

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE; CENTER FOR)
BIOLOGICAL DIVERSITY; DEFENDERS)
OF WILDLIFE; NATURAL RESOURCES)
DEFENSE COUNCIL, INC.; NORTH)
CAROLINA COASTAL FEDERATION;)
OCEANA; ONE HUNDRED MILES;)
SIERRA CLUB; and SURFRIDER,)
FOUNDATION,)

Plaintiffs,)

v.)

WILBUR ROSS, IN HIS OFFICIAL)
CAPACITY AS THE SECRETARY OF)
COMMERCE; NATIONAL MARINE)
FISHERIES SERVICE; and CHRIS)
OLIVER, IN HIS OFFICIAL CAPACITY AS)
THE ASSISTANT ADMINISTRATOR FOR)
FISHERIES,)

Defendants.)

No. 2:18-cv-03326-RMG

**MOTION TO INTERVENE OF THE STATES OF MARYLAND, CONNECTICUT,
DELAWARE, MAINE, NEW JERSEY, NEW YORK, AND NORTH CAROLINA
AND THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA**

The States of Maryland, Connecticut, Delaware, Maine, New Jersey, New York, and North Carolina and the Commonwealths of Massachusetts and Virginia (“the States”) hereby move to intervene permissively as Plaintiffs-Intervenors in the above-captioned case pursuant to Federal Rule of Civil Procedure 24(b). The below memorandum of law sets forth the States’ basis for intervention and attaches a proposed complaint in intervention. Following good-faith consultation, counsel for Plaintiffs has advised that Plaintiffs do not oppose this motion, and counsel for Defendants has advised that Defendants reserve their position pending review of the motion.

MEMORANDUM OF LAW IN SUPPORT OF MOTION

The States respectfully submit this memorandum of law in support of their motion to intervene. As detailed below, the States amply satisfy the requirements for permissive intervention under Federal Rule of Civil Procedure 24(b), and intervention should therefore be granted.

BACKGROUND

A. The NGOs' Complaint

This case was filed last week by the South Carolina Coastal Conservation League and eight other organizations (“the NGOs”) against the National Marine Fisheries Service (“NMFS”), the Assistant Administrator for Fisheries, and the Secretary of Commerce. *See* Complaint for Declaratory and Injunctive Relief, ECF No. 1 (“NGO Compl.”). The case challenges certain actions taken by NMFS in connection with five companies’ proposals to conduct seismic testing—a form of surveying involving the repeated firing of arrays of airguns at high volumes—to explore the ocean floor for potential oil and gas resources. NGO Compl. ¶¶ 1-2, 72. More specifically, the case challenges NMFS’s grant of “incidental harassment authorizations” pursuant to the Marine Mammal Protection Act, allowing the five companies to incidentally harass marine mammals well over 300,000 times in the course of conducting their seismic testing activities. NGO Compl. ¶¶ 9-10, 15, 103-27, 148-56; *see* Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Geophysical Surveys in the Atlantic Ocean, 83 Fed. Reg. 63,268 (Dec. 7, 2018). The case also challenges a biological opinion that NMFS issued pursuant to the Endangered Species Act in connection with the companies’ proposed seismic testing activities. NGO Compl. ¶¶ 11-12, 128-39, 157-63. Finally, it challenges NMFS’s decision not to conduct an environmental impact statement pursuant to the National Environmental Policy Act in connection

with those activities. NGO Compl. ¶¶ 13-14, 140-47, 164-70. The NGOs' complaint seeks declaratory and injunctive relief. NGO Compl. pp. 44-45.

