

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MAN AGAINST XTINCTION A/K/A “MAX”)
)
Plaintiff)
) Civil Action No.
v.)
) 19-CV-10639-IT
SECRETARY, MASSACHUSETTS EXECUTIVE)
OFFICE OF ENERGY AND ENVIRONMENTAL)
AFFAIRS (“MEOEEA”)) 16 June 2019
)
DAVID PIERCE and as director, MASSACHUSETTS)
DIVISION OF MARINE FISHERIES (“MDMF”))
)
ARTHUR SAWYER and as president of the)
MASSACHUSETTS LOBSTERMEN’S ASSOCIATION)
AS REPRESENTING ALL IT’S MEMBERS (“MLA”))
)
CENTER FOR COASTAL STUDIES)
)
JOHN HAVILAND)
)
VINEYARD WIND LLC)
)
BAYSTATE WIND LLC)
)
Defendants)

VERIFIED TYPO-CORRECTED AMENDED COMPLAINT FOR DECLARATORY,
INJUNCTIVE, AND OTHER RELIEF AND A REQUEST FOR A JURY TRIAL THAT IS
SERVING AS PLEADING DOCUMENT NO. 1 TO BE SUPPLEMENTED IN FILING OF
ADDITIONAL PLEADING DOCUMENTS CONSISTING OF SCIENTIFIC FACT/DATA

I the Plaintiff — Richard Maximus Strahan — SPEAK:

Plaintiff Man Against Xtinction (“MAX”) is a licensed commercial lobster fisherman, an avid whale watcher, a conservation scientist who researches whales and marine wildlife and a professional recovery agent of endangered wildlife species. He is bringing the instant action to stop the Defendants from the further prohibited killing and injuring along the US coastline of Endangered Whales and Sea Turtles. Acting in concert, the Defendants’ past and prospective killing of Right Whales incidental to commercial marine fisheries has caused the Right Whale

species to now be functionally extinct. Due to the Defendants and other prohibited killing, the Right Whales have now irreparably lost the ability to annually give birth to a sufficient number of newborn whales to continue the survival of their species. The Right Whale will be extinct in the near future.

1. The Plaintiff is seeking to obtain in the instant action injunctive relief to legally protect his interests in marine wildlife by making Massachusetts' commercial fisheries a "Green Fishery" employing only Green Fishermen and open to all members of the Public. This is required under current state and federal law. As such the Massachusetts fishing industry will be required to be Whale Safe and no longer devastate Endangered Whales and Sea Turtles population by entangling them in Vertical Buoy Ropes (VBR).

2. The Plaintiff is a "Green Fisherman" seeking protection of his and other members of the Public's equal rights under law to have the opportunity to engage in commercial lobster fishing in Massachusetts state waters in a manner that is Whale Safe. **FN1** He does not want or need to use VBR in his lobsterpot gear in order to sustainably obtain lobsters to sell. He believes his Green Fishing operation should be prioritized to favor the conservation of marine wildlife over any profit making. The Plaintiff is fully cooperative with government agencies, academics, and conservationists to promote scientific management of marine fisheries. He will utilize his fishing operations to conduct research on the environment, to collect field data beneficial to sustainable management, and to report the location of each of his trawls and pots at all times in order to aid the sustainable management of commercial marine fishing.

3. The State Defendants are operating an unlawful commercial fishing operation that seeks to only benefit the profiteering of a small number of specific individuals. They deny the opportunity to access a fishing permit to over 99% of the Public. They refuse to allow the entire Public any equal or competitive opportunity to participate in lobsterpot fishing. The State Defendants regulate marine fisheries only to assist those few individuals they personally favor

¹ As a "Green Fisherman" the Plaintiff does not want to injure other species of marine wildlife when he attempts to sustainably harvest lobsters. He seeks to conduct his commercial fishing operations to be Whale Safe. The State Defendants have adopted regulations requiring the use of Vertical Buoy Ropes (VBR) or Killing Ropes in lobster/pot and gill net commercial fishing licensed by them. The State Defendant are threatening the Plaintiff with fines and loss of his right to fish if he does not use Killing Ropes that will cause him to "take" endangered marine wildlife in violation of the ESA's Section 9 prohibitions against such.

with fishing permits to add to their profits at the cost of the widespread destruction of marine wildlife. The State Defendants marine fisheries operations only serve the Public Bad. Despite lobsterpot fishing being only a revocable privilege by state statute — with no one possessing any property right to even obtain a renewed fishing permit — the State Defendants restrict access to commercial fishing licenses to a small number of culturally favored individuals. State Defendants licensure of lobsterpot fishermen is unlawfully discriminatory. It only favors individuals related to its chose selected individuals seeking to profit off the unsustainable destruction of marine wildlife. A such, Massachusetts marine fisheries statutes are facially and as applied violative of the Constitution and the Massachusetts state constitution.

4. The Plaintiff is now the object of a vendetta being conducted by disgruntled employees of the State Defendants. Defendant Massachusetts Division of Marine Fisheries employees David Pierce and Daniel McKiernan are preventing the Plaintiff from obtaining MDMF license to do marine fishing in Massachusetts state waters as retribution for his bringing the instant action, his advocacy for eliminating VBR, and for marine mammal conservation. They recently rejected Plaintiff's 29 April 2019 lawful applications for either a recreational or a student commercial fishing permit. The Plaintiff was issued a recreational lobsterpot permit by the MDMF in 2018. This is a retaliation for his suing the State Defendants since 1996 in order to stop their licensing and regulating of fishing gear that entangles, kills and injures Endangered Whales and Sea Turtles. Now they are usurping their employee authority to insure the Plaintiff never gets a fishing license again to insure in part he has no ability to prove the efficacy of Green Fishing. In doing so Defendant Pierce is violating the constitutionally protected rights of the Plaintiff, including the rights of equal treatment under the law, due process and the right to petition the courts.

5. The Plaintiff is seeking injunctive relief to do three things. First to compel the State Defendants to issue him a commercial lobsterpot permit as a "Green Fisherman" requiring members of the Public by regulation to use fishing gear in Massachusetts coastal waters that does not use VBR and does not entangle Endangered Whales and Sea Turtles. The Second is to stop the State Defendants from licensing any fishing gear in a manner that requires the licensed fishermen to use vertical buoy ropes. Third, the Plaintiff is seeking an injunction to enjoin the State Defendants from further licensing marine fisheries activities until they have applied for and receive from the federal government an incidental take permit under Section Ten of the

Endangered Species Act that authorizes them to license and regulate marine fisheries in United States coastal waters. **FN2** The Plaintiff is claiming that the State Defendants current licensing and regulating of marine fisheries activities in US coastal waters under the concurrent jurisdiction of Massachusetts is in violation of the ESA's Section 9 prohibitions against the "taking" of ESA listed species of whales and sea turtles. **FN3** The State Defendants requiring the use of VBR in lobster pot gear and gill nets violates the ESA's Section 9 prohibitions against "taking" ESA listed species of whales and sea turtles.

6. The State Defendants have every year since 1973 killed and injured Right Whales and other endangered species of whales and of turtles listed as protected under the Endangered Species Act. **FN4** They have done so incidental to their licensing of Lobster Pot and Gill Net fishing by requiring the use of VBR by their licensed agents.

