

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

GINA RAIMONDO, *et al.*,

Federal Defendants,

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

Defendant-Intervenors.

Civil Action No. 18-112 (JEB)

**PLAINTIFFS' MOTION TO ENFORCE OPINIONS AND ORDERS
AND OPPOSITION TO FEDERAL DEFENDANTS'
MOTION FOR ENTRY OF JUDGMENT**

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INTRODUCTION

Plaintiffs Center for Biological Diversity, Conservation Law Foundation, Defenders of Wildlife, and the Humane Society of the United States respectfully move this Court to enforce its opinion and order of April 9, 2020, holding the National Marine Fisheries Service’s 2014 biological opinion on the continued operation of the American lobster fishery unlawful and its subsequent opinion and order on remedy of August 19, 2020.

A federal agency cannot choose to disregard a court order. Yet that is just what the National Marine Fisheries Service (“NMFS”) has done. Although NMFS issued a new biological opinion covering the lobster fishery by the court-ordered deadline, it failed to include a lawful incidental take statement (“ITS”) authorizing deaths and serious injuries of North Atlantic right whales that will result from the fishery’s continued operation, even after the full implementation of new take reduction regulations it purportedly intends to issue in September. *See* Ex. 1 to the Declaration of Kristen Monsell.

NMFS’s failure to issue an ITS “confirm[ing] that any take complies with both the [Endangered Species Act and Marine Mammal Protection Act]”—a failure this Court previously recognized “as the crux of this case”—violates this Court’s directives, leaving these critically endangered animals to suffer deadly entanglements in the process. *See* Mem. Op. on Summ. J. at 6, ECF No. 91 (hereinafter “SJ Op.”); Order on Summ. J., ECF No. 90; Mem. Op. on Remedy, ECF No. 125 (hereinafter “Remedy Op.”); Order on Remedy, ECF No. 124 (collectively, “Opinions and Orders”). Accordingly, Plaintiffs must again turn to this Court to remedy the agency’s willful failure to do what the ESA—and this Court—so plainly require. The Court should grant the instant motion, declare NMFS in violation of the Court’s Opinions and Orders, and command NMFS to come into compliance within 60 days.

Pursuant to LCvR 7(m), counsel for Plaintiffs conferred with counsel for NMFS and Intervenor via email on June 15, 2021 regarding this motion. Counsel for NMFS and Intervenor responded that they oppose this motion.

Plaintiffs combine this motion with their opposition to Federal Defendants' motion for entry of judgment, ECF No. 136. Of Plaintiffs' four claims, the issuance of a new biological opinion has mooted only the second. NMFS has not issued a lawful ITS exempting all takes of right whales by the lobster fishery from the prohibitions of section 9 of the Endangered Species Act, 16 U.S.C. § 1538, to moot Plaintiffs' third claim. Nor has it separately issued an incidental take authorization exempting such takes from the prohibitions of the Marine Mammal Protection Act, 16 U.S.C. §§ 1371(a), 1372(a), to moot Plaintiffs' fourth claim. This Court retains jurisdiction to resolve Plaintiffs' motion to enforce its Opinions and Orders on their first claim. Federal Defendants' motion is premature and the Court should deny it.

PROCEDURAL HISTORY

Plaintiffs' Complaints presented four distinct and non-fungible causes of action: *first*, that NMFS violated the Endangered Species Act ("ESA") and Administrative Procedure Act ("APA") in issuing the 2014 biological opinion ("2014 BiOp"); *second*, that the agency's unlawful reliance on the 2014 BiOp in its ongoing authorization of the American lobster fishery violates its substantive ESA section 7(a)(2) duty to ensure against jeopardy; *third*, that the agency's ongoing authorization of the lobster fishery without a valid ITS violates ESA section 9's prohibition against causing unauthorized incidental take; and *fourth*, that the agency's ongoing authorization of the lobster fishery without incidental take authorization under section 101(a)(5)(E) of the Marine Mammal Protection Act ("MMPA") violates that statute and the APA. *See CBD et al. Complaint* ¶¶ 117–39, ECF No. 1; *CLF Complaint* ¶¶ 118–48, ECF No. 1,

Case. No. 1:18-cv-00283 (D.D.C); SJ Op. at 11–12 (summarizing four claims). Plaintiffs’ first and fourth claims arose under the APA, while their second and third claim arose under the ESA’s citizen-suit provision. Plaintiffs sought, *inter alia*, declaratory relief on all four claims pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202. Plaintiffs and Federal Defendants briefed all four claims on cross-motions for summary judgment. *See* ECF Nos. 66, 83 (Plaintiffs); ECF Nos. 79, 86 (Federal Defendants).