Count One of the NGOs' complaint alleges that NMFS's issuance of incidental harassment authorizations ("IHAs") violated the Marine Mammal Protection Act and the Administrative Procedure Act in a multiple of ways. NGO Compl. ¶¶ 148-56. For instance, the NGOs allege that NMFS's decision violates the Marine Mammal Protection Act's requirement that IHAs be issued only for harassment of "small numbers" of marine mammals. NGO Compl. ¶¶ 149, 153; *see* 16 U.S.C. § 1371(a)(5)(D)(i) (allowing authorization of incidental "taking by harassment of small numbers of marine mammals of a species or population stock"). The NGOs also allege that NMFS acted unlawfully in determining that the harassment it authorized would have no more than a "negligible impact" on affected marine mammal species or stocks. NGO Compl. ¶¶ 150, 153; *see* 16 U.S.C. § 1371(a)(5)(D)(i)(I) (allowing incidental taking by harassment only upon finding that it "will have a negligible impact" on the affected marine mammal species or stock). Further, they allege that NMFS unlawfully determined that the mitigation measures it prescribed in connection with the IHAs would ensure that the companies' seismic testing activities would have the "least practicable impact" on affected marine mammal species or stocks. NGO Compl. ¶¶ 152-53; *see* 16 U.S.C. § 1371(a)(5)(D)(ii)(I) (authorization must prescribe "means of effecting the least practicable impact on such species or stock and its habitat").

Count Two of the NGOs' complaint alleges illegality in the biological opinion that NMFS issued, pursuant to the Endangered Species Act, in connection with the companies' seismic testing activities. NGO Compl. ¶¶ 157-63. The NGOs allege, among other things, that NMFS unlawfully determined that seismic testing was "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of any

such species' designated critical habitat. NGO Compl. ¶¶ 158, 160-61, 163; *see* 16 U.S.C. § 1536(a)(2), (b)(3)(A). For instance, they allege that NMFS gave inadequate consideration to the precarious plight of the critically endangered North Atlantic right whale, and to the potential severe consequences of exposing right whales to seismic testing. NGO Compl. ¶ 160.

Finally, Count Three of the NGOs' complaint alleges that NMFS violated its National Environmental Policy Act obligations by failing to prepare an environmental impact statement or supplemental environmental impact statement in connection with its issuance of the IHAs, and by adopting an inadequate environmental assessment instead. NGO Compl. ¶¶ 164-70.

B. The States' Proposed Complaint in Intervention

All nine of the States are situated along the Atlantic coast, with coastal economies that depend on tourism and marine activities. Like the NGOs' complaint, the States' proposed complaint in intervention—attached hereto as Exhibit A¹—challenges NMFS's actions with respect to the five companies' proposals to conduct seismic testing in the Atlantic Ocean. Proposed Complaint-in-Intervention of Plaintiffs-Intervenors States of Maryland, Connecticut, Delaware, Maine, New Jersey, New York, and North Carolina and Commonwealths of Massachusetts and Virginia (“State Compl.”). Like the NGOs' complaint, the States' proposed complaint alleges that NMFS's decision to issue the IHAs violated the Marine Mammal Protection Act and the Administrative Procedure Act. *Id.* ¶¶ 71-76. It also alleges that NMFS's biological opinion violated the Endangered Species Act and the Administrative Procedure Act, *id.* ¶¶ 77-83, and that NMFS's environmental analysis was insufficient to meet its obligations under the National Environmental Policy

¹ *See* Fed. R. Civ. P. 24(c) (motion to intervene must “be accompanied by a pleading that sets out the claim or defense for which intervention is sought”).

Act, *id.* ¶¶ 84-88. The States’ proposed complaint requests relief that generally tracks the relief requested by the NGOs. *Id.* pp. 27-28.

Count One of the States’ proposed complaint alleges that NMFS’s issuance of the IHAs contravenes the Marine Mammal Protection Act and Administrative Procedure Act. *Id.* ¶¶ 71-76. Like the NGOs’ complaint, the States’ complaint alleges that NMFS’s decision violates the Marine Mammal Protection Act’s provision that IHAs issue only for harassment of “small numbers” of marine mammals. *See, e.g., id.* ¶¶ 2, 56, 57, 73, 74. It also alleges that NMFS acted unlawfully in concluding that the five companies’ seismic testing would have no more than a “negligible impact” on marine mammal species or stocks. *See, e.g., id.* ¶¶ 2, 59-61, 73, 75. The proposed complaint further alleges that NMFS unlawfully determined that the mitigation measures on which it conditioned the IHAs would ensure that seismic testing would have the “least practicable impact” on marine mammal species or stocks. *See, e.g., id.* ¶¶ 53, 62, 73, 76.

