



HOUSE COMMITTEE ON
NATURAL RESOURCES
CHAIRMAN BRUCE WESTERMAN

To: Subcommittee on Water, Wildlife and Fisheries Republican Members
From: Subcommittee on Water, Wildlife and Fisheries staff: Kiel Weaver (kiel.weaver@mail.house.gov), Doug Levine (doug.levine@mail.house.gov) and Annick Miller (annick.miller@mail.house.gov), x58331
Date: April 18, 2023
Subject: Legislative Hearing on: **H.J. Res. 29 (Mann)**, Resolution Providing for Congressional Disapproval of the Lesser Prairie Chicken Listing under the Endangered Species Act; **H.J. Res. 46 (Bentz)**, Resolution Providing for Congressional Disapproval of the Recission of the Trump Critical Habitat Rule; **H.J. Res. 49 (Stauber)**, Resolution Providing for Congressional Disapproval of the Northern Long-Eared Bat Listing under the Endangered Species Act; and **H.R. 1213 (Grijalva)**, *RESCUE Whales Act of 2023*.

The Subcommittee on Water, Wildlife and Fisheries will hold a legislative hearing on: H.J. Res. 29 (Mann), a Resolution Providing for Congressional Disapproval of the Lesser Prairie Chicken Listing under the Endangered Species Act; H.J. Res. 46 (Bentz), a Resolution Providing for Congressional Disapproval of the Recission of the Trump Critical Habitat Rule; H.J. Res. 49 (Stauber), a Resolution Providing for Congressional Disapproval of the Northern Long-Eared Bat Listing under the Endangered Species Act; and H.R. 1213 (Grijalva), the RESCUE Whales Act of 2023 **on Tuesday, April 18, 2023 at 10:30 a.m. EDT in 1334 Longworth House Office Building.**

Member offices are requested to notify Thomas Shipman (Thomas.Shipman@mail.house.gov) by 4:30 p.m. on Monday, April 17th, if their Member intends to participate in the hearing.

I. KEY MESSAGES

- The Endangered Species Act (ESA), while well-intended, is 50 years old and in need of major oversight and updates.
- The ESA is a magnet for litigation, particularly as it relates to species listings. Environmental litigants repeatedly sue the federal government to list or up-list species even if those listings stifle proactive conservation.
- This hearing will cover three ESA-related joint resolutions under the Congressional Review Act (CRAs). These CRAs would overturn Biden administration actions that led to an even more unnecessary and overburdensome federal regulatory ESA regime.
- In addition, H.R. 1213 (Grijalva) would increase uncertainty for fishing communities that depend on access to lobsters in federal waters.

II. WITNESSES

Panel I:

- Member panel (TBD)

Panel II:

- *Mr. Gary Frazer*, Assistant Director for Ecological Services, U.S. Fish and Wildlife Service, Washington, D.C. (H.J. Res. 29, H.J. Res. 46 and H.J. Res. 49);
- *Mr. Rick Horton*, Executive Vice President, Minnesota Forest Industries, Grand Rapids, Minnesota (H.J. Res. 49);
- *Mr. Fred Flippance*, Board President, Oregon Rural Electric Cooperative Association, Hines, Oregon (H.J. Res. 46);
- *Mr. Robert Fischman*, Professor of Law, Indiana University Maurer School of Law, Bloomington, Indiana (H.J. Res. 29, H.J. Res. 46 and H.J. Res. 49) (Minority witness); and
- *Mr. Don Hineman*, Past President, Kansas Livestock Association, Dighton, Kansas (H.J. Res. 29)

Panel III:

- *Mr. Sam Rauch III*, Deputy Assistant Administrator, National Marine Fisheries Service, Silver Spring, Maryland (H.J. Res. 46 and H.R. 1213);
- *Mr. Norman Semanko*, Chief Counsel, Family Farm Alliance, Boise, Idaho (H.J. Res. 46);
- *Dr. Michael J. Moore*, Senior Scientist, Woods Hole Oceanographic Institution, Woods Hole, Massachusetts (H.R. 1213) (Minority witness)
- *Mr. Curt Brown*, Marine Biologist, Ready Seafood, Cape Elizabeth, Maine (H.R. 1213);
- *Ms. Ginny Olsen*, Political Director, Maine Lobstering Union, Stonington, Maine (H.R. 1213); and