7. In 1996, this Court thoroughly reviewed the State Defendant and the Defendant MLA's commercial fishing activities and ruled that endangered whales are routinely entangled in VBR used in the Massachusetts state lobster pot fisheries in violation of the ESA Section 9 prohibition. **FN5** The Court also ruled that the State Defendants were liable for each and every entanglement of an endangered whales by the fishing gear deployed by their licensed agents. The Court deemed it fitting to order the State Defendants to apply for an obtain an ESA Section 10

² ESA Section 10 at 16 USC § 1539.

³ See 322 CMR § 4.13(c): "Surface Identification of Traps. 1. Single Traps. Single traps shall each be marked with a single buoy measuring at least seven inches by seven inches or five inches by 11 inches. Sticks are optional, but if used, shall not have a flag attached. 2. Trawls. The east end of a trawl shall be marked with a double buoy, consisting of any combination of two buoys measuring at least seven inches by seven inches or five inches by 11 inches and one or more three foot sticks. The west end of a trawl shall be marked with a single buoy measuring at least seven inches by seven inches or five inches by 11 inches buoy with a three foot stick and a flag."

⁴ 16 USC § 1538(a and g). Section 9 of the Endangered Species Act "prohibits" the incidental killing and/or injuring of any species listed as endangered under the Act: ESA: "It is unlawful for any person subject to the jurisdiction of the United States to— (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas."

⁵ See *Strahan v. Coxe*, 939 F. Supp. 963 (Dist. Mass. 1996) and 127 F. 3d 155 (1st Circuit, 1997) (Massachusetts marine fishing agency liable under ESA Section 9(a) for unlawful taking of ESA listed species of endangered whales by entanglements of endangered whales in fishing gear licensed and regulated this agency).

Incidental Take Permit from the federal government to authorize its commercial fisheries activities so they no longer would violate the ESA.

8. The Defendant Sawyer is a Massachusetts state actor and CEO of Defendant Massachusetts Lobstermen's Association. Sawyer has been appointed to the Massachusetts Marine Fisheries Advisory Commission ("MFAC") which has exclusive state regulatory authority over commercial fishing in Massachusetts waters. Sawyer conspires with all the other voting members of the Defendant MLA to conduct commercial fishing operation that use VBR and which violate the ESA's Section 9 prohibitions by "taking" of ESA listed species of whales and sea turtles. Sawyer and the MLA conspire with the State Defendants to insure that only their members can obtain fishing licenses from the State Defendants. Sawyer and the MLA oppose Green Fishermen from fishing in Massachusetts waters by also using threats of violence against them and the destruction of their fishing gear. The Plaintiff has been coerced by Sawyer and the MLA to not openly practice Green Fishing and by their intimidation and use threats of violence and theft of his property.

9. The Defendant Center for Coastal Studies is being sued as a state actor acting in concert with the State Defendants to insure that they can continue to license fishing gear that employs VBR and entangles and otherwise unlawfully "takes" ESA listed species of whales and sea turtles. Defendant CCS has been paid millions of dollars as an agent and co-conspirator the State Defendants since 1989 to serve as its agents to spread propaganda to promote the State Defendants and Defendant MLA's unlawful activities to the Public. Defendant CCS has been given exclusive access to entangled wildlife and actively prevents the Public from getting access to MDMF's information about entangled whales and sea turtles in Massachusetts coastal waters. This is deliberately done to impede the Public from obtaining evidence of the entanglement of marine wildlife. Defendant conspires with the other Defendants to do this to insure that the unlawful *status quo* is maintained and that the Plaintiff and the Public will be prevented from being able to fully document the unlawful killing of marine wildlife from the other Defendants licensing and practice of gill netting and lobster pot fishing in Massachusetts coastal waters.

10. The Court is mandated by the ESA and the Public Interest to FINALLY permanently enjoin the State Defendants from requiring any further deployment of Vertical Buoy Ropes for use with Pot Gear and Gill Nets into US coastal waters. These Killing Ropes are the single most significant cause for the fishing gear licensed and regulated by the State Defendants

routinely entangling Endangered Whales and Sea Turtles. The simple deployment of Killing Ropes must be considered a categorical violation of the ESA's Section 9 prohibitions against taking Endangered Whale and Sea Turtles.

11. The Plaintiff is also bringing supplemental claims against the Commercial Defendants (i. e. MLA, Sawyer, Haviland and CCS for tortious injuries inflicted on him and the Public by their being a public nuisance and for violations of the Massachusetts Civil Rights Act by using threats of killing endangered wildlife to interfere with MAX's enjoyment of the his protected right under the Massachusetts Constitution to enjoy the environment.

12A. The Plaintiff is Petitioning the Court for —

- A. A Declaratory Judgment from the Court declaring that the deployment of any VBR in the marine habitat historically used by Endangered Whales and Sea Turtles is a categorical violation of the ESA's Section 9 prohibitions against taking any of its listed species of wildlife and Requires the Defendants to obtain an ESA Section 10 permit.
- B. A Declaratory Judgment that the State Defendants requiring the use of VBR's in fishing gear deployed in US coastal waters is also a violation of the ESA's Section 9 prohibitions against taking.
- C. A permanent injunction banning the State Defendants from requiring the Plaintiff and other licensed fishermen to use VBRs on their fishing gear.
- D. An order requiring that the State Defendants apply for an ESA Section 10 Incidental Take Permit from the federal government that authorizes them to deploy fishing gear in US coastal waters that might harm endangered wildlife.
- E. The Plaintiff is also seeking appropriate award of compensatory and punitive damages against each of the Commercial Defendants.

12B. The Plaintiff is seeking a Jury Trial against each of the Defendants.

The Parties

13. Plaintiff Richard Maximus Strahan in 2016 graduated *magnum cum laude* with a Bachelor of Arts degree in Classics Studies from the University of Massachusetts in Boston MA. He is licensed by the State Defendants to do lobster pot fishing in Massachusetts State waters. He is also licensed as a commercial lobster pot fisherman by the State of New Hampshire. He is

also an avid whale watcher and researcher on sea turtles. He is the Chief Science Officer of Whale Safe USA, a campaign to make the US coastline environmentally safe for endangered species of coastal whales and sea turtles. His business mailing address is P. O. Box 82, Peterborough NH 03458.

14. Defendant Director of the Massachusetts Division of Marine Fisheries is being sued in its official capacity as a violator of the ESA Section 9 prohibitions on taking ESA listed species. The Director of the MDMF official business address the Office of the Director, Division of Marine Fisheries, 251 Causeway Street, Suite 400, Boston, MA 02114.

15. Defendant Secretary of the Executive Office of Energy and Environmental Affairs is being sued in its official capacity as a violator of the ESA Section 9 prohibitions on taking ESA listed species. This Defendants' official business address.

16. Defendant Massachusetts Lobstermen's Association Inc. and its members are being sued as violators of the ESA Section 9 prohibitions on taking ESA listed species. The MLA'S official business address is 8 Otis Place Scituate, MA 02066-1323.

17. Defendant Arthur Sawyer is being sued both as an individual and as chief executive officer of the Defendant Massachusetts Lobstermen Association. His business address is Arthur Sawyer, 368 Concord Street, Gloucester, MA 01930.

18. Defendant John Haviland is being sued as an individual in his personal capacity. His business mailing address is John Haviland % PO Box 543, Green Harbor, MA 02041.

19. Defendant Center for Coastal Studies is a Massachusetts corporation doing business in many states. Its business address is Center for Coastal Studies, 5 Holway Avenue, Provincetown. MA 02657.