On April 9, 2020, this Court granted Plaintiffs’ motion for summary judgment, holding that the 2014 BiOp violates the ESA because it did not include a lawful ITS as required by the statute and its implementing regulations. SJ Op. at 17–19. The Court held that NMFS’s “failure to include an ITS in its 2014 BiOp after finding that the American lobster fishery had the potential to harm the North Atlantic right whale at more than three times the sustainable rate is about as straightforward a violation of the ESA as they come.” *Id.* at 19. The Court limited itself to addressing “only one part of Count I.” *Id.* at 15. Although the Court found “no need to engage in Plaintiffs’ other arguments as to why the 2014 BiOp violated the ESA,” *id.* at 19, it cautioned that “NMFS would do well to adhere to *all* of the Act’s requirements in any future BiOps.” *Id.* While the Court granted Plaintiffs’ motion for summary judgment, *id.* at 20; ECF No. 90, the Opinion is silent as to the merits of Plaintiffs’ remaining three claims.

In its subsequent Remedy Opinion issued on August 19, 2020, the Court concluded that the agency’s legal error in omitting a lawful ITS from the 2014 BiOp was serious “because the actions taken were not statutorily authorized” and because the agency’s approach undermined “integral parts of the [ESA’s] statutory scheme.” Remedy Op. at 10, 11 (citations omitted). Accordingly, the Court vacated the 2014 BiOp and stayed vacatur until May 31, 2021 to give NMFS time to complete its new rulemaking to reduce the risk of right whale entanglements in

lobster gear and issue a lawful biological opinion. *Id.* at 2. The Remedy Opinion addressed only the next steps to be taken on the 2014 BiOp ruled unlawful under Count 1. Noting that “[t]he agency intends to issue a new BiOp (presumably including an ITS this time, if required),” the Court assumed that “the new rule and BiOp will moot—and should redress—Plaintiffs’ claims in this action, including those on which judgment has not yet been entered, all of which pertain to [NMFS’s] authorization and management of the lobster fishery under the current regulatory regime analyzed in the 2014 BiOp.” *Id.* at 7 (cleaned up).

FACTUAL BACKGROUND

I. New Information Reveals the Increasingly Dire Status of Right Whales and the Role Entanglements Are Playing in Their Demise

As this Court is aware, the North Atlantic right whale is a critically endangered species that is threatened by the numerous harmful effects of entanglements in commercial fishing gear as well as vessel strikes. *See, e.g.*, SJ Op. at 9–10; Remedy Op. at 1. Since January 2018, when Plaintiffs filed suit, there have been 17 right whales confirmed killed and 13 documented serious injuries in the U.S. and Canada.¹ Entanglements were responsible for the majority of the incidents in which NMFS identified the cause. As alarming as these numbers are in their own right, the agency’s leading right whale population biologist co-authored a paper published in early 2021 finding that, from 2010 to 2017, only 29 percent of right whale mortalities were observed, and that “cryptic [i.e., unobserved] deaths due to entanglements significantly outnumber[] cryptic deaths from vessel collisions or other causes.”²

¹ See NMFS, *2017–2021 North Atlantic Right Whale Unusual Mortality Event*, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event> (updated June 2, 2021).

² Pace, R.M., III, et al. 2021. Cryptic mortality of North Atlantic right whales. *Conservation Science and Practice*, <https://conbio.onlinelibrary.wiley.com/doi/10.1111/csp2.346>.