Count Two of the States’ proposed complaint alleges that NMFS’s biological opinion was unlawful. *Id.* ¶¶ 77-83. In particular, it alleges that NMFS unlawfully concluded that seismic testing was unlikely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification. *See, e.g., id.* ¶¶ 65, 78, 82. In that vein, the complaint—like the NGOs’ complaint—alleges that NMFS took inadequate account of the North Atlantic right whale’s precipitous decline and the potentially severe consequences of seismic testing for right whales. *See, e.g., id.* ¶¶ 62, 65, 70, 81, 82.

Count Three of the States’ proposed complaint alleges that NMFS’s environmental analysis was insufficient to meet its obligations under the National Environmental Policy Act. *Id.* ¶¶ 84-88. The complaint alleges that NMFS should have conducted a full environmental impact statement in connection with the IHAs, rather than just an environmental assessment, and acted

unlawfully in concluding that the IHAs would have no significant environmental impact. *See, e.g., id.* ¶¶ 68-70, 87, 88.

LEGAL STANDARD

Federal Rule of Civil Procedure 24(b) provides that “on timely motion, the court may permit anyone to intervene who,” as relevant here, “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). The rule further provides that, “[i]n exercising its discretion” with regard to permissive intervention, “the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). The Court’s discretion in granting permissive intervention is broad. *Lewis v. Excel Mechanical, LLC*, No. 2:13-cv-281-PMD (D.S.C. Jul. 16, 2013), 2013 WL 3762904, *4; *see id.* (explaining that “the two questions that the Court must consider as to permissive intervention are whether [the party seeking intervention] has a claim or defense that shares a question of law or fact in common with this action, and whether intervention would unduly delay resolution of this litigation with respect to the current parties”).

ARGUMENT

The States’ motion easily satisfies the standards for permissive intervention. *First*, it is clear that the States have claims that share questions of law and fact with the NGOs’ claims. *See* Fed. R. Civ. P. 24(b)(1)(B). The States are challenging the same IHAs, the same biological opinion, and the same environmental assessment as the NGOs. NGO Compl. ¶¶ 9-10, 15, 103-27, 148-56; State Compl. ¶¶ 64-70. Both the States and the NGOs are challenging the IHAs as violating the Marine Mammal Protection Act and the Administrative Procedure Act. NGO Compl. ¶¶ 148-56; State Compl. ¶¶ 71-76. In addition, both the States and the NGOs are challenging the biological opinion as violating the Endangered Species Act and the Administrative Procedure Act, and

are challenging the environmental assessment as violating the National Environmental Policy Act and the Administrative Procedure Act. NGO Compl. ¶¶ 157-63, 164-70; State Compl. ¶¶ 77-83, 84-88. Beyond these broad commonalities, the States' claims share numerous questions of law and fact with the NGOs' claims. Foremost among these are the following:

- Whether NMFS's issuance of the IHAs was arbitrary and capricious or otherwise contrary to law. NGO Compl. ¶ 156; State Compl. ¶¶ 74-76.
- Whether NMFS's conclusion that the IHAs were for "small numbers" of marine mammals was arbitrary and capricious or otherwise contrary to law. NGO Compl. ¶¶ 149, 153, 156; State Compl. ¶ 74.
- Whether NMFS's conclusion that the IHAs would have only a "negligible impact" on affected marine mammal species or stocks was arbitrary and capricious or otherwise contrary to law. NGO Compl. ¶¶ 150, 153, 156; State Compl. ¶ 75.
- Whether NMFS's conclusion that its prescribed mitigation measures would ensure the least practicable adverse impact on affected marine mammal species or stocks was arbitrary and capricious or otherwise contrary to law. NGO Compl. ¶¶ 152-53, 156; State Compl. ¶ 76.
- Whether NMFS's biological opinion was arbitrary and capricious or otherwise contrary to law. NGO Compl. ¶¶ 160, 162-63; State Compl. ¶ 81.
- Whether NMFS's conclusion that the proposed seismic testing was not likely to jeopardize the continued existence or recovery of Endangered Species Act-listed species and was not likely to destroy or adversely modify critical habitat for such species was arbitrary and capricious or otherwise contrary to law. NGO Compl. ¶¶ 160, 163; State Compl. ¶¶ 81, 82.