III. BACKGROUND

Congressional Review Act

The Congressional Review Act (CRA) was included in the Small Business Regulatory Enforcement Fairness Act, which was signed into law on March 29, 1996.¹ The main function of the CRA is to allow Congress to overturn “major” rules issued by federal agencies. Major rules, as defined in the CRA, are rules that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

- (A) an annual effect on the economy of \$100 million or more;
- (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

¹ “The Congressional Review Act (CRA): Frequently Asked Questions.” Maeve P. Casey and Christopher M. Davis. Congressional Research Service. 11/12/21. [R43992 \(congress.gov\)](https://www.congress.gov/rfs/cra)

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. ²

Under the CRA, both chambers of Congress can vote to disapprove of a rulemaking by a federal agency and if the disapproval is signed by the President, the rulemaking is either repealed or does not go into effect.³ Under the CRA, there is a timeline that must be met for a congressional resolution of disapproval to be in order. During a period of 60 days of continuous session after such a rule is received by Congress from the Executive branch, any member of either chamber may sponsor a resolution of disapproval under the CRA.⁴ During this period, a member of the House or Senate can introduce a resolution of disapproval. Any resolution introduced after that timeframe is not in order under the CRA.

Congress has overturned twenty major federal rules since the CRA was passed in 1996.⁵ Sixteen of these CRA resolutions occurred in the 115th Congress (2017-2018) when Republicans controlled the House and Senate during the Trump administration.⁶ Congress has passed two CRA resolutions this year: Disapproval of the Waters of the United States (WOTUS) Rule and the Disapproval of a Department of Labor rulemaking instituting environmental, social, and governance (ESG) investing in employer-sponsored retirement plans.⁷ Since being passed by Congress, the ESG CRA resolution has been vetoed by President Joe Biden and he has said he will also veto the WOTUS CRA resolution.⁸

H.J. Res. 29, Resolution Providing for Congressional Disapproval of the Lesser Prairie Chicken Listing under the Endangered Species Act (Rep. Tracey Mann, R-KS)

On November 25, 2022, the U.S. Fish and Wildlife Service (USFWS or Service) published a final rule that added the Lesser Prairie Chicken (LPC) to the federal endangered species list and created two distinct population segments (DPS).⁹ Specifically, the LPC would be listed as threatened in the Northern DPS, which covers Kansas, Oklahoma, and the northern Texas Panhandle and the LPC would be listed as endangered in the Southern DPS, which covers New Mexico and west Texas.¹⁰ This CRA would repeal this rule and return the LPC to its previous non-ESA management framework.

² Id, at 9

³ Id

⁴ [8 5 U.S.C. §802\(a\)](#).

⁵ “The Congressional Review Act (CRA): Frequently Asked Questions.” Maeve P. Casey and Christopher M. Davis. Congressional Research Service. 11/12/21. [R43992 \(congress.gov\)](#)

⁶ Id, at 6.

⁷ “Roll Call Votes 118th Congress – 1st Session (2023).” U.S. Senate. [U.S. Senate: Roll Call Votes 118th Congress - 1st Session \(2023\)](#)

⁸ “Vetoes by President Joseph R. Biden Jr.” U.S. Senate. [U.S. Senate: Vetoes by President Joseph R. Biden Jr.](#)

⁹ [87 FR 72674](#)

¹⁰ Id

LPC ESA History

The LPC is known as a “boom and bust” species that is very susceptible to weather conditions such as drought or high precipitation periods.¹¹ As such, the LPC has been subject to several listing petitions from environmental groups since 1995, with the USFWS making a 12-month finding in 1998 that the species may merit listing.¹² However, due to higher priority listing decisions, the USFWS never took action to list the species until 2011.

