UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MAN AGAINST XTINCTION ("MAX") a.k.a. RICHARD MAX STRAHAN,	)	Civil Action No. 19-cv-10639-IT
Plaintiff	)	16 September 2020
v.	)	
SECRETARY, MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS ("MEOEEA"), *et al.*	)	
Defendants	)	

MEMORANDUM IN SUPPORT OF
RENEWED MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff Man Against Xtinction, a.k.a. Richard Max Strahan, has been sounding the alarm of the Northern Right Whale's likely extinction at the hands of Defendants' lobsterpot and gillnet fishery licensing scheme for over 25 years. Massachusetts not only controls who is allowed to participate in these fisheries but also mandates how it is done, requiring the use of vertical buoy ropes (VBRs). As has become abundantly clear over the years, VBRs deployed in Massachusetts waters are the single greatest threat to the continued existence of the Northern Right Whale, one of the world's most endangered species. VBRs in Massachusetts waters also kill and harm other endangered species, including other whales and sea turtles. Massachusetts has consistently failed to stop these harms and has clearly demonstrated that it has no real plans or ability to stop them in the future.

By continuing to license these fisheries and require the use of VBRs in its waters, Massachusetts has made the intentional decision to favor lobster and gillnet fishing (and the people whose livelihoods depend on those activities) over whales and turtles. Perhaps this is a rational decision, and the lives or continued existence

of whales and sea turtles should not be allowed to get in the way of a fishing economy and culture that has existed in Massachusetts for hundreds of years. But that is not Massachusetts's decision to make.

Under the Endangered Species Act, if Massachusetts wants to continue to require the use of VBRs in state waters it must get permission from the federal government to do so. In response to this lawsuit, Massachusetts has finally, for the first time, sought that permission by applying for an incidental take permit (ITP). But the process will take years and there is no guarantee that an ITP it will be granted. If it is not, and there is every reason to believe that it will not (see footnote 2, below), Massachusetts can seek a special exception from the "God Squad" or perhaps try to change the law. But it cannot play God and make that decision itself.

It is perhaps unfathomable that an industry could be halted due to 400 or so whales that have virtually no economic value and that almost nobody ever sees. It seems almost unconscionable to allow this to happen now, during a pandemic, when so many people are hurting in so many ways. At the same time, it is perhaps also unfathomable that we could allow a great whale that calls our state home to simply vanish and stop existing; that we might be willing to have the blood of an entire species on our hands, to not do everything we can to keep from killing these creatures off. This is a moral dilemma.

It is not, however, a legal dilemma. The law is clear that Massachusetts's licensing scheme must end now. There is no basis for further delay; the

Commonwealth has had 25 years to comply with the law and it has failed. This Court cannot grant a permit for take of Northern Right Whales or Loggerhead Turtles; it cannot sanction Massachusetts's licensing scheme by allowing it to continue in any form. It can only call a halt. And it must do so now.

ARGUMENT

I. Procedural Background

Plaintiff filed his first Section 9 action against Massachusetts to stop its unpermitted take of Northern Right Whales caused by its lobsterpot and gillnet fishery licensing scheme in 1995. *Strahan v. Coxe*, 939 F. Supp. 963, 989 (D. Mass. 1996). As this Court recounts in detail in its April 30, 2020, Order, this lawsuit was followed by at least three others, in 2005 (*Strahan v. Diodati et al.,* No. 05-10140-NMG (D. Mass.)); in 2018 (*Strahan v. MEOEEA*, No. 18-cv-10392-DJC (D. Mass.)); and the present action, in 2019. See ECF No. 206, Order at pp. 5-9.

