ARGUMENT SCHEDULED FOR FEBRUARY 24, 2023

No. 22-5238(L), 22-5244, 22-5245, 22-5246

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAINE LOBSTERMEN'S ASSOCIATION,
Plaintiff-Appellant,

STATE OF MAINE DEPARTMENT OF MARINE RESOURCES
Intervenor-Appellant,

v.

NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE; JANET COIT, IN HER OFFICIAL CAPACITY AS ASSISTANT ADMINISTRATOR FOR FISHERIES,
Defendants-Appellees,

CONSERVATION LAW FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE,
Intervenors-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 1:21-cv-02509-JEB

REPLY BRIEF FOR INTERVENOR-PLAINTIFF-APPELLANT STATE OF MAINE DEPARTMENT OF MARINE RESOURCES

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

GLOSSARY

APA:	Administrative Procedure Act
DST:	Decision Support Tool
ESA:	Endangered Species Act
Federal Appellees Brief:	Response Brief for Federal Appellees, National Marine Fisheries Service, et al.
ME Brief:	Opening Brief of the State of Main Department of Marine Resources
M/SI:	Mortality and Significant Injury
NMFS:	National Marine Fisheries Service

I. INTRODUCTION

> "When dealing with data uncertainties (e.g, a range of potential calving rates, or unquantified benefits from conservation measures), we utilized metrics representing the worst case scenario. Consequently, model outputs very likely overestimate the likelihood of a declining population."
>
> - A926 (2021 Biological Opinion).

> "Plaintiffs err in asserting that the Service applied an unfounded 'worst-case scenario' approach . . . . The record shows that the Service adopted no such approach . . . ."
>
> - Federal Appellees Brief at 21.

In its 2021 Biological Opinion regarding the effects of several fisheries including the lobster fishery on the North Atlantic right whale, the National Marine Fisheries Service ("NMFS") stretched the precautionary principle (or worst-case scenario analytical approach) beyond the breaking point. It did so by repeatedly overstating the effects of the lobster fishery on the right whale when engaging in consultation under Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), while understating the effects of other factors in the environmental baseline on the species. At the same time, NMFS completely discounted the beneficial effects of risk mitigation efforts in the environmental baseline, including its own Ship Strike Reduction Program and Canadian measures implemented to reduce harm to the right whale from entanglements and vessel strikes.

In an effort to defend their unlawful conduct, Federal Appellees engage in revisionist history and marshal post hoc rationalizations to defend the Biological Opinion. The quotations above illustrate the efforts of Federal Appellees to walk away from NMFS's statements in the Biological Opinion and its associated administrative record. NMFS expressly acknowledged that it systematically inflated the effects of the lobster fishery on the North Atlantic right whale when preparing the Biological Opinion. A926. Yet Federal Appellees now characterize this acknowledgement as "unremarkable." Fed. Appellees Br. at 39. But knowingly misallocating risk posed by different threats to a listed species will lead to misguided conservation efforts and needless economic dislocation in violation of the Endangered Species Act's ("ESA") requirement to use the best scientific and commercial data available, 16 U.S.C. § 1536(a)(2), *Bennett v. Spear*, 520 U.S. 154, 176 (1997), and the Administrative Procedure Act's ("APA") requirement that the agency engage in reasoned decision-making. *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (opining that the APA requires federal agencies to engage in reasoned decision-making).

Federal Appellees' brief cedes the fact that NMFS adopted a "worst-case scenario" analytical approach. Fed. Appellees Br. at 42-43. In a post hoc effort to mitigate the agency's unlawful conduct, Federal Appellees argue NMFS "evaluated a 'worst-case scenario' among the most likely scenarios, and only when necessary to resolve uncertainties," citing to the Biological Opinion. *Id.* (emphasis

added) (citing A926-27). However, neither the Biological Opinion nor the administrative record confirm that NMFS "evaluated a 'worst-case scenario' among the most likely scenarios." While Federal Appellees refer to the "most likely scenarios," their brief does not cite any portions of the record identifying those most likely scenarios. Federal Appellees should not be permitted to engage in post hoc rationalization to support NMFS's approach to undertaking the effects analysis and finalizing the Biological Opinion. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (rejecting an agency's attempt to rely in court on "impermissible post hoc rationalizations" to defend the legality of its action).