- Whether NMFS’s environmental assessment was arbitrary and capricious or otherwise contrary to law. NGO Compl. ¶¶ 169, 170; State Compl. ¶¶ 87, 88.
- Whether NMFS’s conclusion that the IHAs would have no significant environmental impact was arbitrary and capricious or otherwise contrary to law. NGO Compl. ¶¶ 167, 170; State Compl. ¶¶ 87, 88.

The remedies that the States request likewise overlap substantially with those requested by the NGOs. For instance, both the States and the NGOs seek declarations that Defendants have violated the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act. NGO Compl. p. 44; State Compl. pp. 27-28. Both the States and the NGOs request that the Court vacate NMFS’s IHAs, biological opinion, and environmental assessment. NGO Compl. p. 44; State Compl. p. 28. And both the States and the NGOs request that the Court enjoin Defendants from authorizing takes of marine mammals incidental to seismic testing for purposes of oil and gas exploration in the Mid- and South Atlantic until they comply with applicable law. NGO Compl. p. 45; State Compl. p. 28.

Second, the States’ motion to intervene is timely. *See* Fed. R. Civ. P. 24(b). NMFS announced its decision on November 30, 2018, and published it in the Federal Register on December 7, 2018. The NGOs filed this lawsuit on December 11, 2018. The States, in turn, are filing this motion to intervene on December 20, 2018—just nine days later. No proceedings of substance have taken place in this Court. *Cf. MacGregor v. Farmers Ins. Exch.*, No. 2:10-cv-03088 (D.S.C. Oct. 31, 2012), 2012 WL 5380631, *3-*4 (denying permissive intervention as untimely where motion was filed more than one year after plaintiffs filed complaint).

Third, allowing intervention would promote efficiency and judicial economy. The NGOs’ lawsuit is already pending in this Court. The States could have filed their own lawsuit in any of a

variety of district courts along the Atlantic coast. Had the States done so, the result would have been duplicative litigation, with attendant burdens on the government and the judiciary, and the possibility of inconsistent decisions from different courts. Alternatively, suing in another court could have prompted time-consuming motions to transfer one or more of the cases so that they could all be heard by the same court. Intervening in this action, rather than filing a separate, stand-alone action, will conserve resources by avoiding these undesirable consequences. *See Michelin Ret. Plan v. Dilworth Paxson, LLP*, No. CV 6:16-3604-HMH-JDA, 2017 WL 2531845, *3 (D.S.C. June 12, 2017) (exercising discretion to grant motion for permissive intervention where motion met the Rule 24(b) requirements and where “granting [the] motion will conserve judicial resources”).

Finally, intervention would not prejudice any party or the Court. *See Fed. R. Civ. P. 24(b)(3)* (providing that “the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights”). This case is at its very earliest stages, with nothing of substance having transpired subsequent to the NGOs’ filing of their complaint just last week. *See Students for Fair Admissions Inc. v. Univ. of North Carolina*, 319 F.R.D. 490, 495 (M.D.N.C. 2017) (finding no prejudice to other parties where motion for permissive intervention was filed at “the early stage of the proceedings”). The States do not expect that their intervention will delay or otherwise interfere with adjudication of the NGOs’ claims. Consistent with the absence of prejudice from intervention, the NGOs do not oppose the States’ motion to intervene.²

² In discussing permissive intervention, courts occasionally have stated that intervenors must establish an independent basis of subject matter jurisdiction. *See, e.g., MacGregor*, 2012 WL 5380631, *3. The States’ proposed complaint raises claims under multiple federal statutes and thus properly invokes federal question jurisdiction pursuant to 28 U.S.C. § 1331.

CONCLUSION

For the foregoing reasons, the States' motion to intervene should be granted.