In response to Mr. Strahan's litigation efforts, Massachusetts has occasionally enacted various "protective measures" to supposedly prevent take to Northern Right Whales caused by VBRs. ECF No. 206, Order at p. 6; ["Judge Woodlock found that the additional protective measures undertaken, in part, through administrative rulemaking, transformed 'the factual predicates upon which this litigation proceeded'…"]; pp. 7-8 [Judge Gorton "further found that the efforts undertaken by the Massachusetts Defendants caused them to be 'at the forefront in taking regulatory steps to eliminate contact between whales and fishing gear, rendering the risk of entanglements 'nearly nonexistent'."] These measures largely accomplished Defendants' goals of first delaying the litigation and then avoiding

liability, with the ultimate purpose to allow the continued use of VBRs in Massachusetts waters. But, as this Court observed, these supposed measures have failed to prevent the concomitant entanglement, harm, killing, and take of endangered Northern Right Whales. ECF No. 206, Order at p. 20.

Plaintiff filed this action *in propria persona* on April 4, 2019. ECF No. 1. He filed a Motion for Preliminary Injunction on January 30, 2020 (ECF No. 144) that this Court granted in part and denied in part on April 30, 2020 (ECF No. 206). In its Order, the Court invited Plaintiff to renew his Motion for Preliminary Injunction (ECF No. 144) if Defendants had not obtained an Incidental Take Permit (ITP) within 90 days of the Order. ECF No. 206 at p. 31. Plaintiff secured representation on May 5, 2020 (ECF No. 209) and subsequently submitted interrogatories to Defendants and noticed two depositions in furtherance of the anticipated need for a renewed motion for a preliminary injunction. See ECF No. 215 at pp. 1-2. On July 29, 2020, having not yet produced the requested discovery, Defendants sought a stay of these proceedings, revealing that they had not obtained an ITP and didn't expect to know whether they would be able to obtain one for at least two years, but probably longer. ECF No. 212. Plaintiff filed a motion to compel the requested discovery on July 30, 2020. ECF No. 215. Defendants started producing responsive documents on August 14, 2020, most recently producing its "13th Production" on September 15, 2020. Declaration of Adam Keats at ¶ 2.

II. Factual Background

This Court has previously recounted the relevant facts that are likely to be proven at trial. ECF No. 206, pp. 15-28. In short: (1) Defendants regulate the lobster and gillnet fisheries in Massachusetts waters, issuing licenses and requiring the use of VBRs; (2) endangered whales, including the Northern Right Whale, and endangered sea turtles, including the Loggerhead Sea Turtle, have been and continue to be entangled by VBRs in Massachusetts waters; (3) this entanglement continues to result in lethal and sub-lethal harm to endangered whales and sea turtles. *Id*.

III. The Preliminary Injunction Standard Under the ESA

Courts within the First Circuit traditionally consider four factors in deciding whether to grant a preliminary injunction: (1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest. *Strahan v. Coxe*, 127 F.3d at 160 (citing *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir.1996)). "This traditional test for preliminary injunctions, however, is not the test for injunctions under the Endangered Species Act." *National Wildlife Fed'n v. Burlington Northern RR*, 23 F.3d 1508, 1510 (9th Cir. 1994). In drafting the ESA, Congress "foreclosed the exercise of the usual discretion possessed by a court of equity." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). This Court must

therefore turn to the language of the ESA to determine whether to issue Plaintiffs' requested injunction.

Congress enacted the Endangered Species Act in order to "halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. All persons, including federal agencies, are specifically instructed not to 'take' endangered species, meaning that no one is 'to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect' such life forms." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("*TVA v. Hill*"); 16 U.S.C. § 1532(19).