This unlawful analytical approach led to pervasive shortcomings in the Biological Opinion. The Court need not take on the task of rooting out each shortcoming. Rather, the Court can and should hold that the agency's analysis was flawed when it disregarded the best available data regarding three key elements: the apportionment of right whale mortality between Canada and the United States (defaulting to a 50/50 split); entanglement between gear types (assuming 100% of entanglements are attributable to trap/pot (i.e., lobster) gear); and anthropogenic and natural sources of mortality (assuming 100% of mortality is attributable to anthropogenic sources).

II. ARGUMENT

A. NMFS Erred by Arbitrarily Defaulting to a 50/50 Split of Right Whale Mortality between Canada and the United States.

Under *State Farm*, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). NMFS failed this test in the Biological Opinion by arbitrarily splitting unassigned right whale mortality and significant injury ("M/SI") 50/50 between the United States and Canada. Despite the post hoc rationalizations of Federal Appellees (and Intervenor Appellees), a 50/50 split directly contradicts, and obscures, actual data showing far more Canadian takes. And after-the-fact argument does not cure the arbitrary nature of a decision for which the Biological Opinion offers no rational explanation.

In the unknown country apportionment section of the Biological Opinion, NMFS provides cursory discussion of why it decided not to apportion based on either the percentage of time right whales occur in each country's waters or on known risk. A814-15. Regardless of whether the agency was correct in its conclusions on these points (which it was not), those conclusions are not explanations for why the agency decided to instead go with the 50/50 split. NMFS did not face a choice among only apportionment based on time, known risk, or an arbitrary 50/50 split. Simple dismissal of two options and failure to consider other

available and defensible options (including extrapolating from the known country apportionment data) is not "a satisfactory explanation" for defaulting to a 50/50 split.

In discussing the 50/50 split, NMFS merely states that it was following the approach used by the Atlantic Large Whale Take Reduction Team for its April 2019 meeting. *Id.* The only other possible reason given for why the 50/50 split represents the "best available information," is the agency's statement that "[g]iven limited distribution information and transboundary fishery attributes, NMFS assessed an equal division of the unassigned serious injuries and mortalities between the United States and Canada." A815. There is no "rational connection between the facts found and the choice made." *See State Farm*, 463 U.S. at 42. NMFS's decision to assign a 50/50 split between the United States and Canada was arbitrary and in error.

NMFS asserts that "[t]hese methods were peer reviewed . . . and while the reviewers did not come to consensus on accuracy, they considered the approach reasonable." A815. But, as the State pointed out earlier (and neither Federal Appellees nor Intervenor Appellees addressed), this statement is erroneous – nowhere did the peer reviewers conclude that the 50/50 split was "reasonable." *See* ME Br. at 14-16.

As this Court has stated on numerous occasions, "post hoc explanation by appellate counsel . . . is not an acceptable foundation for review of agency action."

Nasdaq Stock Mkt. LLC v. SEC, 1 F.4th 34, 38 (D.C. Cir. 2021); *see also Genuine Parts Co. v. EPA*, 890 F.3d 304, 314 (D.C. Cir. 2018); *Am. Min. Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990). That has not stopped Federal Appellees here. They cite to *Appalachian Power Co. v. EPA*, arguing the fact that "a model is limited or imperfect is not, in itself, a reason to remand agency decisions based upon it." Fed. Appellees Br. at 25-26 (citing 249 F.3d 1032, 1052 (D.C. Cir. 2001)). But this analogy fails – NMFS's simplistic assumption of a 50/50 split is nothing like the complex and quantitative computer modeling EPA used to determine whether a state's manmade air emissions affected a downwind state's attainment. *See Appalachian Power Co.*, 249 F.3d at 1048.

Further, Federal Appellees miss the full mark: as the *Appalachian Power Co.* court held, an agency "has undoubted power to use predictive models so long as it explains the assumptions and methodology used in preparing the model and provides a complete analytic defense should the model be challenged." *Id.* at 1052 (emphasis added). As detailed above, NMFS failed to either explain the assumptions or provide a complete analytic defense in regards to the 50/50 split. NMFS's decision to arbitrarily split unassigned M/SI is so oversimplified that the agency's conclusion is unreasonable. *See id*. Assigning a 50/50 split between the United States and Canada bears "no rational relationship to the reality it purports to represent" and, as such, this Court should reject it. *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999).

