

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DISTRICT 4 LODGE OF THE)
INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE)
WORKERS, LOCAL LODGE 207,)
f/k/a, IAMAW MAINE LOBSTERING)
UNION – LOCAL 207 *et al.*,)

Case 1:21-cv-00275-LEW

Plaintiffs,)

v.)

GINA M. RAIMONDO, *in her official*)
capacity as Secretary, United States)
Department of Commerce *et al.*,)

Defendants,)

and)

CENTER FOR BIOLOGICAL)
DIVERSITY, CONSERVATION LAW)
FOUNDATION, and DEFENDERS OF)
WILDLIFE,)

[Proposed] Intervenor-Defendants.)
_____)

**MOTION TO INTERVENE OF CENTER FOR BIOLOGICAL DIVERSITY,
CONSERVATION LAW FOUNDATION, AND DEFENDERS OF WILDLIFE WITH
SUPPORTING MEMORANDUM OF LAW**

EXPEDITED CONSIDERATION REQUESTED

The Center for Biological Diversity, Conservation Law Foundation, and Defenders of Wildlife (collectively, “Conservation Groups”) submit this combined Motion to Intervene as Defendants and Memorandum in Support. Conservation Groups will provide a perspective the existing parties to this case cannot—that of organizations dedicated to the preservation of imperiled species, including the critically endangered North Atlantic right whale. Conservation Groups meet the criteria for intervention as of right: this motion is timely; they have “significantly protectable” interests in the final rule affecting right whales; the disposition of this case will impair their ability to protect those interests; and Defendants do not adequately represent those interests. Fed. R. Civ. P. 24(a)(2). In the alternative, Conservation Groups seek permissive intervention. Fed. R. Civ. P. 24(b)(1)(B). Given Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 10, Conservation Groups respectfully expedited consideration.

INTRODUCTION

Plaintiffs challenge a final rule issued by the National Marine Fisheries Service (“NMFS”) under the Marine Mammal Protection Act (“MMPA”). 86 Fed. Reg. 51,970 (Sept. 17, 2021) (“Final Rule”). The Final Rule amends the Atlantic Large Whale Take Reduction Plan to include new measures purporting to reduce North Atlantic right whale mortality and serious injury¹ from operation of the lobster fishery by approximately 60 percent below current levels. The right whale is critically endangered species, with only 368 whales left as of January 2019. *See* Pls.’ Exhibit A at 82–83, ECF No. 1-1 (NMFS 2021 Biological Opinion, hereinafter “Ex. A”).² And the population has only declined since. *See, e.g.*, Pls.’ Exhibit D at 131, ECF

¹ A “serious injury” is “any injury that will likely result in mortality.” 50 C.F.R. § 229.2.

² Citations are to the original page numbers for each document, not the ECF-generated numbers.

No. 1-4 (NMFS 2021 Final Environmental Impact Statement, hereinafter “Ex. D”).

Entanglement in commercial fishing gear is the primary threat to the right whale’s continued existence. *See* Ex. A at 83–85. NMFS has determined that, on average, U.S. fisheries currently entangle 15.125 percent of the right whale population each year (or roughly 55 whales per year based on a population of 368). Ex. A at 223. NMFS has further determined that this level of entanglement results in the death or serious injury of 7.7 right whales per year. *Id.* Of these, the lobster fishery is responsible for 7.57 deaths each year. *Id.* at 223–24.

The MMPA required NMFS to amend the Atlantic Large Whale Take Reduction Plan because mortality and serious injury of right whales in commercial fishing gear exceeds the whale’s potential biological removal level and vastly exceeds insignificant levels approaching a zero mortality and serious injury rate. 16 U.S.C. § 1387(f)(2), (5)(A), (7)(F).³ As relevant here, the Final Rule establishes a new restricted area roughly thirty miles off the coast of Maine (“LMA 1 Restricted Area”). 50 C.F.R. § 229.32(c)(6). Fishing for lobster with static vertical buoy lines is prohibited in this area from October 1 through January 30. *Id.*⁴ NMFS included this new restricted area in the Final Rule because the best available science demonstrates that the area is a hotspot where right whale and vertical lines co-occur at significant levels, placing the whales at increased risk of entanglement. *See, e.g.*, 86 Fed. Reg. at 51,997. This closure provides much-needed protections to right whales.