Three years after the passage of the ESA, a lawsuit was filed under the Act to halt construction and operation of the Tellico Dam, on the basis that the project would cause the extinction of a small fish known as the snail darter. *Id.* at p. 164. The plaintiff argued that "once a federal project was shown to jeopardize an endangered species, a court of equity is compelled to issue an injunction restraining violation of the Endangered Species Act." *Id.* at p. 166. The District Court "declined to embrace" this position, engaging in an apparent weighing of the equities to find that "[w]here there has been an irreversible and irretrievable commitment of resources by Congress to a project over the span of a decade, the Court should proceed with a great deal of circumspection." *Id.*, quoting the District Court opinion. The Court of Appeals reversed and ordered the injunction to issue, finding that:

> "Whether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a

> unique form of life. Courts are ill-equipped to calculate how many dollars must be invested before the value of a dam exceeds that of the endangered species. Our responsibility under § 1540(g)(1)(A) is merely to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives."
> …
> [T]he District Court … erred by not issuing an injunction. While recognizing the irretrievable loss of millions of dollars of public funds which would accompany injunctive relief, the [appellate] court nonetheless decided that the Act explicitly commanded precisely that result: "It is conceivable that the welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final will of Congress, than the writeoff of those millions of dollars already expended for Tellico in excess of its present salvageable value."

Id. at p. 1074, quoting the Court of Appeals opinion.

The Supreme Court affirmed. The Court observed that "as a general matter it may be said that, '[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion'." *Id*. at p. 193, quoting D. Dobbs, Remedies 52 (1973). But the Court then explained that it is "emphatically … the exclusive province of the Congress" to establish the "relative priority for the Nation" of legislative programs and projects. *Id*. at p. 194. Thus, even though the Court was "urged to view the Endangered Species Act 'reasonably,' and hence shape a remedy 'that accords with some modicum of common sense and the public weal'," the Court refused:

> We have no expert knowledge on the subject of endangered species; much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has

> been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution."

Id.

In other words, the Supreme Court made clear that Congress, in enacting the ESA, conferred jurisdiction to the courts to enjoin violative activity and established the parameters within which courts must make such determinations. Under the ESA, only the first two factors of the usual four-part test are considered: (1) the likelihood of success on the merits and (2) the potential for irreparable harm if an injunction does not issue.[1] *Strahan v. Coxe*, 127 F.3d at 160. The other two factors—balancing of the harms and the effect on the public interest—have "been answered by Congress' determination that the 'balance of hardships and the public interest tips heavily in favor of protected species'." *Id*., quoting *National Wildlife Fed'n v. Burlington Northern R.R.*, 23 F.3d at p. 1510; *Animal Welfare Ins. v. Martin*, 623 F.3d 19, 27 (1st Cir. 2010). There is no balancing for courts to do; "the balance has been struck" by Congress. *TVA v. Hill*, 437 U.S. at p. 194.

[1] The First Circuit has ruled that injunctive relief can be granted in ESA cases only upon a showing of irreparable harm. *Animal Welfare Ins. v. Martin*, 623 F.3d at p. 27, citing *Strahan v. Coxe*, 127 F.3d at p. 160 ["Rather than supplant the need for proof on the irreparable harm requirement, as [appellant] seeks, this circuit's law has incorporated Congress's prioritization of listed species' interests into the third and fourth prongs of the analysis, modifying those factors where appropriate to 'tip[] heavily in favor of protected species'."]. The Ninth Circuit has articulated the test differently, finding a rebuttable presumption of irreparable harm for ESA violations. *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005). For the purposes of this motion the differences are immaterial; this Court has already determined that irreparable harm to Northern Right Whales is likely if an injunction does not issue. See Section V, below.

In the First Circuit, if a court finds that a plaintiff is likely to succeed on the merits (that a violation of the ESA has occurred and will occur again (*Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993)) and that irreparable harm will follow if not enjoined (*Animal Welfare Ins. v. Martin*, 623 F.3d at p. 27), the court is required to enjoin the activity. *Weinberger v. Romero-Barcelo*, 456 U.S at p. 314, citing *TVA v. Hill*, 437 U.S. at p. 173; *Strahan v. Coxe*, 127 F.3d at 171 ["The district court was not required to go any farther than ensuring that any violation would end."]. "The purpose and language of the [ESA] limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act." *Weinberger v. Romero-Barcelo*, 456 U.S at p. 314.