On September 1, 2010, WildEarth Guardians filed suit against the USFWS over a number of species the litigant desired to be listed, including the LPC. In May 2011, the USFWS entered into a settlement agreement with WildEarth Guardians that required the Service to publish a listing rule for the LPC. The Service’s December 11, 2012 rule proposed to list the LPC as threatened throughout its range and was finalized on April 10, 2014.¹³ However, on September 1, 2015, the U.S. Federal District Court for the Western District of Texas vacated the final listing rule for the LPC, forcing USFWS to remove the LPC from the endangered species list. Federal Judge Robert Junell specifically stated in his opinion that his main justification for striking down the rule was that the USFWS did not properly consider the voluntary conservation measures that were in place for the LPC when the Service made its listing decision.¹⁴

On September 8, 2016, WildEarth Guardians, Defenders of Wildlife, and the Center for Biological Diversity petitioned to list the LPC, believing again that the LPC was on the verge of extinction.¹⁵ On November 30, 2016, the USFWS published a 90-day finding that listing may be warranted and initiated a 12-month finding to determine whether to list the LPC. While that 12-month finding was never finalized the Service and the three environmental litigants entered into a settlement on September 12, 2019, that required the USFWS to publish a 12-month finding, which was then released on June 1, 2021, and led to the November 25, 2022, rulemaking.¹⁶

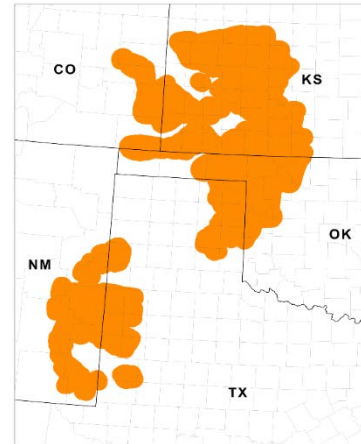


Figure 1: Lesser Prairie Chicken Occupied Range Source: <https://www.nrcs.usda.gov/programs->

¹¹ Id

¹² “Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status with Section 4(d) Rule for the Northern District Population Segment and Endangered Status for the Southern Distinct Population Segment.” Federal Register. 6/1/2021. [Federal Register: Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status With Section 4\(d\) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment](#)

¹³ “Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status with Section 4(d) Rule for the Northern District Population Segment and Endangered Status for the Southern Distinct Population Segment.” Federal Register. 6/1/2021. [Federal Register: Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status With Section 4\(d\) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment](#)

¹⁴ “Court Vacates Lesser Prairie Chicken Listing Under Endangered Species Act.” Tiffany Dowell. Texas A&M Agrilife Extension. 11/6/15. [Court Vacates Lesser Prairie Chicken Listing Under Endangered Species Act - Texas Agriculture Law \(agrilife.org\)](#)

¹⁵ “Petition to list the Lesser Prairie Chicken (*Tympanuchus pallidicinctus*) and Three Distinct Population Segments under the U.S. Endangered Species Act and Emergency Listing Petition for the Shinnery Oak Prairie and Sand Sage Prairie Distinct Population Segments.” WildEarth Guardians. 9/8/2016. [LPC petition 2016 final \(wildearthguardians.org\)](#)

¹⁶ “Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status with Section 4(d) Rule for the Northern District Population Segment and Endangered Status for the Southern Distinct Population Segment.” Federal Register.

Voluntary Conservation

The aforementioned rounds of litigation ignored the successful voluntary measures intended to benefit the LPC. Starting in 2012, stakeholders who would possibly be affected by a listing of the LPC came together to form the Lesser Prairie Chicken Interstate Working Group (Working Group). The Working Group is composed of the Western Association of Fish & Wildlife Agencies, the state wildlife directors of the five impacted states, industry (oil and gas, wind, and utilities), and private landowners.¹⁷

In October 2013, the Working Group published the Lesser Prairie Chicken Range-Wide Conservation Plan.¹⁸ This plan created a framework for all affected stakeholders to conserve LPC habitat on private land through a Candidate Conservation Agreement (CCA). A CCA is a program, authorized by the USFWS, that allows private landowners to commit to implement voluntary actions designed to reduce threats to a covered species. This LPC action plan has also been replicated on federal lands through Candidate Conservation Agreements with Assurances (CCAA).¹⁹