Since the Court’s most recent decision in August 2020, other new information has come to light demonstrating that the species’ status is increasingly dire and that entanglements in commercial fishing gear are not just impeding the whale’s recovery but actively driving it toward extinction. For example, in October 2020, NMFS declared that, since 2011, approximately 218 right whales have been killed by fishing gear entanglements and vessel strikes—“a rate of roughly 24 whale deaths per year.” *See* Status Report at 2, ECF No. 128. NMFS also stated that its preliminary estimate of the number of right whales alive in January 2019 is 366 right whales, and that it preliminarily revised its original estimate of the number of right whales alive in January 2018 from 412 down to 383 right whales. *Id.* Scientists from the New England Aquarium subsequently released a new estimate for the right whale population at the end of 2019, finding the population “stands at just 356” individuals. *Id.* at 3. These scientists now believe there are roughly 70 breeding females in the population and that low birth rates coupled with whale deaths “means that there could be no females left in the next 10 to 20 years.” *Id.*

In light of this new information—and NMFS’s continued failure to take immediate action to protect right whales from entanglement—in December 2020, Plaintiffs filed an emergency rulemaking petition, requesting that the agency (1) declare that deaths and serious injuries of right whales from commercial fisheries are having, or are likely to have, an immediate and significant adverse impact on the species; and (2) take certain measures to help alleviate the emergency, including implementing emergency closures to fishing with static vertical buoy lines in important right whale habitat.³ In the petition, Plaintiffs highlighted that right whale mortality

³ CBD et al., *Emergency Petition to the National Marine Fisheries Service to Take Action under the Marine Mammal Protection Act to Protect Critically Endangered North Atlantic Right Whales from Death and Serious Injury in Commercial Fishing Gear*, Dec. 2020, https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/2020-12-02-Center-et-al-NARW-MMPA-Emergency-Petition.pdf.

and serious injury in commercial fishing gear is not only having a significant adverse impact on the species, but that each entanglement is unlawful because NMFS has not authorized such “take” under either the ESA or the MMPA. NMFS has not responded to Plaintiffs’ petition.

In January 2021, NMFS issued a draft biological opinion on the operation of ten federal fisheries in the Atlantic Ocean, including the lobster fishery. *See* Monsell Decl., Ex. 2.⁴ The draft biological opinion concluded that the lobster fishery currently kills and seriously injures right whales in both state and federal waters, and would continue to do so even after the full implementation of the forthcoming rule to amend the Atlantic Large Whale Take Reduction Plan (“Plan”) under the MMPA. *Id.* at 230. The draft biological opinion failed to include a draft ITS for this lethal take. *See id.* at 390–91.

Plaintiffs submitted extensive comments on the draft biological opinion in February 2021. Those comments stated, *inter alia*, that the draft biological opinion improperly failed to include an appropriate ITS for the lethal take of right whales that NMFS admits would occur in the lobster fishery. Monsell Decl., Ex. 3 at 42–46. The comments further indicated that, should NMFS fail to rectify this error in the final opinion—or to implement additional mitigation measures that drive right whale mortality and serious injury to zero—NMFS would violate the Court’s Opinion and Order on summary judgment. *See id.*

Additionally, in March 2021, NMFS published a report in which it reiterated its prior conclusion that the right whale is one of nine marine species whose extinction is almost certain

⁴ NMFS batched all ten fisheries into one consultation, rather than consulting on a fishery-by-fishery basis. *See* Ex. 1 at 7. While the Jonah crab fishery was established as a separate fishery in 2015, Jonah crabs were historically harvested as incidental catch in the lobster fishery. *Id.* at 5. Targeted fishing of Jonah crab is currently restricted to fishers with lobster permits. *Id.* Plaintiffs refer to the Jonah crab and American lobster fisheries as the lobster fishery.

in the immediate future if existing threats are not dramatically reduced.⁵ In the report, NMFS also concluded that protecting right whales from entanglement in fishing gear is the number one priority for saving the species.

II. The 2021 Biological Opinion

Against this backdrop, the agency issued its final 2021 BiOp in May 2021. This opinion concludes, *inter alia*, that ten federal fisheries will not jeopardize the continued existence of right whales but will continue to result in their death and serious injury. In particular, it concludes that trap/pot gear in state and federal waters currently kills or seriously injures 7.57 right whales per year and will continue to kill or seriously injure 3.17 right whales per year even following the full implementation of the forthcoming rule amending the Plan. Ex. 1 at 226.⁶ The 2021 BiOp expects this take to come primarily from the lobster fishery. *See id.* at 226–27 (noting that the lobster fishery represents “the vast majority of the gear in U.S. federal waters, and we expect entanglements in other federal trap/pot gear to be rare.”).

