



MAINE

Lobstermen's Association, Inc.

2 Storer St, Ste 203 * Kennebunk, ME 04043
207-967-4555 * 866-407-3770 * www.maine lobstermen.org

Center for Biological Diversity v. Ross
U.S. District Court for the District of Columbia
August 19, 2020

The court orders that:

- 1) The portion of the 2014 Biological Opinion on the American lobster fishery pertaining to the North Atlantic right whale is hereby VACATED and REMANDED to the agency;
- 2) Vacatur is STAYED until May 31, 2021;
- 3) Plaintiffs request for an injunction prohibiting the National Marine Fisheries Service from authorizing the use of static vertical lines in the proposed Southern New England Restricted Area is DENIED; and
- 4) Defendants shall submit status reports updating the Court on their progress toward new rules and a new BiOp beginning September 30, 2020, and every sixty days thereafter.

What does this Decision Mean for Maine's Lobster Fishery?

This is a positive outcome for the lobster fishery. The judge finds National Marine Fisheries Service (NMFS) proposed management schedule "reasonable" and has given the agency until May 31, 2021 to complete the rulemaking process that will result in new right-whale conservation measures and the issuance of a superseding Biological Opinion (BiOp). The lobster fishery will continue to operate during this time and the court will not impose any interim closures while the agency completes its work.

The judge has struck a delicate balance in holding NMFS accountable for fulfilling its mandate to aid the recovery of imperiled right whales without causing undo economic injury to the lobster industry. The judge writes, "The Court is also mindful that it owes some deference to NMFS's expert judgment that the situation for right whales, while precarious, does not require immediate action." Moreover, the judge accepted the industry's argument that closure of the fishery would impose severe economic hardship and was not needed to protect whales while new rules are being finalized.

Understanding the Judge's Order

Due to the highly endangered status of North Atlantic right whales and documented historic interactions with lobster gear, NMFS is required under the Endangered Species Act (ESA) to issue a BiOp and Incidental Take Statement (ITS) for right whales in order to permit the fishery. The BiOp and ITS include mitigation measures which meet the standards of both the ESA and the Marine Mammal Protection Act (MMPA) to ensure that the operation of the fishery will not jeopardize the existence of right whales or have more than a negligible impact on the species.

Order 1. *“The portion of the 2014 Biological Opinion on the American lobster fishery pertaining to the North Atlantic right whale is hereby VACATED and REMANDED to the agency”*

By vacating the 2014 Biological Opinion on the American lobster fishery pertaining to right whales, the judge has determined that it does not meet the requirements of the law and therefore is no longer valid. The judge has asked NMFS to issue a new biological opinion by remanding it back to the agency.

The judge writes:

“[T]here is little “doubt whether the agency chose correctly” in promulgating the 2014 BiOp without an ITS: it did not.”

“The agency has already explained why it did not include an ITS with the [2014] BiOp: although the text of the ESA and MMPA prohibited such exclusion, the agency believed it was preferable to issue the BiOp anyway rather than close the lobster fishery. The Court rejected that argument, and it is therefore “certain that the agency” cannot cure its errors on remand “because the actions taken were not statutorily authorized”.”

Order 2. *“Vacatur is STAYED until May 31, 2021”*

Given the dire consequence of vacating the 2014 Biological Opinion, which would remove NMFS’s authorization to permit the fishery, the judge stayed the effective date of vacatur thus allowing the Biological Opinion to remain in place while NMFS completes a new BiOp with an ITS for right whales. A critical decision point was whether the judge would require NMFS to complete the new rule and accompanying BiOp by January 31, 2021, as Plaintiffs proposed, or give the agency until May 31, 2021 as NMFS and industry intervenors requested.

The judge writes:

“If the stay expires before the new Plan and BiOp go into effect, the lobster fishery would presumably have to cease operating on February 1, 2021.”

“The agency, it should be noted, has previously used its emergency authority under section 118(g) of the MMPA [in 1997] to immediately implement interim right whale protective measures despite a new TRP rule being only a few months away. Here, though, NMFS has declined to use that power, concluding that the risk of entanglement of right whales in NMFS-controlled waters between January and May 2021 is not pronounced enough to warrant “emergency . . . action in an expedited timeframe with limited public involvement,” largely because lobster fishing decreases during those cold months.”

“[As] requested by the Government, the Court will stay vacatur until May 31, 2021 — the date by which NMFS promises the new superseding BiOp will be promulgated — there will be no period in which a BiOp is not in operation. Put another way, there should be no interim closure of the fishery. Vacatur plus a nine-month stay is also appropriate, in the Court’s equitable discretion, because it gives NMFS an incentive to complete the Plan amendments within the timeframe the agency has provided.”

Order 3. *“Plaintiffs request for an injunction prohibiting the National Marine Fisheries Service from authorizing the use of static vertical lines in the proposed Southern New England Restricted Area is DENIED”*

The plaintiffs asked the Court to prohibit NMFS from authorizing the use of fishing gear with vertical lines in an important new whale habitat south of Cape Cod in Massachusetts until NMFS has implemented the new whale rules. The court acknowledged that since lobstermen use vertical lines, this request would result in a year-round closure of an area roughly the size of Connecticut to lobster fishing. The industry associations raised concern that lobstermen would shift fishing gear resulting in an increase in gear density along the boundaries of the closure, making entanglement more likely.

The judge writes:

“The gear-shift dispute illustrates perfectly the reasons for the Court’s decision not to order the creation of the [closure] even in the face of likely irreparable harm. Such a decree would substitute the Court’s judgment for NMFS’s, even though the agency is the expert best positioned to judge whether a measure such as the SNERA closure would help at all, let alone be appropriate as a management tool. Under the MMPA, it is NMFS, not this Court, that Congress has tasked with making such judgments after engaging in the deliberate and deliberative Take Reduction Plan process. With that process close to fruition, it would not be in the public interest for the Court to unilaterally invent significant right-whale protective measures.”

Order 4. *“Defendants [NMFS] shall submit status reports updating the Court on their progress toward new rules and a new BiOp beginning September 30, 2020, and every sixty days thereafter”*

The judge writes:

“Although the Court therefore finds the May 31, 2021, deadline acceptable, it will look with considerable disfavor on any future requests by NMFS for even more time to complete the new rule and BiOp.”