious injury and mortality” interactions between this fishing gear and North Atlantic right whales over the next 10 years.

4. NMFS’s mandate ignores the reality that the Maine lobster fishery *already* has an extremely low incidence of interactions with right whales due, in part, to a suite of mitigation measures that have been implemented for many years. Reducing its already low impact *by another 98%* is not possible without driving most of Maine’s harvesters out of business permanently.

5. Should NMFS’s draconian mandate be imposed, the Maine lobster fishery will not exist as we know it today and the opportunity for future generations to continue this proud heritage will be lost. Lives and livelihoods will be uprooted, and a cultural tradition that has existed for more than 175 years will be gone. To make matters worse, these tragic losses will be for naught. NMFS will have accomplished no meaningful benefit to the North Atlantic right

whale because, as reflected in its 2021 BiOp and discussed below, NMFS failed to forthrightly address the most significant causes of harm to North Atlantic right whales or to apply the best available science.

6. Even though it is now being unjustifiably targeted by NMFS, the Maine lobster fishery has long embraced, and continues to embrace, a strong desire to conserve and coexist with the North Atlantic right whale. Indeed, the fishery has implemented measures over the past two decades to reduce the risk it posed to North Atlantic right whales, including drastic reductions in vertical lines, gear modifications, and effort reductions. These actions have come at no small cost to lobstermen and were implemented with extremely high compliance by lobstermen. And they have undeniably been successful as there has not been a *single* known North Atlantic right whale entanglement with Maine lobster gear in *almost two decades*. Moreover, there has *never* been a known North Atlantic right whale serious injury or mortality interaction associated with Maine lobster gear.

7. Critically important new scientific information about right whale migration patterns shows that the Maine lobster fishery will continue to pose very little risk to North Atlantic right whales. Numerous independent scientists have demonstrated that changes in the oceanic environment have pushed the migration path of right whales out of the Western Gulf of Maine and squarely into heavily used waters in Canada—where whales feed and are routinely entangled in snow crab fishing gear and struck by vessels, and where conservation measures have lagged far behind those implemented in the Maine lobster fishery. This new information establishes that North Atlantic right whales seldom migrate to, and even more rarely aggregate or feed in, Maine's commercial lobster fishing areas.

8. The 2021 BiOp is divorced from this 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.

9. Because the 2021 BiOp is based on the simplistic and false premise that more lobster rope in the water equals more risk to whales—regardless of gear type, location, configuration, presence of weak insertions, other mitigation measures, oceanographic conditions, and whale behavior and distribution—it exaggerates and arbitrarily inflates the risk posed by the Maine lobster fishery. Even worse, NMFS erroneously attributes impacts to the Maine lobster fishery that are, in fact, caused by other fisheries (such as the Canadian snow crab fishery) or by non-fishing vessels that are well-known to strike and kill North Atlantic right whales. NMFS relies on these demonstrably incorrect assumptions and attributions to justify its plan to squeeze the fishery down to reach an artificially derived risk reduction factor of 98%.

10. Unfortunately, these punishing measures will provide no appreciable benefit for the North Atlantic right whale while at the same time decimating the Maine lobster fishery. Eliminating the Maine lobster fishery will not end right whale deaths in Canada or vessel strikes. The 2021 BiOp truly accomplishes a “lose-lose” situation for whales and the lobster fishery. This regrettable result is the quintessential example of unlawful agency decision-making that long ago caused the Supreme Court to admonish federal agencies to adhere to the ESA’s “best available science” requirement in order to “avoid needless economic dislocation produced by agency

officials zealously but unintelligently pursuing their environmental objectives.” *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

11. The Maine Lobstermen’s Association, Inc. (“MLA”) is dedicated to the preservation of a sustainable lobster resource, and to the fishermen and communities that depend on the Maine lobster fishery. MLA has proactively worked to develop, and consistently supported, conservation measures for the North Atlantic right whale based on sound science. But, as described above and in the allegations that follow, the 2021 BiOp is neither sound science nor lawful. The 2021 BiOp’s failure to identify, present, and apply the best available science to its assessment of the North Atlantic right whale unfairly and arbitrarily places useless conservation burdens on the Maine lobster fishery.

12. MLA brings this lawsuit because NMFS’s imposition of draconian measures on the Maine lobster fishery will not halt the decline of the North Atlantic right whale while simultaneously resulting in a devastating economic hardship on the more than 4,800 individually owned and operated lobster fishing vessels and the tens of thousands of jobs they support, all of which are essential to Maine’s economy and irreplaceable aspects of the State’s coastal and maritime heritage.

13. Defendants’ approval of the 2021 BiOp is unlawful because NMFS did not rely on the best available scientific information, made erroneous and arbitrary assumptions unsupported and contradicted by data and evidence, relied on an outdated and flawed methodology to model projections of the North Atlantic right whale population, and inexplicably failed to account for either the positive impact of mitigation measures already or soon-to-be employed by the Maine lobster fishery. NMFS also ignored or arbitrarily discounted evidence submitted by MLA and others that would have enabled the agency to correct its mistakes.

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