Nevertheless, the 2021 BiOp fails to include a lawful incidental take statement for this lethal take.⁷ Instead, NMFS states that it is authorizing zero lethal take “because the lethal incidental take of ESA-listed whales has not been authorized under section 101(a)(5) of the

⁵ See NMFS, *Species in the Spotlight Priority Actions 2021-2025: North Atlantic Right Whale 1*, 4 (March 2021), https://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_NARightWhale-FINAL%20508.pdf.

⁶ The 2021 BiOp disavows responsibility for NMFS’s agency actions authorizing deaths and serious injuries in state waters by limiting the scope of the agency action to fisheries operating in federal waters under a federal permit. *See id.* at 6. Plaintiffs’ position is that this unlawfully narrows the agency action’s scope, but this legal deficiency is not at issue now.

⁷ For the first time, the agency has purported to include an ITS for the *non-lethal* take of right whales, even though NMFS has not authorized such take under the MMPA. *See* Ex. 1 at 390–91. The legality of the authorization of this non-lethal take is not at issue here.

MMPA” and that “[f]ollowing the issuance of such authorizations, NMFS may amend this Opinion to adjust lethal incidental take allowance for these species, as appropriate.” *Id.* at 390. This is the same rationale the agency provided in the 2014 BiOp on this point. *See* C1 26812 (Monsell Decl., Ex. 4).

ARGUMENT

I. The Court Has the Inherent Authority to Enforce Its Own Orders

“There is ‘no doubt’ that federal courts have continuing jurisdiction to protect and enforce their judgments.” *United States v. Baroid Corp.*, 346 F. Supp. 2d 138, 142 (D.D.C. 2004) (citing *Cent. of Ga. R.R. Co. v. United States*, 410 F. Supp. 354, 357 (D.D.C. 1976)). A court’s enforcement jurisdiction is grounded in “the interest of the judicial branch in seeing that an unambiguous mandate is not blatantly disregarded by parties to a court proceeding.” *Int’l Ladies’ Garment Workers’ Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984). Without such jurisdiction, “the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.” *Riggs v. Johnson Cty.*, 73 U.S. 166, 187 (1868). This general rule extends to the specific context of a court’s mandate issued to a federal administrative agency. “The exercise of this authority is ‘particularly appropriate’ when a case returns to a court on a motion to enforce the terms of its mandate to an administrative agency.” *Flaherty v. Pritzker*, 17 F. Supp. 3d 52, 55 (D.D.C. 2014) (citation omitted).

“A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991); *see also id.* at 42–44 (reciting courts’ broad inherent powers, including contempt, necessary to ensure “submission to their lawful mandates” and to punish “disobedience to the orders of the Judiciary”) (citations omitted). This includes the power “to set enforceable

deadlines both of an ultimate and an intermediate nature,” *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52 (D.D.C. 2006) (quoting *Nat. Res. Def. Council v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1974)), and extends, if necessary, to holding violators in contempt. *See Shillitani v. United States*, 384 U.S. 364, 370 (1966) (“There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt.”).

“The Court should grant a motion to enforce if a ‘prevailing plaintiff demonstrates that a defendant has not complied with a judgment against it.’” *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014) (citation omitted). “In determining whether an agency has complied with the terms of a remedial order on remand, the Court is guided not only by the text of that order but also by its relevant opinions.” *Anglers Conservation Network v. Ross*, 387 F. Supp. 3d 87, 93 (D.D.C. 2019) (citing *City of Cleveland v. Fed. Power Comm’n*, 561 F.2d 344, 346–47 (D.C. Cir. 1997)). Conversely, if a plaintiff “has received all relief required by that prior judgment, the motion to enforce is denied.” *Flaherty*, 17 F. Supp. 3d at 55 (citation omitted). “A motion to enforce the judgment does not provide a means for a court to reconsider its judgment.” *Resolute Forest Prods., Inc. v. United States*, 427 F. Supp. 3d 37, 41 (D.D.C. 2019).