³ “Potential biological removal level” means “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.” 16 U.S.C. § 1362(20). NMFS defines “insignificant levels approaching a zero mortality and serious injury rate” to mean “10 percent of the Potential Biological Removal level for a stock of marine mammals.” 50 C.F.R. § 229.2.

⁴ The Final Rule specifies that the LMA 1 Restricted Area will be effective 30 days from publication of the Final Rule in the Federal Register. The Final Rule published in the Federal Register on September 17, 2021, 86 Fed. Reg. 51,970, meaning the LMA 1 Restricted Area goes into effect this year on October 18, 2021.

Yet if Plaintiffs succeed, highly imperiled right whales could lose these important protections. This would impair Conservation Groups' interest in protecting the species. Conservation Groups have a long history of advocating on behalf of right whales to address the existential threat of entanglements. Indeed, Conservation Groups have challenged the Final Rule for failing to include sufficient protections to drive serious injury and mortality to below MMPA-mandated levels. *See* ECF No. 170, *Ctr. for Biological Diversity v. Raimondo*, Case No. 18-112-JEB (D.D.C. filed Sept. 17, 2021). Conservation Groups are therefore entitled to intervene.

I. Conservation Groups Are Entitled to Intervene as a Matter of Right

To intervene as a matter of right under Rule 24(a)(2) the movant must: (1) file a timely application; (2) make a showing of an interest in the action; (3) demonstrate that its ability to protect that interest may be impaired by the disposition of the action; and (4) show that the interest is not protected adequately by parties to the action. *R&G Mortgage. Corp v. Fed. Home Loan Mortgage. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). Each of these factors should be liberally construed in favor of intervention. *Northrop Grumman Info. Technology, Inc. v. U.S.*, 74 Fed. Cl. 407, 412 (Fed. Cl. 2006). Conservation Groups satisfy all the criteria for intervention as of right.

A. Conservation Groups' Motion Is Timely

The timeliness of a motion to intervene "is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). The First Circuit has set forth four factors that determine the timeliness of a motion to intervene under Fed. R. Civ. P. 24(a):

- (i) the length of time that the putative intervenor knew or reasonably should have known that his interests were at risk before he moved to intervene;
- (ii) the prejudice to existing parties should intervention be allowed;
- (iii) the prejudice to the putative intervenor should intervention be denied; and
- (iv) any special circumstances militating for or against intervention.

R&G Mortg. Corp., 584 F.3d at 7. Conservation Groups have timely moved to intervene.

Plaintiffs filed their complaint in this matter one week ago, on September 27, 2021. Plaintiffs filed a combined Motion for Temporary Restraining Order and Preliminary Injunction (“TRO/PI”) on October 3, 2021. ECF No. 10. Conservation Groups are prepared to meet any schedule imposed in this case, including on Plaintiffs’ TRO/PI. Therefore, no prejudice, delay, or inefficiency will result from Conservation Groups’ intervention and their motion is timely.

B. Conservation Groups Have Significantly Protectable Interests in this Action

A party seeking to intervene must have an interest in the pending litigation that is significantly protectable. *Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992). While the First Circuit has said “that there is no precise and authoritative definition of the interest required to sustain a right to intervene,” it has emphasized “that the intervenor’s claims must bear a sufficiently close relationship to the dispute between the original litigants and that the interest must be direct, not contingent.” *Id.* at 42 (citation and quotation marks omitted). An environmental group’s active participation in enforcing the relevant statute and implementing relevant ongoing advocacy programs constitute an “undoubtedly, ‘significantly protectable’” interest. *Tutein v. Daley*, 43 F. Supp. 2d 113, 127 (D. Mass. 1999) (quoting *Conservation Law Found.*, 966 F.2d at 41).

