

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; MASSACHUSETTS
LOBSTERMEN'S ASSOCIATION; DISTRICT 4 LODGE OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKS; LOCAL LODGE 207,

Intervenors-Appellants,

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 APPELLANT-INTERVENOR MASSACHUSETTS
LOBSTERMEN'S ASSOCIATION**

SAMUEL P. BLATCHLEY

Counsel of Record

ROBERT T. DUBE JR *

ECKLAND & BLANDO LLP

22 Boston Wharf Road, 7th Floor

Boston, MA 02210

(617) 217-6936

sblatchley@ecklandblando.com

*Supervised by principals of the firm who
are members of the MA bar and D.C Circuit
bar

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
BiOp	References to the 2021 Biological Opinion
CBD	Center for Biological Diversity
CLF	Conservation Law Foundation
Conservation Framework	North Atlantic Right Whale Conservation Framework
DW	Defenders of Wildlife
ESA	Endangered Species Act
J.A.	References to the joint appendix
MALA	Massachusetts Lobstermen's Association
M/SI	mortalities and serious injuries
NMFS	National Marine Fisheries Service
right whale	North Atlantic right whale

I. INTRODUCTION

For the first time on appeal, NMFS now asserts that it did not use “worst case scenarios,” despite specifically stating it was doing so in its Biological Opinion, JA[BiOp_2004, 2149, 2152], and defending that approach before the lower court. Instead, it claims to have sought “more protective outcomes.” This blatant and unavailing attempt at reframing its violation of its statutory obligations should not be accepted by this Court. Even if seeking “more protective outcomes” was permissible, NMFS would still have been required to use the “best available scientific and commercial data available,” which it failed to do. Rather, it relied on statistical models that directly contradicted the actual data available to NMFS. Finally, NMFS reliance on *District 4 Lodge v. Raimondo*, 40 F.4th 36 (1st Cir. 2022), is misplaced, as the First Circuit, in evaluating a grant of a preliminary injunction, lacked the full record now available to this Court and was considering issues not on appeal to this Court.

II. ARGUMENT

A. NMFS Failed to Use Actual Data for Outcomes Reasonably Certain to Occur to Create its Biological Opinion in Violation of the ESA, MMPA, and APA.

Despite Appellees’ assertions to the contrary, this is not a case of “competing views about policy and science,” wherein MALA is simply complaining about catastrophic and ill-advised regulations that otherwise comply with all statutory

obligations. *In re Polar Bear ESA Listing & Section 4(d) Rule Litig.*, 709 F.3d 1, 9 (D.C. Cir. 2013) (citation omitted). Rather, this case asks whether this Court will permit NMFS to use statistical models instead of actual data to forecast worst case scenarios for the right whale in contravention of its obligation to rely on the best available science and commercial data to determine outcomes reasonably certain to occur. 16 U.S.C. §1536(a)(2); 50 C.F.R. § 402.14(g). The answer must be a resounding no. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if it “runs counter to the evidence before the agency[.]”).

In their Brief, CBD, CLF and WF (the “NGOs”) claim that NMFS only “resolved scientific uncertainty” in favor of the right whale “when the available information included a range of values that permitted it to do so.”¹ (NGOs’ Corrected Brief at 13.) However, this framing betrays the exact issues with the Biological

¹ The NGOs alternatively refers to this as a “more conservative approach” and asserts that “Courts” have upheld an agency’s right to use a conservative approach for ESA consultations. (NGOs’ Corrected Brief at 27 (citing *San Luis & Delta–Mendota Water Auth. v. Jewell*, 747 F.3d 581, 610 (9th Cir. 2014); *Nw. Coal. for Alt. to Pesticides v. EPA*, 544 F.3d 1043, 1050 (9th Cir. 2008)).) Notably, the NGOs cite only two Ninth Circuit decisions, which are non-precedential in this Circuit. More importantly, the cases have no persuasive value because, in both cases, the agency was choosing between “various scientific models” and chose a conservative model, whereas here NMFS chose a scientific model over actual data that directly contradicted the model. *See Jewell*, 747 F.3d at 610; *N.W. Coal. For Alt. to Pesticides*, 544 F.3d at 1050. When NMFS is faced with actual data, it must use that data instead of contradictory outcomes suggested by a model. *Tex Tin Corp. v. EPA*, 992 F.2d 353, 354–55 (D.C. Cir. 1993).