20. Defendant Massachusetts Lobstermen Association is a register corporation operating in Massachusetts and other states. Its official agent's address is Massachusetts Lobstermen Association, 8 Otis Place, Scituate, MA 02066

21. Defendant Vineyard Winds LLC has a business address at 700 Pleasant Street, Suite 510, New Bedford, Ma 02740. Its registered agent in Massachusetts address is Registered Agents Inc., 82 Wendell Ave, Suite 100, Pittsfield, Ma 01201.

22. Defendant Baystate Winds LLC is being sued as a corporation whose business address is CEO, Baystate Wind LLC, One International Place, Suite 2610, 100 Oliver Street

Boston MA 02110. The address of its registered agent is % James Avery, Pierce, Atwood LLP, 100 Summer Street, Boston MA 02110.

Jurisdiction and Standing

23. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) under the ESA, APA, 5 U.S.C. § 701 et seq. (APA), 28 U.S.C. § 1361 (mandamus) and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. § 2201, 2202 (declaratory and injunctive relief). An actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested relief is proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701–706. The ESA — 16 U.S.C. § 1540(g) — only grants jurisdiction to hear his ESA Section 9 claims to enforce the take prohibitions and does not provide the Court any jurisdiction to knowingly tolerate or ignore the prohibited taking of ESA listed wildlife species.

24. Venue in this judicial district is proper under 16 USC § 1540(g) and 42 USC § 1983.

25. The Plaintiff has Article III standing pursuant to his living and working in the habitats of Endangered Whales and Sea Turtles. These species are migratory. And their being killed and injured by the Defendants in Massachusetts adversely affects their appearance and presence in New Hampshire, Maine and in other coastal states. The Plaintiff has previously served the requisite notice under 16 USC § 1540(g) in a timely manner on each of the Defendants of his intent to bring the instant claims against them under the ESA.

26. The Plaintiff has Article III standing because he is personally being injured by the Defendants unlawful activities —

- A. The Plaintiff conducts research on endangered species of whales and sea turtles off the US northeast Atlantic coast. and These species decline and extinction is adversely affecting his scientific research interests in these species. As an enthusiastic “whale watcher” off the coastline of Massachusetts, New Hampshire and Maine he has a vested interest in protecting the abundance of whales for his viewing activities and to have more personal access to these whales by having them delisted as ESA protected species.

- B. As a licensed commercial fishermen in New Hampshire, the plaintiff is being injured by the Defendants by their requiring him pursuant to to his licensure to use vertical buoy ropes on his lobster pot gear. This requirement unlawfully exposes him to violate the ESA by causing the entanglement of EFA listed species of endangered whales and sea turtles in his fishing gear. Also, the Plaintiff seeks to increase the number of ESA listed species off the US coastline and this interest is adversely affected by his having to use VBR that kills and injures ESA listed species. Additionally, the Plaintiff is attempting to operate a “Whale Safe” business offering Lobsters for sale that were harvested in an environmentally safe manner. The Defendants requirement that he use VBR is antithetical to his commercial interests in operating a business to provide “Whale Safe” caught Lobsters for sale.
- C. The Plaintiff operates a business in New Hampshire, Massachusetts and Maine to protect and recover ESA listed species. His customers pay him money to stop the killing of whales and sea turtles and increase their numbers. The Defendants continued unlawful killing and injuring ESA listed species antithetical to the business interests of the Plaintiff.
- D. The enjoys the consumption of Lobsters. However, he cannot eat Lobsters as long as they are harvested in a manner that kills or injures ESA listed species.

The Regulatory Scheme for the Protection of Endangered Species of Plants and Animals

27. In enacting the ESA, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction” and that these species are “of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a) (2) and (3).

28. The ESA protects imperiled species by listing them as “endangered” or “threatened.” A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). The Secretary of Commerce is charged with administering and enforcing the ESA for most marine species, including North Atlantic right whales, and has delegated this responsibility to NOAA. 50 C.F.R. § 402.01(b).

29. The ESA seeks “to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species.” 16 U.S.C. § 1531(b). The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3). Accordingly, the ultimate goal of the ESA is not only to prevent listed species from going extinct, but also to recover these species to the point where they no longer require ESA protection.

30. To accomplish these goals, Section 9 of the ESA generally makes it unlawful for “any person” to “take” an endangered species. *Id.* § 1538(a)(1). A “person” includes private parties as well as local, state, and federal agencies. *Id.* § 1532(13). “Take” is defined broadly under the ESA to include harassing, harming, wounding, killing, or capturing a protected species (or attempting to engage in such conduct), either directly or by degrading its habitat enough to impair essential behavior patterns. *Id.* § 1532(19); 50 C.F.R. § 222.102. The ESA prohibits the acts of parties directly causing a take as well as the acts of third parties, such as governmental agencies, whose acts cause such taking to occur. 16 U.S.C. § 1538(g).

31. Additionally, Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any” endangered or threatened species. *Id.* § 1536(a)(2).

32. To comply with Section 7(a)(2)’s substantive mandate, federal agencies must consult with NMFS when their actions “may affect” a listed marine species. 16 U.S.C. § 1536(a)(2). NMFS and the action agency must utilize the “best scientific and commercial data available” during the consultation process. *Id.*; 50 C.F.R. § 402.14(a).

33. Where, as here, NOAA is the action agency as well as the expert consulting agency, NOAA must undertake intra-agency consultation. At the completion of consultation, the consulting branch of NOAA issues a biological opinion that describes the expected impact of the agency action on listed species. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

34. The biological opinion must include a summary of the information upon which the opinion is based, an evaluation of “the current status of the listed species,” the “effects of the action,” and the “cumulative effects.” 50 C.F.R. § 402.14(g)(2), (g)(3).

35. “Effects of the action” include both direct and indirect effects of an action “that will be added to the environmental baseline.” Id. § 402.02. The “environmental baseline” includes “the past and present impacts of all Federal, State or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.” Id. “Cumulative effects” include “future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area.” Id.

36. Thus, in issuing a biological opinion, NOAA must consider not just the isolated share of responsibility for impacts to the species traceable to the activity that is the subject of the biological opinion, but also the effects of that action when added to all other activities and influences that affect the status of that species.

37. After NOAA has added the direct and indirect effects of the action to the environmental baseline and cumulative effects, it must make its determination of “whether the action is likely to jeopardize the continued existence of a listed species.” 16 U.S.C. § 1536(b)(3), (b)(4); 50 C.F.R. § 402.14(h). A likelihood of jeopardy is found when “an action [] reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Recovery is defined as “improvement in the status of listed species to the point at which listing is no longer appropriate.” Id.

38. A biological opinion that concludes that the agency action is not likely to jeopardize the continued existence of a listed species but will result in take incidental to the agency action must include an incidental take statement. 16 U.S.C. § 1536(b)(4).

39. The incidental take statement must specify the amount or extent of incidental taking on such listed species, “reasonable and prudent measures” that NMFS considers necessary or appropriate to minimize such impact, and set forth “terms and conditions” that must be complied with by the action agency to implement the reasonable and prudent measures. Id.; 50 C.F.R. § 402.14(i). Additionally, when the listed species to be incidentally taken are marine mammals, the take must first be authorized by NMFS pursuant to the MMPA, and the incidental take statement must include any additional measures necessary to comply with the MMPA take authorization. Id.