II. NMFS Has Not Complied with the Court’s Opinions and Orders by Issuing a Lawful Biological Opinion with the Required Incidental Take Statement

The Court’s April 2020 summary judgment opinion identified a “straightforward” error in the 2014 BiOp: “the failure to include an ITS . . . after finding that the American lobster fishery had the potential to harm the North Atlantic right whale at more than three times the sustainable rate.” SJ Op. at 19. In particular, NMFS concluded that operation of the fishery could kill or seriously injure up to 3.25 right whales each year but failed to include an ITS authorizing and mitigating this take as required by the ESA. *See id.* at 10. Instead, NMFS stated that it was not authorizing take because

the incidental take of ESA-listed whales by the American lobster fishery has not been authorized under section 101(a)(5) of the MMPA. Because no ITS is included, no incidental [sic] take by the American lobster fishery is authorized under the ESA. Following the issuance of such authorizations, NMFS may amend this Opinion to include an incidental take allowance for these species, as appropriate.

C1 26812 (Ex. 4).

In litigation, NMFS defended its approach by claiming that, because the death and serious injury of right whales from the lobster fishery has more than a “negligible impact” on the species, the agency cannot authorize such take under the MMPA and therefore cannot authorize such take under the ESA. *See* SJ Op. at 16. NMFS claimed it reasonably chose to issue the 2014 BiOp without an ITS rather than not issue a biological opinion at all. *See id.*

The Court rejected this argument, holding that “the ESA and accompanying regulations plainly require an ITS, and they require that the ITS find that any take resulting from the proposed agency action will neither jeopardize the continued existence of the listed species nor run afoul of § 101(a)(5) of the MMPA.” *Id.* at 17. The Court further opined that “NMFS’s finding that the lobster fishery would have more than the ‘negligible impact’ allowed by § 101(a)(5) of the MMPA meant that the fishery violated § 7(b)(4) of the ESA” which “should have ended the agency’s inquiry.” *Id.* at 18.

The Court stated that where NMFS cannot make the relevant findings, “Defendants cannot rewrite the statute just because they do not agree with its consequences.” *Id.* It also held that the agency’s inclusion of the so-called “functional equivalent” of an ITS—a trigger for reinitiation of consultation—is not a lawful substitute and “does nothing to cure its violation of the [ESA.]” *Id.* at 18–19. At the remedy stage, the Court reiterated the agency’s legal error, concluding that “there is no question that the agency has violated the law and absolutely no possibility of the [agency action’s] survival on remand” and that this error undermined the basic

goal of the ESA to protect and recover endangered species. *See* Remedy Op. at 10–12 (citation omitted).

The Court accordingly vacated the 2014 BiOp but stayed vacatur until May 31, 2021 to give the agency time to issue a new rule amending the Atlantic Large Whale Take Reduction Plan and a new—and presumably lawful—biological opinion. *Id.* at 2. In giving NMFS until May 31, 2021 to comply (rather than the shorter timeframe Plaintiffs had requested), the Court noted that it “will look with considerable disfavor on any future requests by NMFS for even more time to complete the new rule and BiOp,” because NMFS had already delayed acting and there comes “a point when the court must ‘let the agency know, in no uncertain terms, that enough is enough.’” *Id.* at 18 (citations omitted). Notably, despite arguing to the Court that the agency required a longer timeframe because “analysis of the effects of the fisheries [on the right whale] . . . necessitates knowing what measures will be in the final rule,” *id.* at 6–7, NMFS did not issue the final rule to amend the Plan by May 31. Rather, it stated that it will not issue the final rule until at least September of this year. Status Report at 1–2, ECF No. 135-1.