Plaintiffs seek to have the LMA 1 Restricted Area declared arbitrary and capricious and its implementation suspended. Pls.’ Compl. at 38, ECF No. 1. Consequently, the viability of critical measures that will reduce entanglement risk to right whales is at stake.

Conservation Groups have a long history of actively advocating for protecting right whales from numerous threats, including fishing gear entanglements. These efforts include administrative and legislative advocacy, litigation, and participation as appointed members of the Atlantic Large Whale Take Reduction Team. Declaration of Miyoko Sakashita ¶¶ 8–13;

Declaration of Sean Mahoney ¶¶ 6–8; Declaration of Michael Senatore ¶¶ 8–12, 15.

Conservation Groups work to protect the right whale by reviewing scientific data and agency information, petitioning NMFS for increased protections, and monitoring and commenting on activities that have the potential to harm right whales. For example, Conservation Groups have petitioned NMFS to implement various protections for the right whale under the Endangered Species Act and MMPA. *See, e.g.*, Sakashita Decl. ¶¶ 8, 12; Senatore Decl. ¶¶ 8, 10, 17. Further, they actively participated in the development of the Final Rule through participating in Atlantic Large Whale Take Reduction meetings and commenting on the proposed rule and related draft documents. Sakashita Decl. ¶¶ 13–17; Mahoney Decl. ¶ 6; Senatore Decl. ¶ 18.

In addition, Conservation Groups have repeatedly sued the federal government, including NMFS, for permitting activities that increase threats to right whales or failing to take sufficient action to protect the species. Sakashita Decl. ¶¶ 8, 11; Mahoney Decl. ¶ 7. These cases include suing NMFS for legal violations related to right whale entanglements in fishing gear, which have forced the agency to amend its fisheries management regulations or comply with relevant statutory requirements. *See, e.g., Conservation Law Found. v. Evans*, Case No. 00-12069-DPW (D. Mass. 2001); *Conservation Law Found. v. Ross*, No. 18-1087-JEB (D.D.C. 2018). Indeed, in 2018 Conservation Groups successfully challenged NMFS’s authorization and management of the lobster fishery given its impact on right whales. *See Ctr. for Biological Diversity v. Ross*, Case No. 1:18-cv-00112 (D.D.C. 2018). Conservation Groups have also been involved in a multi-year effort to obtain congressional funding through new legislative authorizations and annual appropriations for new technologies that would decrease the number of vertical lines in the water to reduce entanglement risk. *E.g.*, Mahoney Decl. ¶ 8; Senatore Decl. ¶ 19.

Conservation Groups each have members that live in and regularly visit areas along the

U.S. East Coast, including Maine and Massachusetts, where right whales are known to occur, to enjoy, study, photograph, and observe the whales. *See, e.g.*, Declaration of Molly Bartlett ¶¶ 3, 14; Declaration of Viola Patek ¶¶ 12–13, 16–17; Declaration of Sharon Young ¶¶ 4, 5, 21. These individuals intend to regularly engage in these activities in the future. Bartlett Decl. ¶ 10; Patek Decl. ¶ 10; Young Decl. ¶¶ 4, 8. Thus, Conservation Groups’ interests here are not only direct and protectable but innately tied to their missions and members, such that these interests would be adversely affected if Plaintiffs are successful in this action.

C. The Disposition of this Action May Impair Conservation Groups’ Interests

Conservation Groups’ interests would be adversely affected if Plaintiffs prevail. Rule 24(a)(2) does not require that the applicant’s interests be legally impaired; rather, the Court must determine “whether disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect its interests.” *Conservation Law Found.*, 966 F.2d at 42; *see also Nat. Res. Defense Council v. Nuclear Reg. Comm’n*, 578 F.2d 1341, 1345 (10th Cir. 1978) (“the court is not limited to consequences of a strictly legal nature.”); *Cal. ex. rel. Lockyer v. U.S.*, 450 F.3d 436, 441 (9th Cir. 2006) (“a party has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.”).