IV. Plaintiff Will Likely Succeed on the Merits

This Court previously ruled that "Plaintiff has demonstrated a strong likelihood of success on his claim that Defendants have violated the Endangered Species Act's Section 9 prohibitions by permitting the use of VBRs in state waters." ECF No. 206, Order at p. 21. First, as this Court observed, "it is uncontroverted that state-licensed VBRs have entangled endangered whales, and that the most recent known entanglement occurred less than four years ago, in September 2016." *Id*. at p. 22. "It is further uncontroverted in the record that known entanglements vastly underestimate actual entanglements." *Id*. Second, this Court determined that "there is substantial evidence in the record that entanglements will continue as long as VBRs are deployed in the whale' habitat." *Id*.

The evidence previously presented and considered by this Court has not changed. Additional evidence, not before the Court when it issued its April 30, 2020, Order, provides further confirmation of the Court's previous ruling that Plaintiff is likely to succeed in his claim and that irreparable harm will follow if Defendants' licensing activities are not enjoined.

A. Massachusetts's Licensing Scheme for Lobsterpot and Gillnet Fisheries Has Caused and Will Continue to Cause Take of Endangered Northern Right Whales.

In September 2016 a Northern Right Whale was entangled by gear licensed by Defendants. See ECF No. 206, Order at p. 20, citing 2019 Aff. of Daniel McKiernan at ¶ 22 (ECF No. 19-1.) This entanglement constituted prohibited "take" under the ESA. *Id*. at pp. 17-18; 16 U.S.C. § 1532(19). Because "most right whale entanglements cannot be attributed to a specific fishery," and "less than one percent of all entanglements have ever been identified to original location," other right whales have most certainly been entangled by Massachusetts-licensed gear since 2010. (ECF No. 206, Order at p.20; September 17, 2019, ECF No. 151-6 [Letter from Dr. Scott Kraus and Sixteen Whale Scientists with Expertise on the Right Whale]). There is no question that fishing gear licensed by Massachusetts has caused take of endangered Northern Right Whales in the past.

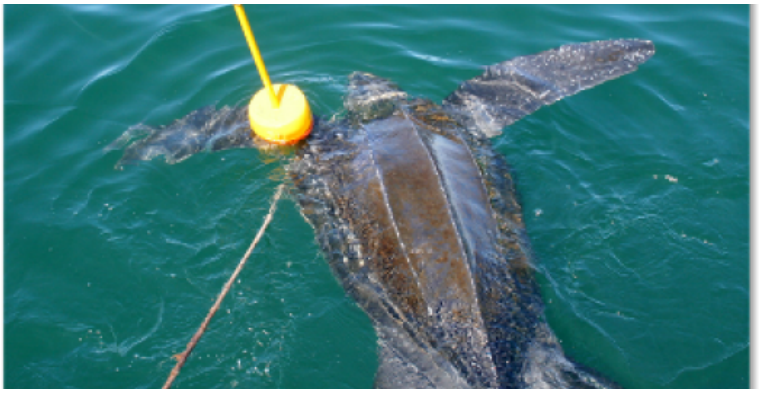
This Court previously concluded that "there is substantial evidence in the record that entanglements will continue as long as VBRs are deployed in the whales' habitat." ECF No. 206, Order at p. 23. The Court pointed to "an unprecedented *increase* in fatalities in the past three years," despite various efforts

taken by Massachusetts to prevent entanglements. *Id*. at p. 24. The Court also observed that despite seasonal closures that were initiated in 2015, at least one whale was subsequently entangled, and "since right whales may be found anywhere within the range of the species at any given time, the seasonal closures may have reduced but have not ended VBR entanglements." *Id*.