40. The take of a listed species in compliance with the terms of a valid incidental take statement is not prohibited under Section 9 of the ESA. 16 U.S.C. § 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5).

41. If NMFS determines in its biological opinion that the action is likely to jeopardize the continued existence of a listed species, the biological opinion must include “reasonable and prudent alternatives” to the action that will avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

42. Regardless of the conclusion reached in the biological opinion, the agency undertaking the federal action has an independent duty to ensure that its actions are not likely to jeopardize the continued existence of listed species. 16 U.S.C. § 1536(a)(2). An agency’s reliance on a legally flawed biological opinion to authorize an action does not satisfy its substantive duty to ensure against jeopardy.

43. Moreover, the ESA’s implementing regulations further require an agency to reinstate Section 7 consultation when: (a) the amount of take specified in the incidental take statement is exceeded; (b) new information reveals that the action may have effects not previously considered; (c) the action is modified in a way that was not previously considered; or (d) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

44. The ESA specifies that Section 7 consultation must typically be completed within ninety days after initiation. 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e). The substantive duty to ensure against jeopardy of listed species remains in effect regardless of the status of the consultation.

45. Non-federal actors are similarly mandated and prohibited from taking listed species without authorization and review by the designated federal wildlife agency enforcing the ESA. The ESA Section 9 prohibitions are interpreted as broadly and to be as all encompassing as necessary so as to achieve the purposes of this Act in insuring that listed endangered species are not to be threatened by extinction and will be able to recover their populations to a non-endangered status.

46. The ESA imposes a non-discretionary obligation on state and private actors to apply for an ESA Section 10 incidental take permit if they engage in any activity that will physically interact or affect a member of an ESA listed endangered species. This is triggered by the fact that a taking is broadly interpreted by ESA Section 9 to be any level of unintended physical interaction with a listed endangered species. The ESA supervising federal agency will first informally review whether or not there is any need for the applicant to seek and be issued an ITP. If it determines that the activity in question poses a significant threat to take a listed species, it will order the initiation of a formal ITP process by the applicant.

47. It is an incontrovertible fact that VBR required for use by the State Defendants in the marine fisheries they license repeatedly entangle, kill and injure Right Whales and all other Endangered Whales. The ESA pursuant to Sections 9 & 10 requires that state governments — whose licensing activities that reasonably threaten to routinely incidentally take listed species of wildlife — apply for an incidental take permit before continuing to engage in those activities from federal wildlife agencies that are tasked to oversee enforcement of the ESA.

**Background on Examples of ESA Listed Endangered Species of Whales
and Sea Turtles that are Adversely Affected by Commercial Fishing**

48. Killing VBR Ropes are responsible for virtually all the historical entanglements of endangered whales and sea turtles by lobster/crab pot gear deployed along the US coastline. The Court has previously ruled that the State Defendants licensing of lobster pot gear entangles endangered whales and incidentally takes these listed species in violation of the ESA's Section 9 take prohibitions. *Strahan v. Coxe* has since been repeatedly cited by federal courts as controlling precedent. It is being used as controlling precedent by parties in a current federal lawsuit against the California state-licensed Dungeness Crab pot fishery. This commercial marine fishery also requires the use of VBR. It is also violating the ESA's Section 9 by entangling endangered whales in California state waters.

49. It is incontrovertible that the deployment of Killing Ropes in the coastal marine habitat of whales and sea turtles is on its own a categorical violation of the ESA's Section 9 prohibitions on the taking of these listed species. Over a hundred thousand Killing Ropes are annually deployed by fishermen licensed by the State Defendants for months at a time off the Massachusetts coast. These killing ropes are deployed in the coastal marine habitat of large whales and sea turtles. Every year, many Endangered Whales and Sea Turtles are routinely

entangled, killed and/or injured from their encounter with VBR deployed in Massachusetts waters. Each of the Killing Ropes required to be deployed by the State Defendants' possess a significant risk to entangle, kill, and otherwise seriously injure large whales and sea turtles on any day of the year in Massachusetts coastal waters.

50. MAX refuses to use VBR in his lobster pot fishing equipment anymore. He is refusing to use Killing Ropes in order to prevent the entanglement of any Endangered Whale or Sea Turtle in his deployed lobster pot gear. Upon information and belief, he knows that every VBR in Massachusetts waters poses a significant risk to entangle and Endangered Whale or Sea Turtle inhabiting the area on any given day of the year.

51. The Right Whale as a species is now effectively EXTINCT. Right Whales no longer give birth in the numbers required to support the survival of their species. Last year, there was zero births from all Right Whales. This is a result of female Right Whales being repeatedly and unrelenting killed and seriously injury by the said Killing Ropes deployed under permit from the State Defendants. Only an immediate cessation of any further entanglement of Right Whales in Massachusetts waters will provide any reasonable chance for the Right Whale species continued survival on the Earth.

52. MAX is a conservation scientist petitioning the Court to ruthlessly enforce the "take prohibitions" imposed by Section 9 the Endangered Species Act against all the Defendants to stop their killing and injuring any more Endangered Whales and Sea Turtles from their deployment of killing ropes in Massachusetts coastal waters. Endangered Whale species include the Northern Right Whales and other species of whales **FN6**. Endangered Sea Turtles species includes Green Turtles and other species of Sea Turtles. **FN7** All of these Endangered Species are recognized as native resident species of Massachusetts. Endangered Whales and Sea Turtles are year round inhabitants of US coastal waters under the concurrent jurisdiction of Massachusetts.

⁶ The Endangered Whales includes: (1) The Sei Whale, *Balaenoptera borealis*; (2) The Northern Right Whale, *Eubalaena glacialis*; (3) The Humpback Whale *Megaptera novaeangliae*; (4) The Fin Whale *Balaenoptera physalus*; and (5) The Blue Whale, *Balaenoptera musculus*.

⁷ The Endangered Sea Turtles include: (1) The Green turtle, *Chelonia mydas*; (2) Loggerhead turtle, *Caretta caretta*; (3) The Olive Ridley turtle, *Lepidochelys olivacea*; (4) The Hawksbill turtle, *Eretmochelys imbricate*; (5) The Kemp's Ridley turtle, *Lepidochelys kempii*; and (6) The Leatherback turtle, *Dermochelys coriacea*.

53. The State Defendants are categorically violating the ESA's Section 9 take prohibitions by requiring that thousand plus fishermen that they license to use VBR when they go lobster pot fishing in United States coastal waters. Massachusetts' own endangered species Act ("MESA") prohibits the State Defendants from killing or injuring these endangered animals by requiring the use of VBR.

54. Endangered Whales and Sea Turtles are resident species of the "Urban Sea" that exists along the northeast coastline of the United States. The Urban Sea consists of the harbors, bays, and inlets of the peri-urban coastal waters under the concurrent state jurisdiction of Maine, New Hampshire, Massachusetts and the other New England states and all federal waters out to the 200-mile ECZ boundary. In the Urban Sea, the Endangered Whales and Sea Turtles are routinely killed, injured and their reproduction impaired by commercial and recreational anthropogenic activities. These anthropogenic activities include in part commercial fishing, vessel traffic and harbor operations, chemical pollution, disposal of plastic debris, and noise pollution ("Anthropogenic Threats").