Conservation Groups’ interests and efforts in actions to protect and prevent the right whale’s extinction—and more specifically, in the Final Rule’s measures to reduce mortality and serious injury in commercial fishing gear—are substantial and longstanding. Petitioning for rulemakings protecting right whales, lobbying Congress for funding, and participating on the Atlantic Large Whale Take Reduction Team are examples of Conservation Groups’ efforts. Consequently, any disposition that invalidates or modifies elements of the Final Rule creates significant risks that the interests of Conservation Groups and their members in protecting the

right whale will be impaired.

NMFS describes the right whale’s situation as a “conservation crisis” and states that “protecting every individual is a top priority. Right whales cannot withstand continued losses of mature females—we have reached a critical point.” NMFS, Immediate Action Needed to Save North Atlantic Right Whales, July 3, 2019;⁵ *see also* NMFS, 10 Things You Should Know About North Atlantic Right Whales, Oct. 17, 2019 (the right whale’s “survival . . . depends on no more than one whale death per year.”).⁶ And it is not just lethal entanglements that are a concern. The sublethal impacts of entanglement—especially on a whale’s ability to reproduce—“may be equally harmful to the whale population.” *Conservation Law Found. v. Ross*, 422 F. Supp. 3d 12, 32 (D.D.C. 2019). As that decision explained, “[b]oth lethal and sublethal effects of entanglement bring the species ever closer to extinction, from which there is, of course, no return.” *Id.* at 34.

NMFS established the LMA 1 Restricted Area to protect right whales in what the best available science demonstrates is a co-occurrence “hotspot” where both right whales and fishing effort overlap significantly from October to January. 86 Fed. Reg. at 51,997; *see also* Ex. D at 78 (describing NMFS’s “hotspot” approach); *id.* at 81 (stating right whale density model demonstrates whale presence in area during late fall and early winter while acoustic data confirms whale presence in the area in recent years). Right whales are at heightened risk of entanglement in this area between October and January. NMFS concluded that “the LMA 1 Restricted Area provides significant risk reduction for right whales.” 86 Fed. Reg. at 51,997. If

⁵ Available at: <https://www.fisheries.noaa.gov/leadership-message/immediate-action-needed-save-north-atlantic-right-whales>.

⁶ Available at: <https://www.fisheries.noaa.gov/feature-story/10-things-you-should-know-about-north-atlantic-right-whales>.

Plaintiffs are successful, the LMA 1 Restricted Area could be preliminarily or permanently enjoined, increasing the risk right whales will become entangled. This will impair Conservation Groups' interests in protecting right whales from entanglements and conserving this critically endangered species. *See, e.g.,* Young Dec. ¶¶ 29, 33. Conservation Groups satisfy the “impairment” test for intervention of right.

D. Conservation Groups' Interests Are Not Adequately Represented by Existing Parties

The final element for intervention of right is whether there is a possibility that the existing parties will not adequately represent the interests of the applicant. The burden of demonstrating inadequate representation is “minimal”—Conservation Groups need only show their interests “may” not be adequately represented. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) (“[A] movant ‘ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation[.]’”) (citation omitted).

Plaintiffs—lobster industry participants who seek to invalidate an important conservation measure in the Final Rule—do not represent Conservation Groups' interests. And Defendants' interests diverge in several ways that could affect this litigation.

Although NMFS and Conservation Groups presumably share one objective in this lawsuit—rejecting Plaintiffs' effort to enjoin implementation of the LMA 1 Restricted Area—that is not assured at this point. *Cf., e.g., NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (“[A] shared general agreement [between intervenors and the agency] that the [agency action] should be lawful does not necessarily ensure agreement in all particular respects about what the law requires.”); *Am. Great Lakes Ports Ass'n v. Zukunft*, No. CV 16-1019 (RC), 2016 WL 8608457, at *4 (D.D.C. Aug. 26, 2016) (prospective intervenor's interests may not be

adequately represented because government might decide to settle with the plaintiff).