Instead of issuing a biological opinion that complied with the ESA and the Court’s Opinions and Orders, NMFS issued the 2021 BiOp with the same “straightforward” violation of the ESA as the 2014 BiOp: the failure to include a lawful ITS after finding that the lobster fishery will continue to kill and seriously injure North Atlantic right whales. Specifically, the 2021 BiOp concludes that the lobster fishery in both state and federal waters currently kills or seriously injures an annual average of 7.57 right whales (3 in state fisheries and 4.57 in federal fisheries). Ex. 1 at 226, Tbl. 62 (Col. 2, “Estimated [mortality/serious injury] in trap/pot gear (60.4% Fed)”). Even after the implementation of forthcoming regulations amending the Plan, the 2021 BiOp concludes that the federal trap/pot fishery alone will continue to kill or seriously

injure 2.56 right whales each year, while the state trap/pot fisheries will continue to kill or seriously injure 0.61 right whales a year, for a total of 3.17 lethal takes annually, a rate nearly four times the species' potential biological removal ("PBR") level. *Id.* (Col. 4, "Remaining M/SI in trap/pot gear with measures implemented under the proposed rule").⁸ Yet NMFS did not include an ITS for this anticipated lethal take as required by the ESA.

In attempting to justify failing to include a lawful ITS once again, NMFS states that it is authorizing zero lethal take of right whales "because the lethal incidental take of ESA-listed whales has not been authorized under section 101(a)(5) of the MMPA. Following the issuance of such authorizations, NMFS may amend this Opinion to adjust lethal incidental take allowance for these species, as appropriate." Ex. 1 at 390. This is the same reasoning provided in the 2014 BiOp that the Court already rejected. *Compare id.* with C1 26812 (Ex. 4). And although the 2021 BiOp contains reasonable and prudent measures and terms and conditions, *see* Ex. 1 at 392–97, these measures cannot substitute for a lawful ITS, as this Court has already ruled. *See* SJ Op. at 19 ("Any non-ITS substitute, even one that fulfills one of several functions of an ITS, will not do."). In short, NMFS has failed to comply with the Court's Opinions and Orders on remand.

III. The Court Should Declare NMFS in Violation of the Court's Opinions and Orders and Order NMFS to Come into Compliance Within Sixty Days

This Court should declare NMFS in violation of its prior Opinions and Orders and command the agency to come into compliance with the ESA within 60 days. This is an appropriate remedy not only because of the agency's failure to correct the legal violation

⁸ NMFS, Stock Assessment Report, *NORTH ATLANTIC RIGHT WHALE (Eubalaena glacialis): Western Atlantic Stock* at 22 (Apr. 2020), https://media.fisheries.noaa.gov/dam-migration/2019_sars_atlantic_northatlanticrightwhale.pdf (stating the right whale's PBR is 0.8).

identified by this Court but also because of NMFS's well-documented history of issuing biological opinions on the operation of the lobster fishery without the required ITS for the lethal take of right whales those biological opinions acknowledged would occur. *See, e.g.*, Pls.' Summ. J. Mem. at 61, ECF No. 66-1 (describing agency's pattern of issuing biological opinions without ITSs for right whales); Pls.' Opp'n to Mot. to Stay at 13, ECF No. 71 (same). In other words, the agency's behavior "suggests a strategy of looking for ways to avoid the law's mandate as opposed to looking for a means of complying with the law," rendering this case one in which a motion to enforce is appropriate. *See Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Service*, 530 F. Supp. 2d 1126, 1127 (N.D. Cal. 2008) (noting the court's view that the agency "is in contempt of the law and the prior orders of this Court."). Indeed, courts regularly "respond[] to an agency's stubborn refusal to follow [a judicial] mandate or statutory provisions" by "directing agency action" to bring about compliance. *Local Joint Exec. Bd. of Las Vegas v. N.L.R.B.*, 657 F.3d 865, 873–74 (9th Cir. 2011) (listing cases).

NMFS cannot simply ignore the Court's Opinions and Orders because it disagrees with the analysis or because compliance would be inconvenient. As the Supreme Court has made clear, "[i]f a person to whom a court directs an order believes that order is incorrect, the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal." *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *see also Sierra Club v. EPA*, 479 F.3d 875, 884 (D.C. Cir. 2007) ("If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing en banc or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court."). NMFS did not seek a stay, file a motion for reconsideration, or otherwise seek to overturn the Court's holding. NMFS was bound to follow the Court's Opinions and Orders in completing the 2021 BiOp; it did not.