Since the CCA/CCAA's were formed, more than 180 oil and gas, agriculture, pipeline, electric transmission, and wind energy companies have enrolled into the programs. Private industry has invested more than \$64 million in enrollment and mitigation fees for conservation and over six million acres are enrolled in the partnership.²⁰ These voluntary public-private conservation partnerships for the LPC and its habitat have proven to be successful as recent aerial surveys indicate that the LPC's population has increased substantially since 2013, increasing from approximately 20,000 birds to nearly 35,000 birds in 2020.²¹

Other private efforts have also been successful in individual states impacted by the LPC. In New Mexico, a local CCA/CCAA has enrolled over 114 entities and conserved approximately four million acres of LPC historic range.²² However, with the listing now finalized, new acreage is shut out of the CCA/CCAA, which will result in less private investment and conservation efforts for the species.

6/1/2021. [Federal Register: Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status With Section 4\(d\) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment](#)

¹⁷ "Lesser Prairie-Chicken." Western Association of Fish & Wildlife Agencies. [Lesser Prairie-Chicken – WAFWA](#)

¹⁸ Id

¹⁹ "Candidate Conservation Agreements." U.S. Fish and Wildlife Service. [Candidate Conservation Agreements | U.S. Fish & Wildlife Service \(fws.gov\)](#)

²⁰ "Lesser Prairie-Chicken." Western Association of Fish & Wildlife Agencies. [Lesser Prairie-Chicken – WAFWA](#)

²¹ "Lesser Prairie Chicken Rule Pressures Fragile Rural Economies." Shelby Hagenauer and Daniel Munch. U.S. Farm Bureau. 1/19/2023. [Lesser Prairie Chicken Rule Pressures Fragile Rural Economies | Market Intel | American Farm Bureau Federation \(fb.org\)](#)

²² "CEHMM" programs can help in the face of a listing decision by the US Fish and Wildlife Service." Emily Wirth. CEHMM Conservation & Environmental Services. [b96cf9_5e8178c1d4994bea97c6bfaee6adba22.pdf \(cehmm.org\)](#)

Flawed 4(d) Rule

As a part of the listing rule, the LPC in the Northern DPS will be listed as threatened. As a threatened species, the Northern DPS LPC will be managed under a 4(d) rule.²³ A 4(d) rule is intended to allow activities that cause little harm to the species, while preventing actions that have a greater risk of harm.²⁴

Where this particular 4(d) rule has been flawed is the need for livestock ranchers within the LPC range to follow a grazing plan developed by a “Service-approved party.”²⁵ To date, the USFWS has not indicated what entities it will consider to be approved and what the process will be to develop those grazing plans²⁶ Without further details from USFWS, ranchers are potentially vulnerable to penalties for incidental harm to the species and litigation from environmental groups who oppose livestock grazing. This is of particular concern given the economic impact of the cattle industry within the LPC’s range. The area inhabited by the LPC contains 37 percent of the nation’s cattle and calves, the equivalent of \$25 billion in economic output.²⁷

As Figure 2 shows, LPC populations have increased by more than 50 percent in less than a decade while agricultural production hovered around the same output. The rule admits “grazing by domestic livestock is not inherently detrimental to lesser prairie-chicken management and, in many cases, is needed to maintain appropriate vegetative structure.”²⁸ Yet, by implementing a flawed 4(d) rule, the USFWS has in effect put livestock grazers in the potential crosshairs of ESA compliance and litigation.