The Court's conclusion is still correct. First, Plaintiff deposed by written questions Dr. Michael Moore, Senior Scientist, Biology Department, and Director, Marine Mammal Center at the Woods Hole Oceanographic Institution, Woods Hole, Massachusetts. Keats Dec., Ex. 1. Dr. Moore would qualify as an expert on the lethal and sublethal effects on Northern Right Whales of entanglement in fishing gear and ship strikes, including in Massachusetts waters, if called to testify as such in this litigation. *Id*. at pp. 2, 19. Dr. Moore testified in his deposition that "The general trend in recent years has been for rope entanglements for [Northern Right Whales] to have increased, relative to ship and vessel trauma." *Id*. at p. 8. Dr. Moore confirmed that Northern Right Whales can be found in jurisdictional waters of Massachusetts in every month of the year. *Id*. at p. 13. He expressed his opinion that the known incidents of harm or death to Northern Right Whales caused by VBRs deployed in jurisdictional waters of Massachusetts do not constitute all of the harm actually caused by VBRs, and that "It is statistically inconceivable that as long as [Northern Right Whales] and rope in the water column coexist in any area, morbidity and mortality is not a significant risk for [Northern Right Whales], including the jurisdictional waters of Massachusetts." *Id*. at pp. 14-15.

Sarah Sharp, DVM, submitted a declaration in support of Plaintiffs' Opposition to Defendants' Motion for Stay. Keats Dec., Ex. 2 [see also ECF No. 221-1]. Dr. Sharp provides medical care for live stranded marine mammals and conducts necropsies on dead marine mammals as a member of the Greater Atlantic Marine Mammal Stranding Response Network; she would qualify as an expert on the lethal and sublethal effects on Northern Right Whales of entanglement in fishing gear and ship strikes, including in Massachusetts waters, if called to testify as such in this litigation. *Id*. at p. 1. In an extensive review of all known documented mortalities of Northern Right Whales between 2003 and 2018 that she authored, Dr. Sharp observed a 30% increase from 2003 to 2018 in overall deaths of Northern Right Whales caused by entanglements. *Id*. at p. 2; see Keats Dec., Ex. 3. Dr. Sharp declared that this "thirty percent increase demonstrates that the more recently implemented fisheries mitigation efforts have failed to reduce [Northern Right Whale] deaths due to entanglement, and in fact, current fishing practices and their overlap with the [Northern Right Whale] population have caused an increase in entanglement related deaths of these critically endangered whales in recent years." Keats Dec., Ex. 2, at pp. 2-3. Dr. Sharp also declared that "[b]ased on the available data regarding right whale distribution and location and timing of acutely entangled right whale carcasses, it is likely that right whales are currently being entangled in pot/trap and gillnet fishing gear in Massachusetts state waters. Wherever vertical buoy rope and right whales cooccur there is a threat of whales being entangled in that line." *Id*. at p. 3.

B. Massachusetts' Licensing Scheme for Lobsterpot and Gillnet Fisheries Has Caused and Will Continue to Cause Take of Endangered Sea Turtles.



Plaintiff separately sought a preliminary injunction due to Defendants' prohibited take of endangered sea turtles through entanglement, similar to that inflicted on Northern Right Whales. ECF No. 190. This Court denied the motion on the grounds that "the underlying claim—that state-licensing of vertical buoy ropes in Massachusetts waters violates the Endangered Species Act—is the same" as that was raised in Plaintiffs' earlier motion for preliminary injunction regarding Northern Right Whales. ECF No. 208. Plaintiff hereby renews his argument regarding the need for a preliminary injunction in order to halt unpermitted take of endangered sea turtles as a separate and independent basis for enjoining Massachusetts' licensing scheme.

It is uncontroverted that Massachusetts' licensing scheme for lobsterpot and gillnet fisheries has caused take of endangered sea turtles. Keats Dec., Ex. 4 at p. 3 (Defendants' March 19, 2020, Response to Plaintiffs' Request for Admissions ["Request No. 3: Admit that last year sea turtles became entangled in lobsterpot gear in Massachusetts coastal waters licensed and regulated by MDMF. Response

No. 3: Admitted."]; see also Keats Dec., Exs. 5, 6 [charts indicating dozens of entanglements of sea turtles from 2005 to the present]. The Leatherback Turtle, the turtle most frequently identified in Massachusetts' entanglement records, is listed as endangered under the ESA. 85 Fed. Reg. 48332; see also Keats Dec., Ex. 1 at p. 16 (Dr. Moore Deposition).