“[T]he usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand.” *Heartland Reg’l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29–30 (D.C. Cir. 2005). The necessary corollary must be that if the agency has not cured the problem identified by the court, it is not free to reinstate the original result on remand. This is not a case where the agency, faced with a remand for insufficient explanation of an action, supplied the additional explanation or facts necessary to support its decision adequately. *Cf. id.* at 29 (“In short, the agency complied with the judgment . . . by filling the analytical gap identified” by the court).

The Court did not remand and vacate the 2014 BiOp for additional explanation because of an analytical gap in the opinion’s reasoning but because the agency’s failure to include a lawful ITS “is about as straightforward a violation of the ESA as they come.” SJ Op. at 19. In the face of this clear and unambiguous ruling, the agency has again violated the ESA—and failed to comply with the Court’s Opinions and Orders—by omitting a lawful ITS for lethal take of right whales. The 2021 BiOp offers the same reasoning as its 2014 BiOp for why NMFS did not do so: because lethal take of right whales has not been authorized under section 101(a)(5)(E) of the MMPA. *See* Ex. 1 at 390; C1 26812 (Ex. 4). The Court has already rejected the argument that NMFS can choose to issue a biological opinion without an ITS for the lethal take of right whales because it has not authorized that take under the MMPA. *See* SJ Op. at 18. The Court specifically stated “that the alternative is to ‘decline to issue a BiOp entirely’ . . . does not change the requirements of the ESA,” particularly considering “[t]he plain intent of Congress in enacting the [ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* (citations omitted).

Yet NMFS “ha[s] moved forward as though the Court instead accepted [its] argument” that the ESA permits it to issue a biological opinion without the legally required ITS. *See Oceana v. Ross*, No. 2:17-cv-05146-RGK-JEM, 2020 WL 5239197, at *3 (C.D. Cal. Jan. 8, 2020). The agency’s failure to “compl[y] with a judgment entered against it” means the Court should grant Plaintiffs’ motion to enforce. *Sierra Club*, 61 F. Supp. 3d at 39 (citations omitted). To ensure NMFS finally complies with the law, the Court should issue an order “specify[ing] both the statutory provision according to which it must act and the timeline according to which it must do so.” *Oceana*, 2020 WL 5239197 at *4 (giving the agency 30 days to come into compliance); *see also Oceana v. Ross*, 359 F. Supp. 3d 821, 831 (N.D. Cal. 2019) (granting the plaintiff’s motion to enforce the judgment and ordering NMFS to issue a new rule that complied with the law within 90 days); *Int’l Ladies’ Garment Workers’ Union*, 733 F.2d at 923 (stating that if the district court determines an agency “violated the express terms of our mandate, the court must act forthwith to enforce the mandate and require the [agency] to comply with its terms.”).

Ordering NMFS to act within 60 days is not only well within the Court’s power but is necessary to remedy the agency’s pattern of delaying actions to protect right whales from entanglements in fishing gear, *see Remedy Op.* at 18; *see also* ECF No. 135-1 at 1–2 (agency statement that it will not issue the final rule to amend the Plan until at least September 2021); the agency’s repeated failure to comply with the plain requirements of the ESA; and the agency’s treatment of this Court’s Opinions and Orders as mere suggestions rather than mandatory directives. Plaintiffs respectfully request the Court grant this motion to enforce to ensure that NMFS must finally comply with the ESA and the Court’s Opinions and Orders.

IV. The Court Should Deny Federal Defendants' Motion for Entry of Judgment Because Plaintiffs' Claims Are Not Moot

Plaintiffs oppose Federal Defendants' motion for entry of judgment pursuant to Fed. R. Civ. P. 58(d), ECF No. 136, as premature. "The sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal under 28 U.S.C. § 2107 begins to run." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978); *see also Diamond by Diamond v. McKenzie*, 770 F.2d 255, 230–31 (D.C. Cir. 1985). Because NMFS has neither issued a lawful ITS under the ESA nor separately issued an MMPA section 101(a)(5)(E) incidental take authorization, Plaintiffs' first, third, and fourth claims have neither been fully adjudicated nor mooted and are not ripe for appeal. The Court should deny Federal Defendant's motion.