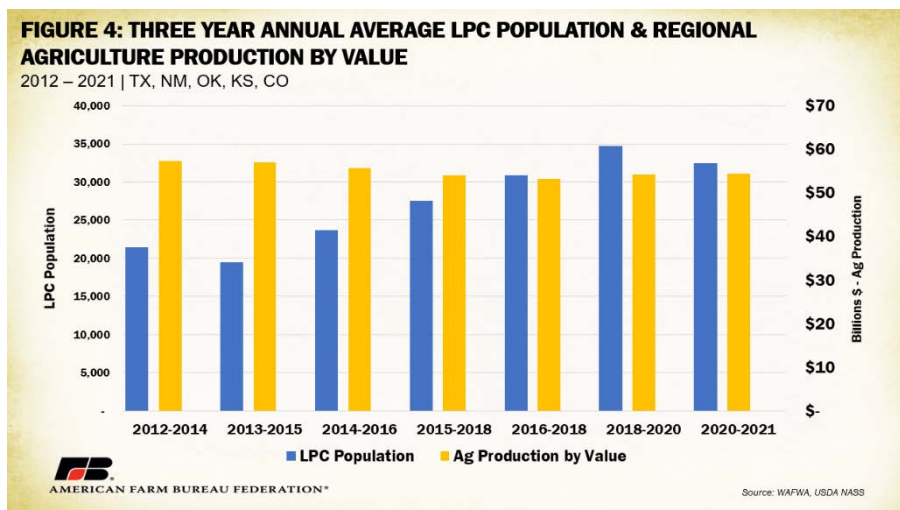


Figure 2. Source: <https://www.fb.org/market-intel/lesser-prairie-chicken-rule-pressure-fragile-rural-economies>

H.J. Res. 29 is cosponsored by nine Republican members. A Senate companion has been introduced by U.S. Senator Roger Marshall (R-KS) and is cosponsored by four Republican

²³ [87 FR 72674](#)

²⁴ “Section 4(d) Rules Under the Endangered Species Act.” Frequently Asked Questions. October 2021. [Section 4\(d\) Rules Under the Endangered Species Act \(fws.gov\)](#)

²⁵ [87 FR 72674](#)

²⁶ “Lesser Prairie Chicken Rule Pressures Fragile Rural Economies.” Shelby Hagenauer and Daniel Munch. U.S. Farm Bureau. 1/19/2023. [Lesser Prairie Chicken Rule Pressures Fragile Rural Economies | Market Intel | American Farm Bureau Federation \(fb.org\)](#)

²⁷ “Lesser Prairie Chicken Rule Pressures Fragile Rural Economies.” Shelby Hagenauer and Daniel Munch. U.S. Farm Bureau. 1/19/2023. [Lesser Prairie Chicken Rule Pressures Fragile Rural Economies | Market Intel | American Farm Bureau Federation \(fb.org\)](#)

²⁸ [87 FR 72674](#)

Senators. A witness from Kansas will testify in support of the House measure while the Biden administration will likely testify in opposition to it.

H.J. Res. 46, Resolution Providing for Congressional Disapproval of the Recission of the Trump Critical Habitat Rule (Rep. Cliff Bentz, R-OR)

On June 24, 2022, both the USFWS and the National Marine Fisheries Service (NMFS) announced that they were rescinding the Trump administration’s regulatory definition of “habitat.”²⁹ This recission once again opens the door for USFWS and NMFS to designate critical habitat in areas that are **not** (emphasis added) currently occupied by the species in question and in some cases, have not been occupied in decades and may never be occupied. This CRA would repeal the 2022 Biden administration rule that rescinded the Trump administration’s definition of “habitat.”

Weyerhaeuser Case

The ESA does not statutorily define “habitat,” however recent events have created a need for a regulatory definition of “habitat.” In 2018, the U.S. Supreme Court in a unanimous decision in *Weyerhaeuser Co. v. U.S. FWS* stated an area must logically be “habitat” for that area to meet the definition of “critical habitat” under the ESA.³⁰ The *Weyerhaeuser* case stemmed from a species known as the dusky gopher frog, a rare species that is confined to a few ephemeral (short lasting) ponds in the Mississippi River Delta.³¹ The USFWS had identified three features necessary for occupied areas to be designated as critical habitat. These were:

1. ephemeral ponds for breeding,
2. open-canopy forest with holes and burrows for dwelling, and
3. open-canopy forest connecting breeding and dwelling areas.³²

However, the USFWS determined that there was not enough occupied land to sustain the species. The USFWS then designated approximately 1,500 acres of private land, not occupied by the frog, as critical habitat.³³ After it was determined that this plot of land only contained one characteristic suitable for the frog (the presence of ephemeral ponds), the landowner, Weyerhaeuser Company, then sued the USFWS.³⁴ In its suit, Weyerhaeuser stated that this habitat was not suitable for the frog and that USFWS inadequately weighed the benefit to the species against the economic impacts. The U.S. Supreme Court ultimately sided with Weyerhaeuser, which caused USFWS to agree to remove the areas in question from critical