55. The Right Whales viability as a species has been eviscerated by the Anthropogenic Threats occurring in the Urban Sea of the United States and especially by the commercial activities licensed and regulated by the Defendants MDMF and its supra agency MEOEEA ("State Defendants"). The State Defendants are acting in concert with Defendant Center for Coastal Studies and the other commercial defendants to annually cause the deployment of veritable "mine fields" constituting thousands of Vertical Buoy Ropes ("Killing Rope Fields") that act like "fly paper" to entangle and kill and Right Whale, Sea Turtles and members of other species of whales — especially Humpback Whales — that come to swim through them. Individual Right Whales are repeatedly entangled by the Defendants licensed fishing gear in the Killing Fields of lobster/crab pots and gill nets. As a result they are seriously injured and killed as a result of these entanglements. Additionally, the ability of female Right Whales to breed is being adversely impaired from the repeated injuries inflicted on them by these entanglements and the adverse impact of the establishing of Killing Fields off the Massachusetts coast by the commercial defendants.

56. The Right Whale's remaining population is no longer viable. Right Whales reproduction capability as a species has collapsed under the burden of the Anthropogenic Threats. Right Whales did not give birth to any young in 2018. Over the last ten years, Right

Whales births have not replaced the Right Whales killed by Anthropogenic Threats and natural mortality. The Right Whales are effectively extinct unless all VBR Fields are eliminated and proactive efforts commenced to increase their annual production of newborn calves.

57. The Defendants are now conspiring to commit “Whale Fraud.” The Defendants are maliciously acting in concert to deliberately prevent the enforcement of federal and state environmental laws at the intensity necessary to protect Right Whales and other endangered marine wildlife from being routinely killed and otherwise injured by VBR. They want as a categorical imperative to prevent any environmental laws from being enforced against the commercial fishing industry. Amazingly the Defendants have adopted a strategic practice to encourage the extinction of the Right Whale as its resolution to the legal conflict of its VBRs killing Endangered Whales and Sea Turtles.

58. The fact of the Defendants Whale Fraud is factually supported by the fact that the State Defendants were found liable by the Court in 1996 for violating the ESA’s Section 9 prohibitions by their killing and injuring Endangered Whale Species through their licensing and regulating commercial fishing using VBR Fields. Instead of changing their ways after the Court’s ruling, the Defendants chose to double-down on their illegal activities by use of fraud and force. They solicited the services of non-profit companies (e. g. the Center for Coastal Studies in Provincetown MA) to feign ineffective alterations of their illicit activities as reducing the incidents of Right Whales and Humpback Whales being killed and injured by their commercial fishing activities on Right Whale survival

59. The Northern Right Whale is the world’s most critically endangered large whale species and also one of the world’s most endangered mammals. Northern Right Whale’s essential marine habitat is within the 200 mile ECZ of mostly the US but extends northwards into Canada. They live in the “urban sea” of the United States. Their coastal marine habitat is no longer marine wilderness from having so hugely been adversely impact from commercial development of area within 100 miles inland of the US coast that spills outward to the Ocean. The Northern Right Whale living along the US coastline is more akin to a moose trying to live in a suburb of an eastern city like Boston or Concord NH. Not a good situation.

60. Right whales migrate annually from their summer feeding grounds off the Northeast coast of the United States to their winter breeding grounds off the Southeast coast. Females typically reach sexually majority at age nine or ten and give birth to a single calf. The gestation period lasts roughly one year. From 2005 to 2014, the average right whale calving interval (i.e. the amount of time between the birth of a right whale calf and a subsequent calf from the same mother) ranged from three to five years. The average right whale calving interval has increased every year since 2014, to a high of 10 years in 2017.

61. Right whales have raised patches of roughened skin on their heads, known as callosities. These callosities are found only on right whales and, like human fingerprints, have distinctive patterns that enable scientists to individually identify right whales. The callosities are covered by barnacles and tiny crustaceans known as whale lice.

62. Upon information and belief, in recent years the incidents of entanglements in the Defendants lobster pot gear and gill nets have increased for Endangered Whales and Sea Turtles. This is because there has been an explosion in the population of American Lobsters off the US northeastern coast coincident with an increase in the consumer market for lobster. Now more commercial fishermen are deploying more commercial fishing gear due to the greater market demand and the larger lobster population that can meet this demand. It is important to note that there are more lobsters because their main predator — the Cod fish — was recently wiped out by overfishing authorized and encouraged by the State Defendants.

63. The bottom line is that the Right Whale is now functionally EXTINCT. This is largely due to its being killed and injured by unlawful takings incidental to the lobster pot and gill net fisheries licensed and regulated by the State Defendants.

Plaintiff's Claims Against the Defendants

COUNT I: *Defendants Violation of 16 USC § 1538(a and g): The Fishing Defendants Violation of the ESA Section 9(a) Prohibitions Against the Incidental Taking of Endangered Species of Whales and Sea Turtles Occurring as a Direct Result of their Respective Individual Commercial Fishing Operations FN8* (State Defendants, CCS, MLA, Sawyer and Haviland)

64. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 63.

65. Endangered Whales and Sea Turtles are resident species of wildlife in US coastal waters under the concurrent state jurisdiction of Massachusetts. Right Whales are reside in every month of the year in Massachusetts coastal waters. Right Whales are known to give birth in Cape Cod Bay, other bays and inlets along the Massachusetts coastline. All Endangered Whales and Sea Turtles are listed by Massachusetts as resident species of Massachusetts and protected as endangered species under the Massachusetts Endangered Species Act.

66. The State Defendants are licensing and regulating all commercial fishing operation off the Atlantic coastline in waters under the concurrent state jurisdiction of the state of Massachusetts. These Defendants — require only by regulation and not by statute — that the Public it licenses to do lobster/crab pot fishing must use VBR on their pot gear. The State Defendants license about 1,000 private individuals to do commercial lobster pot fishing in Massachusetts. The State Defendants also license hundreds of other individuals to conduct recreational lobster pot fishing in state waters. The State Defendants also license full time high school and college students to do limited commercial lobsterpot fishing in state waters during the Summer months each year.

67. Since 1973, Massachusetts resident Endangered Whales and Sea Turtles are routinely entangled in their encounters with VBR deployed in Massachusetts state waters. In Massachusetts state waters VBR are responsible for nearly all the entanglements of Endangered

⁸ **ESA Section 9(a):**[I]t is unlawful for any person subject to the jurisdiction of the United States to— (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C); ... or (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

Whales and Sea Turtles in fishing gear licensed and regulated by the State Defendants. In prior lawsuits against the State Defendants, the Plaintiff subpoenaed from NOAA entanglement records of Endangered Whales and Sea Turtles. In these records NOAA reported that VBR was the apparent cause in all these reported entanglements of Endangered Whales and Sea Turtles.

68. The State Defendants have required the use of VBR in lobsterpot gear from 1973 to the present day. From 1973 to the present day, Endangered Whales and Sea Turtles have been entangled, killed and injured by their encounters with VBR deployed in Massachusetts state waters. Endangered Whales and Sea Turtles are attracted to VBR. Whales enjoy rubbing up against them and this phenomena results in their becoming entangled in the VBR.

69. In 1996, the Court ruled a finding of fact that Endangered Whales were routinely being entangled in VBR on lobsterpot gear deployed in state waters. The Court then ruled the State Defendants are violating the ESA's Section 9 prohibitions against taking Endangered Whales requiring the use of VBR by the fishermen that they license to deploy lobsterpot gear in state waters made them liable. This is after the Court first ruled in *Strahan v. Coxe* that these said entanglements by the State Defendants were a violation of the ESA Section 9 prohibition against taking ESA listed endangered species of wildlife.