Opinion that MALA has repeatedly raised. These supposed “range of values” were not based on the actual and best scientific and commercial data but rather were generated by a model that was systematically manipulated to provide worst case scenarios directly in contrast to the outcomes the real data showed were reasonably certain. This is a clear violation of the ESA. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56–57 (D.C. Cir. 2015) (“[A]gencies do *not* have free rein to use inaccurate data.”) (emphasis in original). MALA is not “simply disagreeing with NMFS’s reasoned conclusions about the lethal threat of federal lobster gear to right whales,” (NGOs’ Corrected Brief at 13), it is objecting to NMFS’s arbitrary, capricious, and illegal reliance on models that flaunt the actual data NMFS had available. *Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 96 (D.D.C. 2017) (“Suffice it to say, it is arbitrary and capricious for an agency to base its decision on a factual premise that the record plainly showed to be wrong.”).

Nothing demonstrates NMFS’s systemic flaws in crafting its Biological Opinion more clearly than NMFS’s newest defense of its unsupportable Canadian vs. US mortality distribution. NMFS claims that it “explained that apportioning more mortalities to Canada than the United States *based simply on observed data* would reflect only ‘relative differences in survey effort’ and not the best available science.” (NMFS Brief at 26 (emphasis added).) Put differently, NMFS asks this Court to hold that rejecting actual verifiable data of mortality distribution in favor of a model that

estimates what mortality may be is somehow compliant with the agency's obligation to use the best available data to determine outcomes reasonably certain to occur.² Such reliance is arbitrary and capricious and NMFS's actions clearly violate the ESA and APA. *Building Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246–1247 (D.C. Cir. 2001) (agency cannot base its decision “on speculation or surmise or disregard [of] superior data.”).

Finally, this Court should not be fooled by NMFS's wordsmithing. NMFS repeatedly said it resolved uncertainties by assuming worst case scenarios. JA[BiOp_2004, 2005, 2149, 2152.] Now, realizing such an approach is clearly impermissible under the ESA, NMFS attempts to jettison such language, claiming that “the record shows that the Service adopted no such [worst case scenario] approach; instead, it applied the best available data and decided, in instances of uncertainty, to resolve the uncertainty in favor of more protective outcomes for the critically endangered whale.” (NMFS's Brief at 21.) NMFS cannot run from its own Biological Opinion. It specifically stated it was using worst case scenarios, and it

² NMFS claims that it was not “required to ‘extrapolate from’ the subset of observed entanglement data simply because it extrapolated from *other* datasets to estimate *other* values elsewhere in the [Biological] Opinion.” (NMFS's Brief at 37 (emphasis in original).) This is a shocking admission of hubris from the agency. NMFS asks this Court to hold that the agency can extrapolate from data when it feels like doing so and can refuse to extrapolate from data when it does not. This is blatantly arbitrary and cannot be accepted. *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259 (D.C. Cir. 1994).

must dance with the language it brought. Further, even if this Court did accept the obviously self-serving reframing of worst-case scenario, saying it resolved uncertainty “in favor or more protective outcomes” is simply using more words to say worst case scenario. There is simply no functional difference between the two. And, as with worst case scenarios, NMFS is not allowed to resolve uncertainty in favor or more protective outcomes when actual data shows that the outcomes reasonably certain to occur are not those that necessitate “more protective outcomes.”

NMFS has failed to rebut the clear evidence that the Biological Opinion was arbitrary and capricious and in violation of the Endangered Species Act. Accordingly, this Court must remand the Biological Opinion directing NMFS to use the actual data available to it rather than statistical models that assume worst case scenarios.

B. *District 4 Lodge v. Raimondo* Is Not Persuasive to This Court Because This Court has a More Developed Record to Consider than the First Circuit Did And the First Circuit Addressed Different Issues.

In their Briefs, NMFS and the NGOs cite to *District 4 Lodge v. Raimondo*, 40 F.4th 36 (1st Cir. 2022), to suggest that Appellants and Appellant-Intervenors’ arguments against the Biological Opinion have already been ruled on by the First Circuit in NMFS’s favor. (NMFS’s Brief at 17-18, 28; NGOs’ Brief at 2, 24.) However, this does not paint an entirely accurate picture of the *District 4 Lodge*

court's opinion nor does it reflect the different procedural postures between the two cases.