The motion's bare-bones 13-paragraph recitation apparently assumes that Plaintiffs' first, third, and fourth claims are moot without establishing or applying relevant legal standards. *See* ECF No. 136. Its assumptions are unfounded.

First, as discussed above, this Court has jurisdiction to resolve the question of whether NMFS has in fact complied with its Opinions and Orders on Plaintiffs' first claim. Until Plaintiffs' motion to enforce is decided, their first claim is not completely adjudicated.

Second, NMFS cannot meet the heavy burden of proving Plaintiffs' unadjudicated third and fourth claims are moot. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (cleaned up). A case may become moot if two conditions are satisfied: (1) "it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur," and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* (cleaned up). "When both conditions are

satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.” *Id.* “The burden of demonstrating mootness is a heavy one.” *Daingerfield Island Protective Soc’y v. Lujan*, 920 F.2d 32, 36 (D.C. Cir. 1990) (cleaned up); *see also Friends of the Earth v. Laidlaw Env’tl. Servs.*, 528 U.S. 167, 190 (2000) (describing burden of demonstrating mootness through voluntary cessation as “formidable”).

Conversely, a case is not moot if there is even “some trace of continuing injury” to the plaintiff. *Kennecott Utah Copper Corp. v. U.S. Dep’t of the Interior*, 88 F.3d 1191, 1207 (D.C. Cir. 1996) (citation omitted). Likewise, if there exists a “partial remedy” that the court can grant—even if it is one that is not “fully satisfactory”—the court may not dismiss on mootness grounds. *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (citation omitted); *see also United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (“The availability of a partial remedy . . . is sufficient to prevent this case from being moot.”).

NMFS cannot meet either of the two conditions for demonstrating that the issuance of its 2021 BiOp has mooted Plaintiffs’ third and fourth claims. As discussed above, NMFS has not issued a lawful ITS with its 2021 BiOp to moot Plaintiffs’ third claim. Neither has it separately issued any incidental take authorization under MMPA section 101(a)(5)(E) for the lobster fishery (a rulemaking independent of the ESA section 7 consultation process) to moot Plaintiffs’ fourth claim. Thus, NMFS has not cured its violations of the ESA and MMPA alleged in Plaintiffs’ third and fourth claims. Plaintiffs’ harms stemming from these ongoing violations continue unabated. This Court retains its full suite of remedial options for these violations, including granting Plaintiffs’ instant motion to enforce or proceeding to rule on these fully-briefed claims and granting declaratory or other statutory or equitable relief. Plaintiffs therefore retain their

legally cognizable interest in this Court's adjudicating the underlying questions of fact and law on both claims.

Even if it could be credibly argued that Plaintiffs' third claim had been mooted by the 2021 BiOp, this would clearly fall into the "capable of repetition yet evading review" exception to the mootness doctrine. *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321–22 (D.C. Cir. 2009). That exception requires demonstrating that "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* at 322 (cleaned up); *see also id.* ("By evading review the Supreme Court has meant evading Supreme Court review.") (cleaned up). Both conditions obtain here, if NMFS is allowed to engage in an infinite loop of issuing new, purportedly "superseding" biological opinions, ECF No. 136 ¶ 11, without lawful ITSs while evading the resolution of Plaintiffs' section 9 claim. *See supra* p. 14 (demonstrating agency's repeated failures to include ITSs for lethal take of right whales in biological opinions). "This, together with a public interest in having the legality of [NMFS's] practices settled, militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Plaintiffs agree only that their second claim, explicitly premised on the agency's unlawful reliance on the 2014 BiOp to fulfill its ongoing substantive duty to avoid jeopardy, has been mooted by the 2021 BiOp and may be dismissed with prejudice. *See, e.g.*, ECF No. 1 ¶ 128. However, the time for the Court to take that action is when all of Plaintiffs' claims have been fully adjudicated and a record for appellate review established. Plaintiffs oppose Federal Defendants' motion for entry of judgment as premature.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion to enforce and deny Federal Defendants' motion for entry of final judgment. Proposed orders are submitted herewith.

Respectfully submitted this 16th day of June, 2021.

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