It is also uncontroverted that take of endangered sea turtles will continue as long as VBRs remain in Massachusetts' waters. No effort has been made to halt the entanglement of sea turtles in Massachusetts waters and there are no current proposals for any action that will halt such entanglements. None of the mitigation measures proposed by Defendants as part of their Motion for Stay of these proceedings are targeted to reducing sea turtle entanglements. ECF No. 217-1 at pp. 9-12; see Declaration of Adam Keats ¶ 3 [Deposition of Daniel J. McKiernan at 1:08: "Q: Would setting a breaking point of 1700 lbs or less effect the entanglement or harm caused to sea turtles by vertical buoy ropes? A: No."]; Keats Dec., Ex. 2, at p. 5 [Dec. of Dr. Sarah Sharp: "such ropes will not reduce the current rate of whale and sea turtle entanglement."].

V. Irreparable Harm is Likely in the Absence of an Injunction

A. Northern Right Whale

This Court previously found "that continued permitting of VBRs by Defendants is likely to result in harms that cannot later be cured." ECF No. 206, Order at p. 28. The Court detailed how it is "uncontroverted that the most recent estimate puts the potential biological removal limit for the species at approximately

0.9 whales per year." *Id.* In other words, the species cannot sustain *even one unnatural death* per year. *Id.* The Court also found "that irreparable injury to the species will occur even in the absence of a right whale death caused by state-licensed VBRs," due to sublethal impacts that can include "increased swimming energy costs, trauma wounds from rope cuts, damage to baleen plates that can prevent efficient filter feeding, and, perhaps most critically, a detrimental effect on the ability for female right whales to breed." *Id.*, citing ECF No. 130-4.

In July 2020, the International Union for the Conservation of Nature increased the Northern Right Whale's endangered classification to "critically endangered." See https://www.fisheries.noaa.gov/feature-story/international-union-conservation-nature-updates-classification-north-atlantic-right (accessed September 14, 2020). As the IUCN stated in its press release on the listing: "The North Atlantic Right Whale (*Eubalaena glacialis*) has been moved from Endangered to Critically Endangered on the IUCN Red List. Fewer than 250 mature individuals were estimated to be alive at the end of 2018, the total population having declined by approximately 15% since 2011. This decline is being driven by a combination of increased mortality due to entanglement in fishing gear and vessel strikes, and a lower reproduction rate compared to previous years. Of 30 confirmed human-caused deaths or serious injuries of North Atlantic Right Whales between 2012 and 2016, 26 were due to entanglement." See https://www.iucn.org/news/eastern-and-southern-africa/202007/almost-a-third-lemurs-now-critically-endangered-iucn-red-list (accessed September 14, 2020.).

Dr. Sharp testified that the Northern Right Whales' "cumulative mortalities from entanglement are not sustainable and are precipitating the current decline in the remaining right whale population. Considering the small size of the current [Northern Right Whale] population and the high rate of death due to entanglement, aggressive intervention is needed to immediately end any further serious injury and mortality caused by entanglement in fishing gear of any member of this critically endangered species." Keats Dec., Ex. 2, at p. 3. Dr. Sharp concluded that "Right now, every further entanglement of a [Northern Right Whale] is an unacceptable threat to the continued survival of the species." *Id.*

Dr. Moore, responding to Plaintiffs' question of whether the Northern Right Whale species can sustain further incidents of sublethal harm caused by VBRs in Massachusetts' water, declared that "given the extremely significant role Mass waters play in the survival of the species, every effort should be made to avoid further sublethal harm to [Northern Right Whales]." Keats Dec., Ex. 1 at p. 16.