Federal Appellees argue that the 50/50 split "may not have been perfect, but it was reasonable based on the available data and therefore passes muster under APA review." Fed. Appellee Br. at 25. First, unsupported statements from NMFS that its actions were "reasonable" are insufficient to establish reasonableness. As discussed above, the peer review summary did not conclude that NMFS's approach was "reasonable," and neither Federal Appellees nor Intervenor Appellees can point to any specific such citation. In fact, the peer review summary explicitly says that a 50/50 split may not be the most appropriate method. A1991. The peer review summary also highlights a "clear recent shift in the spatial distribution of [right whales] which has been coupled with a shift in the source of known serious injuries and mortalities to more Canadian records." *Id.* Yet NMFS discounts both of these factors in its discussion of apportionment between the United States and Canada. *See* A814-15. Thus, not only does the peer review summary refute Federal Appellees' assertion that the peer review found NMFS's methodology to be "reasonable," the peer review summary explicitly calls out the northern shift in right whale spatial distribution and the greater risk to right whales in Canada as reasons that a different method should be examined.

The current briefs of the Federal Appellees and Intervenor Appellees cannot make up for the fact that NMFS did not provide a rational reason in the Biological Opinion itself for why the agency chose a 50/50 split between the United States and Canada. Moreover, unsupported statements from NMFS that its actions were

"reasonable" run contrary to the record. NMFS's decision to split unassigned right whale M/SI evenly between the United States and Canada was arbitrary and is a basis for setting aside the Biological Opinion.

B. NMFS Erred by Attributing 100% of United States Right Whale Entanglement to the Lobster Fishery.

NMFS studied entanglements from 2010-2018 using what it described as the "best available information to estimate future right whale interactions with the fisheries." A813. NMFS then disregarded this data and arbitrarily assumed that 100% of right whale entanglements were attributable to trap/pot gear. A817, 482. The studies recorded 107 right whale entanglements, and NMFS was able to classify the gear type in one-quarter of those entanglements. A816. Of the 25 known entanglements, 78% were categorized as attributable to pot/trap and 22% to gillnet gear. NMFS stated that this "data must be interpreted cautiously," but it then supplanted caution with unreasoned certainty and allocated 100% of the entanglements to the pot/trap fishery. This arbitrary assumption led NMFS to overstate the impacts of the lobster fishery on right whales.

In its brief, NMFS states that "it has good reasons to conclude that most of the unknown-gear entanglements were caused by trap/pot gear." Fed. Appellee Br. at 31 (emphasis added). We agree that the known data of right whale entanglements could inform this reasoned conclusion, but not a 100% allocation. Furthermore, the "good reasons" advanced by Federal Appellees are based on

faulty or incomplete conclusions.

First, NMFS justifies its 100% allocation because right whale interactions with gillnet panels "may be more easily detected" than trap/pot lines. A816; Fed. Appellee Br. at 31-32. However, NMFS fails to provide any data or analyses to support this difference in relative detection rate between gear types. Absent supporting data or analyses, this assertion amounts to an untested hypothesis that is insufficient to disregard the "best available information." NMFS now states this claim is misguided because this statement "was not the basis for the Service's decision." Fed. Appellee Br. at 32. However, this contradicts NMFS's use of the hypothesis in the Biological Opinion, the district court's reliance on it, and NMFS's acknowledgment that the statement was one of the "good reasons" for its allocation. A816, 226.

Second, NMFS states that because the vast majority of lines in the action area are pot/trap lines, 100% of right whale entanglement can be attributed to the lobster fishery. Fed. Appellee Br. at 31; *see* A816-17. However, this conclusion ignores the fact that the presence of a fishing line in the ocean cannot, by itself, inform right whale risk. A807-08. NMFS explained that a gear's presence in the water must be considered alongside a second factor, the presence of right whales where the gear is located. *Id.* Maine pointed out that analysis completed using the NMFS Decision Support Tool ("DST") indicated the State's exempt waters contain 73% of the vertical lines in the state's lobster fishery, but only account for 3% of

the risk of right whale entanglement. A1225. NMFS has not at any point disputed this conclusion. Therefore, that the bulk of the lines in the area are pot/trap lines is not a reasoned basis to ignore the data on known entanglements and conclude that such lines cause 100% of the danger to right whales.

Third, NMFS conflates the Biological Opinion's use of the term "lines" with "vertical lines." The Biological Opinion discusses NMFS's classification of gear types for observed entanglements. For entanglements with gear present, but not known, "it was described as *lines*," which could be "from gillnet gear, trap/pot gear, or another source." A815 (emphasis added). Later, NMFS discussed gillnet panel interactions and stated that one component of the gillnet gear responsible for entanglements are the "vertical lines." A816. NMFS now conflates these discussions in order to engage in post hoc rationalization. The Biological Opinion describes the unknown gear as "lines," not "vertical lines," and NMFS cannot now seek to rewrite the record.