70. Based on the Court's *Strahan v. Coxe* ruling, there is no doubt that since 1973 the State Defendants annually have violated the ESA's Section 9 prohibitions by requiring the use of VBR on the fishing gear that they license and regulate for deployment in Massachusetts state waters. Since 1996, the State Defendants chose to continue requiring the use of VBR by its licensed lobsterpot fishermen. In fact, since 1996 the State Defendants have allowed an increased number of VBR deployed in Massachusetts state waters. At a minimum the State Defendants are currently responsible for the annual deployment of over 100,000 VBR in Massachusetts state waters. There is no question that the State Defendants' licensing and regulation of lobsterpot fishing is responsible for many of the annual reported entanglements of Right Whales and other Endangered Whales in VBR in US coastal waters.

71. In 2019 NOAA produced a draft "stock assessment report" assessing the number of annually killed and seriously injured Right Whales in lobsterpot gear. It claims there are annually about five reported killings/injuries of Right Whales in recent years. The report also claims that NOAA has determined that the killing/injury of a single Right Whale threatens their species with imminent extinction. Since Massachusetts accounts for almost half of all

lobsterpot fishing activity along the US coastline, there is no question that the State Defendants are liable for several killings/injuring of Right Whale in the VBR used in lobsterpot gear.

72. At the April 2019 meeting of the NOAA's Atlantic Large Whale Take Reduction Team, the State Defendants voluntarily agreed to reduce by thirty percent or more the deployment the risk it currently poses to annually kill/injure Right Whales in its state lobsterpot fishery. This constitutes incontrovertible admission by the State Defendants that its lobsterpot fishery poses a clear and present danger to kill/injure annually several Right Whales. Since NOAA has determined that the continued killing of just one Right Whale annually condemns the Right Whale species to extinction, the State Defendants' lobsterpot fishery also poses a clear and present danger to extirpate the Right Whale species in the near future.

The State Defendants Since 1996 At Least Are in Violation of the ESA's Section 9 Prohibitions Against Taking Endangered Whales and Sea Turtles.

73. Since the Court in 1996 determined that the State Defendants lobsterpot fishery violated the ESA's Section 9 prohibition, its still requiring that VBRs be used on its licensed lobsterpot gear continues to the present day and it's a continuing violation until it is cured. The ESA Section 9 prohibitions is a core requirement of the ESA statute, regulations, ESA case law and NOAA policy. Any individual's activities once determined to have violated the ESA Section 9 prohibitions retains its violator status until it is purged by either a Court or by NOAA's making a formal determination — pursuant to an application under ESA Section 10 for an Incidental Take Permit — that the violator's said activity is unlikely to take a ESA listed species in the future.

74. It is also now a categorical violation of the ESA's Section 9 take prohibitions for anyone to deploy VBR and gill nets in marine habitat historically used by Endangered Whales and Sea Turtles. Only when the deployment can be guaranteed to occur without the presence of Endangered Whales and Sea Turtles is it possible to construe the use of VBR as not categorically violating ESA Section 9 take prohibitions. Putting Killing Ropes in habitat occupied by whales is just like pouring cyanide in the water. Since it cannot be removed immediately when an endangered whale or sea turtle shows up, the deployment cannot be lawfully done in the first place. This reality is enforced by two incontrovertible facts. If a whale touches a VBR this is a prohibited entanglement. Endangered Whales and Sea Turtles are attracted to and readily interact with VBR.

75. Once an individual engages in an activity that constitutes ESA Section 9 prohibited conduct, then the burden of proof shifts to that individual to PROVE that its continuing activity will not violate the ESA Section 9 prohibitions in the future. The only way it can lawfully do that is by applying to NOAA for an Incidental Take Permit pursuant to ESA Section 10. It is incontrovertible that the State Defendants bear the burden now of proving that their continuing deployment annually of over 100,000 VBR in Right Whale habitat will not result in the entanglement of a single Right Whale or any other Endangered Whale or Se Turtle. As stated, it is incontrovertible that the State Defendants — annually licensing the deployment of over 100,000 VBR in state waters — cannot prove that at least one further incident of an entanglement of a Right Whale in their licensed lobsterpot gear.

76. The ESA requires that anyone engaging in an activity that is known to kill or injure ESA listed must apply for a ESA Section 10 Incidental Take Permit in order that NOAA can review the activity and issue a ruling on whether or not it is prohibited under the ESA. Courts have no jurisdiction to tolerate any taking of an ESA listed species. Confronted by a defendant accused of engaging in ESA Section 9 prohibited conduct in the past, the Court at a minimum can only order the said defendant to apply for an ESA ITP or rule that the alleged prohibited conduct did not occur in the past and is not likely to occur in the future. The Court has no jurisdiction under the ESA to openly tolerate ANY ESA prohibited conduct by a defendant out of sympathy for any possible adverse impact on the defendant for having the ESA enforced against it.

The State Defendants Will Never Eliminate the Use of VBR Absent a Coercive Order

77. In 1996 and continuing today, the State Defendants, their employees, and the other Defendants are part of a culture that opposes and fights to prevent any environmental laws from being enforced against the Massachusetts commercial fishing industry. For example, the Massachusetts Environmental Policy Act requires a review of all commercial activities for their impact on the environment. Yet, the State Defendants have refused to do a MEPA review on the state's commercial fishing industry.

78. Since 1996 and to the current day, the State Defendants still refuse to admit that their requiring the use of VBR in the fishing gear is not an ESA Section 9 prohibition or that their requiring the use of VBR is a threat to entangle whales. Instead they maliciously lie to the Court in an attempt to evade enforcement of the ESA by it. They are now maliciously claiming

to the Court that they are “managing the conservation” of Right Whales as their authority under state law and pursuant to a ESA Section 6 “state cooperative agreement” that they entered into with NOAA for the Right Whale. Both statements are categorical lies on their part.

79. FIRST, Massachusetts statute imposes no authority on the State Defendants to authorize the taking of ESA listed species. Any possible such authority is categorically prohibited by the ESA and the Supremacy Clause of the Constitution. Further, the Marine Mammal Protection Act prohibits the “fishing” for marine mammals. State statute only authorizes the MDMF to regulate fishing. It does not authorize it to “conserve” any marine species that is not subject to being fished under state permit. This means that all the MDMF regulations to “conserve” Right Whales are facially invalid since the MDMF has no statutory authority to either to tell boaters to stay away from Right Whales or to even stop anyone from killing any marine mammal in state waters. The state agency responsible for protecting and conserving wildlife is the Massachusetts Division of Fish and Wildlife. The Massachusetts Endangered Species Act exclusively assigns to the MDMF exclusive supervisory and enforcement authority to protect state listed endangered species of wildlife — which includes Endangered Whales and Sea Turtles.

80. SECOND, the MDMF itself — and not the MDMF — entered into an ESA Section 6 cooperative agreement for the Right Whale. This cooperative agreement angered commercial fishermen and the State Defendants. So they coerced the then director of the MDMF against his written opposition to enter into a unlawful memorandum of understanding with MDMF to “transfer” its supervisory authority under MESA for Endangered Whales and Sea Turtles for Right Whales to the MDMF. The MDMF had no authority under statute to give away its MESA responsibilities and duties for protecting marine endangered species to the MDMF. As a result, to this day MDMF and the Office of the Attorney General has never enforced the MESA prohibitions against the killing of Right Whales against the MDMF as the MESA statute requires it to do. In fact, it now does nothing for Endangered Whales and Sea Turtles which effectively nullifies its ESA Section 6 agreement with NOAA under the terms of the ESA.