Robert D. Kenney, Ph.D., an emeritus research professor at the University of Rhode Island and "an internationally recognized expert on Right Whales," has provided a declaration in support of this motion. Keats Dec., Ex. 7 at p. 1. Dr. Kenney states unequivocally that "Entanglements are a principal factor that is preventing the recovery of the [Northern Right Whale] population. Elimination of entanglement by fishing gear would give these whales some realistic possibility for a continued survival as a species. … Entanglement is entirely within our control,

and the time is well past for substantial conservation actions to reduce human-caused mortality. We cannot afford to wait any longer to take action." *Id*. at p. 2.

B. Sea Turtles

Defendants' continued take of endangered sea turtles constitutes irreparable harm that cannot later be cured if an injunction does not issue during the pendency of this litigation. The National Marine Fisheries Service and the U.S. Fish and Wildlife Service recently completed a Status Review of the Leatherback Turtle. Keats Dec., Ex. 8. As detailed in the Status Review, the Northwest Atlantic population of Loggerhead Turtles "has a high extinction risk" (*id*. at p. 116) with the primary threat identified as bycatch from commercial and artisanal fisheries. *Id*. at p. 118. The term "bycatch" includes several fishing methods, but the report states that "[f]ishery bycatch in pot/trap gear, especially off the northeastern U.S. coast and in Canadian waters, and trawls are also significant threats." *Id*. The report concludes that a decline of the species by 50 percent in 8 to 17 years is imminent," placing the population's "continued persistence in question." *Id*. at pp. 120-121. Dr. Sharp was unequivocal: "The reality is that ANY standing line in the water column is a fatal threat to endangered whales and sea turtles." Keats Dec., Ex. 2, at p. 4.

VI. Remedy

This Court partially granted Plaintiffs' previous Motion for Preliminary Injunction (ECF No. 144), ordering Defendants to promptly seek an incidental take permit. ECF 206 at p. 31; see also ECF No. 208 (Order re: ECF No. 190 [Mot. for Preliminary Injunction re: sea turtles]). With this Renewed Motion, Plaintiff

amends his previous requests for injunctive relief as follows: Plaintiff hereby requests that this Court immediately enjoin Defendants from authorizing and/or requiring the use of vertical buoy ropes in all Massachusetts waters.

Defendants have sought a stay of this litigation pending their application for a permit under Section 10 of the ESA. ECF No. 211. Defendants will likely urge this Court to grant that stay, allowing the use of VBRs to continue pending the resolution of the ESA permitting process, and allowing an opportunity to see if the proposed mitigation measures have any effect on harm to Northern Right Whales. For the reasons explained in more detail in his Opposition to Motion to Stay, Defendants should not be allowed to delay any further their compliance with the law; they should not be allowed to continue unpermitted harm of endangered whales and sea turtles. See ECF No. 221. The reality is that Defendants cannot and will not be issued an ITP.[2] A stay of this litigation would, through an act of omission, effectively grant Defendants a permit to continue harming endangered species that they would otherwise never be able to obtain.

[2] The ESA requires compliance with section 101(a)(5) of the Marine Mammal Protection Act, which in turn requires that the National Marine Fisheries Service (NMFS) make a finding that any permitted take of a protected marine mammal "have a negligible impact on such species." 16 U.S.C. § 1371(a)(5)(A)(i); 13 U.S.C. § 1536(b)(4)(C). Earlier this year, NMFS admitted that it was unable to make this finding when preparing a biological opinion for the American lobster fishery because of the harm that fishery causes the Northern Right Whale. *Center for Biological Diversity v. Ross*, United States District Court for the District of Columbia, Case 2018-cv-00112, April 9, 2020, Memorandum Opinion at p. 16 (2020 WL 1809465). There is no reason to believe that NMFS will be able to make the same "negligible impact" finding that is also required for the incidental take permit Defendants seek.