Moreover, the ultimate objectives and positions of Conservation Groups and Defendants differ. Conservation Groups have also challenged the Final Rule (and the 2021 Biological Opinion not at issue here). Conservation Groups allege—contrary to Plaintiffs’ claims here and to NMFS’s presumptive position—that the Final Rule violates the MMPA and other laws by *not* adopting sufficient measures to reduce right whale death and injury from the lobster fishery to MMPA-mandated levels. Given the dueling litigation regarding the Final Rule, it not guaranteed NMFS will advance the interests of Conservation Groups here.

Additionally, Conservation Groups have had to sue NMFS repeatedly over the years to force the agency to comply with its statutory obligations to protect right whales from various threats, including entanglements in commercial fishing gear. *Supra* p. 5. As other courts have held in comparable circumstances, considering this history, it is unlikely NMFS will make identical arguments or adequately represent Conservation Groups’ interests. *See County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980) (“there is further reason to doubt that the [agency] will fully protect [the applicant’s] interest . . . in light of the fact that the [agency] began its rulemaking only reluctantly after [the applicant] brought a law suit against it.”); *Coal. of Ariz./N.M. Counties*, 100 F.3d 837, 845 (10th Cir. 1996) (agency’s “ability to adequately represent [the applicant] . . . is made all the more suspect by its reluctance in protecting the [species], doing so only after [the applicant] threatened, and eventually brought, a law suit to force compliance with the Act”). Based on this history, it is possible that NMFS will interpret its legal obligations differently and take positions based on those interpretations that are inconsistent with those of Conservation Groups. Conservation Groups’ distinct perspective on NMFS’s legal obligations with respect to the right whale will offer necessary elements to the proceedings that

other parties will neglect. *See U.S. v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002).

Finally, the government must represent the “broad public interest,” while Conservation Groups have a more discrete, particularized interest in the protection and recovery of imperiled species such as the right whale. *See Conservation Law Found.*, 966 F.2d at 44 (government entity “charged by law with representing the public interest of its citizens might shirk its duty were it to advance the narrower interest of a private entity.”). These differences may prevent NMFS from adequately representing Conservation Groups’ interests. Conservation Groups should be granted leave to intervene as of right.

II. Alternatively, Conservation Groups Should Be Granted Permissive Intervention

If the Court denies intervention as of right, Conservation Groups request in the alternative leave to intervene by permission under Rule 24(b). That rule provides that “[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). The First Circuit has noted that the threshold for permissive intervention is low, and that once the threshold requirements are satisfied, the district court may “consider almost any factor rationally relevant.” *Dagget v. Comm’n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999). As discussed above, Conservation Groups’ motion is timely and there will be no prejudice to existing parties. Further, Conservation Groups’ defenses address the exact matter challenged by Plaintiffs, and thus share a common question of law or fact.

CONCLUSION

Conservation Groups respectfully request that the Court grant them leave to intervene as of right under Rule 24(a), or alternatively, permissive intervention under Rule 24(b).

Respectfully submitted this 4th day of October, 2021,

/s/ Emily Green

Emily K. Green, ME Bar No. 005095
Conservation Law Foundation
53 Exchange St., Suite 200
Portland, ME 04101
(207) 210-6439
egreen@clf.org

Erica A. Fuller*
Conservation Law Foundation
62 Summer St.
Boston, MA 02110
(617) 850-1754
efuller@clf.org

Kristen Monsell*
Center for Biological Diversity
1212 Broadway, Ste. 800
Oakland, CA 94612
(510) 844-7137
kmonsell@biologicaldiversity.org

Jane P. Davenport*
Defenders of Wildlife
1130 17th St. NW
Washington, DC 20036
(202) 722-3274
jdavenport@defenders.org

*Certification for admission pro hac vice to follow.

Counsel for Intervenor-Defendants