81. The above is blatant and incontrovertible evidence of the ongoing malicious and unlawful efforts of the State Defendants to evade any enforcement of the ESA and all other environmental laws against the Massachusetts commercial fishing industry. In Massachusetts the governance culture surrounding the commercial marine fishing industry is facially and as applied

in violation of the Constitution and the Massachusetts Constitution. The Massachusetts statutes and regulations that controls the MDMF, and the ESA violations by the Defendants only serves the Public Bad and not the Public Interest.

82. The State Defendants will never on their own stop their killing/injuring of Endangered Whales and Sea Turtles incidental to its licensing and regulation of marine commercial fisheries unless ordered to do so by the Court.

The Malicious Conspiracy to Conceal and Evade Liability for the Continuing Entanglement of Endangered Whales in VBR after 1996

83. The Defendants Center for Coastal Studies and Massachusetts Lobstermen Association act in concert with the State Defendants to support their continued requirement for the use of VBR by its licensed fishermen. They also act in concert to assist the State Defendants to maliciously conceal the entanglement of Endangered Whales and Sea Turtles from the Public scrutiny. The Defendants are “partners in ESA crime” with the State Defendants. They assist the State Defendants in evading the enforcement of state and federal wildlife laws against the Massachusetts commercial fishing industry. The support of Defendants MLA/CCS has been key in allowing the State Defendants to maintain the *status quo* required use of VBR since 1973 and for being able to maintain traditional, environmentally destructive commercial lobsterpot fishing practices using VBR. Therefore these Defendants are also liable for the violation of ESA Section 9 prohibitions arising from the continued entanglement of Endangered Whales and Sea Turtles in the lobsterpot gear licensed and regulated by the State Defendants.

84. The Plaintiff personally witnessed the beginning and the continuing development of the conspiracy between these Defendants to evade the lawful consequences of the Court’s 1996 Finding & Order. These Defendants are all maliciously acting in concert contributing their unique and separate capacities to insure that environmental laws will not be enforced against lobsterpot fishing and that the use of VBR will continue unabated. The conspiracy started during the pendency of the *Strahan v. Coxe* lawsuit. As a result of the Court’s order requiring the State Defendants to obtain an ESA Section 10 Incidental Take Permit offered, the State Defendants offered funding to CCS if its employees would never testify after 1996 that Endangered Whales were being entangled in Massachusetts or that there was now any threat of entanglement. Upon information and belief, no CCS employee will now admit that VBR offers an entanglement threat to Endangered Whales in Massachusetts waters.

85. Since 1996, the number of VBR deployed in Massachusetts coastal waters has steadily increased. This means that the quantifiable threat factor for entanglement has risen — and not decreased — for VBR to entangle Endangered Whales and Sea Turtles in Massachusetts waters. Also since 1996, *Strahan v. Coxe* has set a precedent for Federal courts to repeatedly hold federal and state agencies liable for violating the ESA’s Section 9 prohibitions when their licensing actions results in the unlawful taking of these species in violation of the ESA Section 9(a) prohibitions. **FN9**

86. Defendant MLA’s individual members are violating the ESA Sections 9 prohibitions by deploying lobster pot gear in US coastal waters that incidentally entangles Endangered Whales and Sea Turtles in a routine and continuous manner since 1973. The MLA and its members are actually “hunting” whales when they deploy lobsterpot gear with VBR. These fishermen are hunting whales in a similar manner as when a fishermen thows dynamite in the water to kill fish and it also kills a whale. Just because the ESA/MMPA prohibits his keeping the whale, it still hunted the whale as evidenced by the dead whale’s body.

There is no question that the Defendant MLA and its members know that they will entangle whales when they deploy VBR with their lobsterpot gear. These VBR are deployed in large numbers over a small area. They literally form a “minefield” of certain injury for any large whale attempting to swim through them. A fishermen will deploy 80 Killing Ropes in a small area. Right Whales and Endangered Turtles are attracted to these Killing Ropes and their attached buoys. In fact all manner of marine wildlife are attracted to the Killing Ropes and their attached buoys which are basically seen by marine wildlife as flotsam and jetsam to be used as shelter and play. Many Endangered Sea Turtles routinely become entangled in Killing Ropes licensed and regulated by the State defendants and Deployed by the Commercial Defendants.

87. The Defendants have never been issued any ESA Section 10 incidental take permit to authorize any incidental taking by them of Endangered Whales and Sea Turtles in the commercial fishing gear that they license and regulate to be deployed in US coastal waters under the concurrent state jurisdiction of Massachusetts..

⁹ See also *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) and *Florida Key Deer v. Stickney*, 864 F. Supp. 1222 (Dist. FL 1994) (Federal Emergency Management Agency violates ESA §§ 9 and 7 for its authorizing, regulating, and funding commercial development in habitat of ESA listed endangered deer species).

88. The Defendant CCS and its employees are acting in concert with both the State Defendants and Defendant MLA to maliciously aid them in unlawfully evading the enforcement of the ESA's Section 9 taking prohibitions so as to be able to continue using VBR and therefore to continue entangling, killing and injuring Endangered Whales and Sea Turtles. The CCS is employed by the State Defendants and is their official agent in its criminal and malicious attempts to evade enforcement of the ESA prohibitions and to unlawfully continue to use of VBR. They were hired to maliciously fabricate evidence and expert opinion to fraudulently deflect Public opinion and the courts from holding the Defendants liable for the killing and injuring of Endangered Whales and Sea Turtles in Killing Ropes. For this and more the Defendant CCS is in violation of the ESA Section 9 prohibitions for taking Endangered Whales and Sea Turtles.

89. The Defendants will continue their said ESA Section 9(a) prohibited taking of Endangered Species of Whales and Sea Turtles into the future unless ordered to stop by the Court.

COUNT II: *Defendants Violation of 16 USC § 1538(a): The Defendants Violation of the ESA Section 9(a) Prohibitions Against the Adverse Alteration of Designated Critical Habitat for the Right Whale.*

90. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 89.

91. The NOAA listed Cape Cod Bay and other areas subject to the State Defendants lobsterpot fishing activities as ESA listed designated critical habitat for the Northern Right Whale FN¹⁰ The State Defendants (i. e. MEOEEA, and the MDMF) are licensing and regulating commercial fishing operation off the Atlantic coastline in waters under the concurrent state jurisdiction of the state of Massachusetts. The deployment of VBR in listed ESA designated critical habitat for the Right Whale in Cape Cod Bay an off the Massachusetts coastline. The deployment of many tons of plastic fishing and the resultant “ghost gear” left behind adversely alters the marine habitat of the Right Whales critical habitat. Right Whales have been know to give birth in Cape Cod Bay and other areas of its designated critical habitat.

¹⁰ 50 CFR 226.203 and *Federal Register*, Vol. 81, No. 17, 27 January 2016

92. The Defendants will continue their said ESA Section 9(a) prohibited taking and unlawful alteration of the listed designated critical habitat of the Right Whale unless ordered not to do so by the Court.

COUNT III: *Defendants Violation of 42 USC § 1983: The Defendants Violation of the Civil Rights Act: The Retaliation Against the Plaintiff for Petitioning the Courts by Refusing me Access to Public Information, Gagging State Employees for Talking to Me, and Refusing to Accept My Petitions for Regulatory Reform.*

93. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 92.