Defendants will also likely urge this Court to balance the equities of enjoining their regulatory scheme vs. the impacts of such an order on the lobster and gillnet industries. The Court should not do so. From a practical perspective, there is nothing to balance. Any "balance" will always tip in favor of the men and women whose livelihoods will be severely impacted by an injunction; it will always tip in favor of the public who loves to eat lobster and other seafood caught in ways that use VBRs; it will always tip in favor of the government agencies whose regulatory processes are necessarily slow and deliberate; and it will always tip away from the Northern Right Whale and the Loggerhead Turtle, whose individual lives and collective species' existence will never outweigh any harm—economic, recreational, social, spiritual—to a person or to our society.

But, more importantly, there is nothing for the Court to balance from a legal perspective. Plaintiff brought this action pursuant to 16 U.S.C. § 1540(g)(1)(A), which defines and confines this Court's jurisdiction and discretion. This is not a case in equity or common law, and the Court's normal equitable jurisdiction and discretion do not apply. Congress already struck the equitable balance, deciding that the continued existence of the Northern Right Whale and/or the Loggerhead Turtle outweigh *anything else*. *TVA v. Hill*, 437 U.S. at p. 194.

There is only one remedy that may be ordered in response to the Courts' previous findings, supported and reinforced in this Renewed Motion, that Plaintiff will likely succeed on the merits and that Defendants' violations of the ESA will likely result in irreparable harm: the Court must issue an immediate injunction

halting Defendants' violative actions. 16 U.S.C. § 1540(g)(1)(a); *Strahan v. Coxe*, 127 F.3d at 171; *Weinberger v. Romero-Barcelo*, 456 U.S at p. 314, citing *TVA v. Hill*, 437 U.S. at p. 173 ["The purpose and language of the [ESA] limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act."].

CONCLUSION

This Court, having previously found that Plaintiff was likely to succeed on the merits and that Defendants' actions in violation of the ESA are likely to result in irreparable harm to the Northern Right Whale, declined to order an immediate halt Defendants' violative actions. ECF No. 206, Order at pp. 28-31. Instead, the Court ordered Defendants to promptly seek an Incidental Take Permit pursuant to Section 10 of the ESA and invited Plaintiff to renew his motion for preliminary injunction if Defendants had not obtained an ITP within 90 days of the Order. *Id.* at p. 31.

The months that have followed the Order have provided plenty of time for Massachusetts to come to grips with the imminent end of its regulatory scheme for the lobster and gillnet fisheries. The fisheries have had five months to contemplate what they will do in the absence of such a scheme. Men and women have been able to fish for lobsters in Massachusetts and the public has been able to eat Massachusetts lobsters for one more summer.

But as the Court has since learned, the Section 10 process is lengthy and a permit, if one is even possible for take of the Northern Right Whale, is not likely to

issue within the next several years. ECF No. 212 at p. 5. Any further delay in injunctive relief, let alone two years or more, could be fatal to the Northern Right Whale, and could cause irreparable harm to the Loggerhead Turtle. See Plaintiff's Opposition to Motion to Stay Further Proceedings, ECF 221; Keats Dec., Ex. 2, at p. 6 [Declaration of Sarah Sharp, DVM: "Endangered species that frequent MA state waters, including the [Northern Right Whale] simply cannot sustain the current fishery entanglement mortality and injury rates."].

Plaintiff respectfully requests that this Court immediately enjoin Defendants' lobstertrap and gillnet fishery licensing scheme pending the resolution of this litigation.

Dated: September 16, 2020

s/ Adam Keats

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Certificate of Compliance with Local Rule 7.1(a)(2)

I hereby certify pursuant to Local Rules 7.1(a)(2) that the parties have conferred and otherwise complied with Rules 7.1.

s/ Adam Keats

Certificate of Service

I hereby certify that I filed and served this document through the ECF system and that electronic copies will be delivered to all registered participants in this matter.

s/ Adam Keats