December 20, 2018

Respectfully submitted,

BRIAN E. FROSH
ATTORNEY GENERAL OF MARYLAND

/s/ W. Jefferson Leath, Jr.
W. Jefferson Leath, Jr. (Fed. Bar No. 2627)
Jefferson Leath, Esq., LLC
40 Calhoun Street, Suite 400
Charleston, SC 29401
Telephone: (843) 853-5353
jeff@seekingslaw.com

Joshua M. Segal (PHV forthcoming)
Assistant Attorney General
John B. Howard, Jr.(PHV forthcoming)
Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202
Telephone: (410) 576-6446
Facsimile: (410) 576-7036
jsegal@oag.state.md.us
jbhoward@oag.state.md.us

*Counsel for the States of Maryland,
Connecticut, Delaware, Maine, New Jersey,
and New York and the Commonwealths of
Massachusetts and Virginia*

Emily A. Vainieri (PHV forthcoming)
Assistant Attorney General
Office of the Attorney General
Maryland Department of Natural Resources
580 Taylor Avenue, C-4
Annapolis, MD 21401
Telephone: 410-260-8352
Facsimile: 410-260-8364
emily.vainieri1@maryland.gov

Counsel for the State of Maryland

GEORGE JEPSEN
ATTORNEY GENERAL OF CONNECTICUT

Robert D. Snook (PHV forthcoming)
Assistant Attorney General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
Telephone: (860) 808-5250
Facsimile: (860) 808-5387
robert.snook@ct.gov

Counsel for the State of Connecticut

MATTHEW DENN
ATTORNEY GENERAL OF DELAWARE

Ilona Kirshon (PHV forthcoming)
Deputy State Solicitor
David J. Lyons (PHV forthcoming)
Deputy Attorney General
Jameson A.L. Tweedie (PHV forthcoming)
Deputy Attorney General
Department of Justice
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801
Telephone: (302) 577-8372
Facsimile: (302) 577-6630
ilona.kirshon@state.de.us
david.lyons@state.de.us
jameson.tweedie@state.de.us

Counsel for the State of Delaware

JANET T. MILLS
ATTORNEY GENERAL OF MAINE

Margaret A. Bensinger (PHV forthcoming)
Assistant Attorney General
Gerald D. Reid (PHV forthcoming)
Chief, Natural Resources Division and
Assistant Attorney General
6 State House Station
Augusta, ME 04333-0006
Telephone: (207) 626-8578
Facsimile: (207) 626-8812
peggy.bensinger@maine.gov
jerry.reid@maine.gov

Counsel for the State of Maine

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

Matthew Ireland (PHV forthcoming)
Assistant Attorney General
Megan M. Herzog (PHV forthcoming)
Special Assistant Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
Telephone: (617) 727-2200
Facsimile: (617) 727-9665
matthew.ireland@mass.gov
megan.herzog@mass.gov

*Counsel for the Commonwealth of
Massachusetts*

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

Dianna E. Shinn (PHV forthcoming)
Deputy Attorney General
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, NJ. 08625-0093
Telephone: (609) 376-2789
Facsimile: (609) 341-5030
dianna.shinn@law.njoag.gov

Counsel for the State of New Jersey

JOSHUA H. STEIN
ATTORNEY GENERAL OF
NORTH CAROLINA

/s/ William Harkins
William Harkins ((Fed. Bar No. 10334)
Assistant Attorney General
Marc Bernstein (PHV forthcoming)
Special Deputy Attorney General
Ryan Park (PHV forthcoming)
Deputy Solicitor General
North Carolina Department of Justice
PO Box 629
Raleigh, NC 27602
Telephone: (919) 716-6535
Facsimile: (919) 716-6761
wharkins@ncdoj.gov
mbernstein@ncdoj.gov
rpark@ncdoj.gov

Counsel for the State of North Carolina

BARBARA D. UNDERWOOD
ATTORNEY GENERAL OF NEW YORK

Andrew G. Frank (PHV forthcoming)
Assistant Attorney General
New York State Attorney General's Office
28 Liberty Street
New York, NY. 10005
Telephone: (212) 416-8271
Facsimile: (212) 416-6007
andrew.frank@ag.ny.gov

Counsel for the State of New York

MARK R. HERRING
ATTORNEY GENERAL OF VIRGINIA

Paul Kugelman (PHV forthcoming)
Senior Assistant Attorney General
Office of the Virginia Attorney General
202 North 9th Street
Richmond, VA 23219
Telephone: (804) 786-3811
Facsimile: (804) 786-2650
pkugelman@oag.state.va.us

Counsel for the Commonwealth of Virginia