Lastly, NMFS attributes Maine's concerns over NMFS's unexplained decision to deviate from its practice of extrapolating from observed data to nothing more than differing policy and scientific views. Fed. Appellee Br. at 33; ME Br. at 20. However, an agency's determination must be "logical and rational," and must "articulate a satisfactory explanation for its action." *Allentown Mack Sales & Serv.*, 552 U.S. 359, 374 (1998); *State Farm*, 463 U.S. at 43. Here, NMFS's inability to provide sufficient reasoning to justify its arbitrary departure from

standard practice goes directly to its violation of the APA and ESA. NMFS had the information to consider the factors before it and come to a reasoned adjustment of the observed data, but instead it arbitrarily zeroed out any impacts from other gear types in violation of the ESA and APA.

C. NMFS Erred by Assuming 100% of Right Whale Mortality is Anthropogenic.

In the Biological Opinion, NMFS describes how it apportioned take among different sources of mortality. The agency states that "[n]atural mortality is not included in the apportionment." A565, 819. This failure to account for any natural mortality is a crystal clear flaw in the NMFS analytical approach. Rather than acknowledge this fact, the agency has devised a series of post hoc rationalizations.

One is that, because humans are responsible for most right whale mortalities, it was reasonable for the agency to assume that humans are responsible for all right whale mortalities. *E.g.*, Fed. Appellees Br. at 35 (arguing "studies confirm that humans are responsible for nearly all adult right whale mortalities"). But as we explain in our opening brief, available, published analyses show that between 1970-2009, 20% of documented right whale deaths were "nonhuman," and that between 2003-2018, 12% of right whale deaths were natural (with all of these being calf deaths). ME Br. at 23. Zeroing out natural mortalities and attributing a share of them to the lobster fishery is unsupported by the best data available and unreasonable, and therefore, unlawful.

Another post hoc rationalization is that natural mortality is limited to calves and NMFS only analyzed mortality of "right whale adults." Fed. Appellees Br. at 36 (emphasis in original). But NMFS does not indicate where in the Biological Opinion it disregarded non-adult (i.e., calf and juvenile) mortality and only analyzed mortality of adult right whales. While Federal Appellees now contend that calves cannot be counted, Fed. Appellees Br. at 36, the Biological Opinion includes statements to the contrary. A684 (stating "new calves rarely go undetected"); A1094 (stating "extensive survey efforts on the breeding grounds allow for the assumption that observed calf counts are essentially a census of NARW calf production"). The claim that calves weren't counted is made for the first time in Federal Appellees' brief, not in the Biological Opinion. "An agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1909. This and other post hoc rationalizations should be disregarded.

Further, Federal Appellees essentially make a harmless error argument: even if NMFS were to reduce the mortality attributed to the lobster fishery to account for natural mortality, the record would still support the conclusion that the fishery adversely affects right whales. Fed. Appellees Br. at 38. First, in making this argument Federal Appellees cede the fact that NMFS failed to account for natural mortality when apportioning mortality among different sources. Even more concerning, Federal Appellees fail to acknowledge that the flawed NMFS analysis

(which propagates errors inherent in worst case scenarios) has overstated the magnitude of the effects of the fishery on the right whale, leading the agency to demand excessive risk reduction by the lobster harvesters in order to fulfill the requirements of the ESA and Marine Mammal Protection Act.

III. CONCLUSION

For the reasons set forth above and in its opening brief, the State of Maine, through its Department of Marine Resources, respectfully requests that this Court reverse the decision of the district court, hold that the Biological Opinion violates the APA and ESA, and remand the Biological Opinion to NMFS without vacatur.

Respectfully submitted,

Dated: January 10, 2023

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE, AND TYPE STYLE REQUIREMENTS

This response complies with the length limit in Fed. R. Civ. P. 27(d)(2)(A), because the response contains 2,987 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The response has been prepared using 14 point Times New Roman font.

Dated: January 10, 2023 *<u>/s/ Paul S. Weiland</u>*
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CERTIFICATE OF SERVICE

In accordance with F.R.A.P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that on January 10, 2023, I electronically filed the foregoing by using the Court's CM/ECF system and that service will be accomplished by the appellate CM/ECF system on all participants registered in this case as CM/ECF users.

/s/ Paul S. Weiland
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