94. The State Defendants and Defendant CCS as a state actor are violating the Plaintiff's First Amendment protected right to petition the Court and Free Speech. These Defendants have intimidated and coerced state employees from talking and otherwise communicating with the Plaintiff on any issue. They have deliberately and maliciously denied the Plaintiff access to Public records in order to deter him from being able to petition the Court and prosecute them and others who have violated the provisions of the ESA.

95. In 2019, Defendant Pierce ordered MDMF employees do deny the Plaintiff any opportunity to apply for a commercial or recreational lobsterpot fishing license. On 4 April 2019 and on 29 April 2019, MDMF attempted to get either a recreational and/or a commercial lobsterpot permit for students. FN The Plaintiff is a citizen of Massachusetts and a full time graduate student at the University of New Hampshire. As such he is entitled to obtain either lobsterpot fishing permit. On both these dates the MDMF employees departed from their routine practice of issuing a permit to anyone appearing in person at its office and offering to pay for the permit. Instead, the Plaintiff was not allowed to purchase a permit and was expelled from the office physically by police under the threat of trespass arrest. The Plaintiff was then trespassed from the MDMF office under the orders of Defendant Pierce.

96. Defendant Pierce and MDMF are unlawfully retaliating against the Plaintiff for bringing the instant action against the State Defendants. MDMF employees told the Plaintiff that they are refusing to issue him any lobsterpot permit so he will not have the standing to ask the Court to allow him to go fishing without using VBR in his gear. They do not want anyone to be able to show that lobsterpot fishing be successfully done with VBR. The State Defendants are violating

the Plaintiff First Amendment protected right for Free Speech, his 14th Amendment protected right of due process and equal treatment under the law.

97. The Massachusetts marine fishing statutes as applied to Green Fishermen and the Plaintiff operates as a Public Bad and does not serve the Public Interest. They discriminate agent 99.9 percent of the Public and deny them and the Plaintiff from any opportunity to get a commercial lobsterpot permit. This violated the Plaintiff's constitutional protected right of due process and equal treatment under the law.

98. The Plaintiff as a Green Fishermen has a preferred right rooted in the Public Interest to obtain a commercial lobsterpot permit over that is possessed by any current holders of a State Defendants lobster pot permit.

COUNT IV: *Defendants Violation of 16 USC § 1538(a and g):* (Defendants Vineyard Wind LLC and Baystate Wind LLC)

99. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 98.

100. The Defendants Vineyard Wind LLC and Baystate Wind LLC are intending to spend billions of dollars to build a energy generating complex in the marine habitat that Endangered Whales and Sea Turtles occupy every month of the year. The construction and operation will subject endangered wildlife to extreme noise and ship traffic that will kill and injure this endangered wildlife in violation of the ESA Section 9 take prohibitions.

101. These Defendants will kill and injure endangered wildlife in the future by the construction and operation of their said energy generating facility unless ordered not to do so by the Court.

The Plaintiff's Supplemental Claims Against the Defend

COUNT V: *Defendants Sawyer, Haviland, MLA and CCS are Public Nuisances and Have Caused Millions of Dollars of Injury to the Plaintiff Apart from How They Injured Other Members of the Public.* **FN11**

102. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 101.

103. The said Defendants have for decades conducted themselves to deliberately and negligently injure the interests of the Plaintiff in his enjoyment and efforts to continue the survival of the Northern Right Whale. It will take millions of dollars for the Plaintiff to accomplish the return the Right Whale to the biological status that it would have if it were not repeatedly killed, injured and entangled by the actions of the Defendants. These Defendants have conducted themselves as a Public nuisance.

COUNT VI: *Violation of the Massachusetts Civil Rights Act.* (David Pierce) **FN12**

104. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 103.

105. The Defendant Pierce's repeated threats to deny the Plaintiff a commercial and recreational lobsterpot license to intimidate and coerce him from suing the State Defendants and otherwise attempting to become a Green Fishermen is a facial violation of the Massachusetts Civil Rights Act. His issuing a trespass notice from entering ever again the MDMF office and order all MDMF employees to not speak with the Plaintiff, provide him any services, and to not allow him access to any public records MDMF possession is a threat to intimidate the Plaintiff and to coerce him from protecting endangered wildlife, bringing lawsuits against the State Defendants and commercial fishermen, and conducting political advocacy.

106. Unless the Court orders Pierce to do otherwise, Pierce will continue to threaten and intimidate the Plaintiff to coerce him from enjoying his statutory and constitutionally protected rights.

¹¹ See *Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court*, 448 Mass. at 34–35 & *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 406 Mass. 701, 707 (1990) (valid case for public nuisance where the defendant had interfered with the rights of the plaintiff's patients to obtain abortion).

¹² GL Chapter 12 § 11H

PRAYER FOR RELIEF

- I. For a Declaratory Judgment that the Plaintiff has a right as a Green Fisherman to obtain a commercial lobsterpot permit from the State Defendants and to not have to use Vertical Buoy Ropes in his fishing gear.
- II. For a Declaratory Judgment that the Defendants are violating the ESA's Section 9(a and g) prohibitions by taking members of Endangered Species of Whales and Sea Turtles off the US coast pursuant to their respective commercial fishing operations owing to their requiring the use of Vertical Buoy Ropes in lobsterpot fishing gear and in Gill nets.
- III. For an order, enjoining the Defendants from licensing or engaging in further Lobster Pot and Gill Net commercial fisheries operations that could result in the entanglement of any Endangered Whale and Sea Turtle and enjoining the Government Defendants from licensing said commercial fisheries operations unless they can scientifically demonstrate that these acts will not result in the killing and/or injuring of individuals of said endangered species.
- IV. For an order, ordering the Defendants Vineyard Wind LLC and Baystate Wind LLC to not build or operate any windfarm without first obtaining an ESA Section 10 Incidental Take Permit.
- V. For an award of 1,000,000 in compensatory relief from Defendants Sawyer, MLA, Pierce and CCS.
- VI. For an award of \$1,000,000 in punitive damages from Defendants Sawyer, MLA, Pierce and CCS.
- VII. For an award of the Plaintiff's direct costs of his prosecution against the Defendants.
- VIII. For any further relief that the Court deems appropriate.

BY:

/s/ Richard Maximus Strahan

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Pro Se and Proud!

VERIFICATION OF THE COMPLAINT

I Richard Maximus Strahan CLAIMS that the about document consists solely of claims of scientific fact, argument and data. While it supplies an outline of rudimentary claims of law and legal characterization of the Defendants actions to assist the Court in granting him his requested relief against them, these claims are merely inclusive and not exclusive. The Plaintiff is not an attorney and petitions the Court to supply through its experience and training in law ANY legal theory and interpretation of the Defendants actions that allow it to issue the relief that is sought in the his entitled "Prayers for Relief" section of the above document. t

The Plaintiff verify under the pains and penalties of perjury that all the facts alleged in the above complaint are known to the best of my ability to be scientifically true. All allegations of facts against the Defendants are the result of the Plaintiff's scientific evaluation of their activities over several decades. The Plaintiff will provide supplemental filings of pleading to the instant document in the record of facts and data in support of his claims of fact and law against the Defendants made in the above document. Signed under the pains and penalties of perjury this 4th day of June in the year 2019.

/s/ Richard Maximus Strahan