First, the 2022 decision was a continuation of the First Circuit's previous decision in *Dist. 4 Lodge of the Int'l Ass'n of Machinists Loc. Lodge 207 v. Raimondo*, 18 F.4th 38 (1st Cir. 2021), which lifted a stay of the Biological Opinion issued against NMFS based on the record then existing. *Id.* at 49-50. The 2022 *District 4 Lodge* decision weighed whether to uphold the district court's preliminary injunction. 40 F.4th at 36. In that decision, plaintiffs were specifically challenging the Biological Opinion on the basis that there was no evidence that whales were present in the LMA 1 Restricted Area and thus NMFS could not assume whales were present in that area. *District 4 Lodge*, 18 F.4th at 40. The First Circuit determined that "the plaintiffs' brief does not point to any relevant existing data supposedly ignored by the Agency." *Dist. 4 Lodge*, 40 F.4th at 40. Indeed, much of the 2022 *Dist. 4 Lodge* decision focused on plaintiffs' contentions regarding closures and different mechanisms that plaintiffs' believed NMFS should have taken regarding the closures, which are not relevant here. 40 F. 4th at 41-42.

Clearly, those arguments and concerns are entirely irrelevant to this present appeal, which focuses on different deficiencies with the Biological Opinion. And, to be clear, MALA has identified specific data ignored by NMFS in favor of statistical models, including, *inter alia* Canadian vs. U.S. Mortalities and collision vs.

entanglement mortalities. Finally, because it was evaluating the merits of a preliminary injunction, the *Dist. 4 Lodge* court had to consider whether the balance of harms weighed in favor of regulation that would ostensibly protect the right whale, a consideration that is not applicable to this appeal. 40 F. 4th at 41-42. Thus, to the extent the First Circuit's *Dist. 4 Lodge* is relevant at all, it is for the proposition that MALA must identify data NMFS did not consider; MALA has met that burden.³

CONCLUSION

NMFS's Biological Opinion was and is arbitrary and capricious and NMFS's attempts to deploy linguistic slight of hands to avoid this truth cannot be permitted to succeed. Whatever noble intentions it might have had, NMFS was required to use the best scientific and commercial data available to it to determine outcomes reasonably certain to occur regarding the right whale. It has failed to do so. Without this Court remanding the Biological Opinion to fix these fatal flaws, NMFS's lawless actions will destroy a cornerstone of Massachusetts' cultural and economic identity – the lobster industry.⁴

³ It also cannot be ignored that this Court, by virtue of the nature of cases it most frequently encounters, is eminently more equipped to handle APA challenges to government regulation than any other circuit, including the First and Ninth Circuits, and thus this Court should not consider the decisions of other courts on APA challenges on regulation as particularly persuasive.

⁴ On January 3, 2023, the Department of Justice filed a letter to this Court informing it of potentially relevant language in H.R. 2617 regarding the American

Dated: January 10, 2023

Respectfully submitted,

ECKLAND & BLANDO LLP

/s/ SAMUEL P. BLATCHLEY

Samuel P. Blatchley BBO# 670237

Robert T. Dube Jr.*

Eckland & Blando LLP

22 Boston Wharf Road, 7th Floor

Boston, MA 02210

(617) 217-6936

sblatchley@ecklandblando.com

*Supervised by principals of the firm who are members of the MA bar and D.C Circuit bar

Counsel for Appellant-Intervenor

lobster industry and NMFS's regulatory efforts. [Dkt. # 58.] It is the opinion of MALA that H.R. 2617 does not affect this appeal as it does not alter NMFS's ongoing obligation to produce regulation(s) that complies with the ESA and MMPA by using the best scientific and commercial data available.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e), as well as this Court's Amended Per Curium Briefing Order, because it contains 1900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Dated: January 10, 2023

/s/ SAMUEL P. BLATCHLEY

Samuel P. Blatchley

CERTIFICATE OF SERVICE

I hereby certify that, on January 10, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Samuel P. Blatchley
Samuel P. Blatchley