²⁹ “U.S. Fish and Wildlife Service and NOAA Fisheries Rescind Regulatory Definition of “Habitat” Under the Endangered Species Act.” Marilyn Kitchell and Lauren Gaches. U.S. Fish and Wildlife Service. 6/23/2022. [Rescind Regulatory Definition of “Habitat” Under the Endangered Species Act | U.S. Fish & Wildlife Service \(fws.gov\)](#)

³⁰ “Final Rules Amending ESA Critical Habitat Regulations.” Erin H. Ward and Pervaze A. Sheikh. Congressional Research Service. [IF11740 \(congress.gov\)](#)

³¹ Id

³² Id

³³ “Settlement Eliminates 1,500 Acres of Designated Dusky Gopher Frog Critical Habitat.” David Miller. Nossaman LLP. 7/18/2019. [Settlement Eliminates 1,500 Acres of Designated Dusky Gopher Frog Critical Habitat \(endangeredspecieslawandpolicy.com\)](#)

³⁴ “Final Rules Amending ESA Critical Habitat Regulations.” Erin H. Ward and Pervaze A. Sheikh. Congressional Research Service. [IF11740 \(congress.gov\)](#)

habitat designations.³⁵ In addition, the Court ruled that the USFWS and NMFS may withhold designating areas as critical habitat if the economic impacts outweigh the benefit to the species.³⁶

Trump Rule and Critical Habitat Implications

The Weyerhaeuser decision spurred USFWS and NMFS to act and on December 16, 2020, the agencies published a final rule that defined “habitat,” for the purposes of designating critical habitat only. The rule defined “habitat” as the abiotic and biotic setting that **currently or periodically** (emphasis added) contains the resources and conditions necessary to support one or more life processes of species.³⁷ In effect, this rule narrowed the scope by which USFWS and NMFS could designate critical habitat to areas occupied by the species and meets each characteristic needed to sustain the species.

Critical habitat designations affect federal actions, federally funding activities, and federally permitted activities.³⁸ When an activity, like a forest management project, construction of a dam, or any critical infrastructure project might impact critical habitat for a listed species, a consultation process is required with USFWS and NMFS under Section 7 of the ESA.³⁹ This process can take years and disincentivizes investment into critical infrastructure. In fact, the USFWS recently submitted a report to Congress on the difficulties they are having in conducting Section 7 consultations in a timely manner. That report can be found [here](#).

Critical habitat can especially have a devastating impact on rural communities. An example of this would be the imposition of critical habitat for the Northern Spotted Owl in the Pacific Northwest, especially Oregon. Studies have shown that the listing of the Northern Spotted Owl and its 9.4 million acres of associated critical habitat⁴⁰ have caused the loss of at least 32,000 timber jobs.⁴¹

By providing a definition of habitat that excludes unoccupied areas, greater certainty was provided to stakeholders operating projects with a federal nexus. Over 900 listed species have

³⁵ “Settlement Eliminates 1,500 Acres of Designated Dusky Gopher Frog Critical Habitat.” David Miller. Nossaman LLP. 7/18/2019. [Settlement Eliminates 1,500 Acres of Designated Dusky Gopher Frog Critical Habitat \(endangeredspecieslawandpolicy.com\)](#)

³⁶ “Final Rules Amending ESA Critical Habitat Regulations.” Erin H. Ward and Pervaze A. Sheikh. Congressional Research Service. [IF11740 \(congress.gov\)](#)

³⁷ “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat.” 87 FR 37757. [Federal Register: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat](#)

³⁸ “Critical Habitat.” *What is it?* U.S. Fish and Wildlife Service. March 2017. [Critical Habitat fact sheet \(fws.gov\)](#)

³⁹ “Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects.” Erin H. Ward, R. Eliot Crafton, Pervaze A. Sheikh. Congressional Research Service. [Endangered Species Act \(ESA\) Section 7 Consultation and Infrastructure Projects \(everycrsreport.com\)](#)

⁴⁰ “USFWS Threatened & Endangered Species Active Critical Habitat Report.” U.S. Fish and Wildlife Service. 4/3/2023. [USFWS Threatened & Endangered Species Active Critical Habitat Report](#)

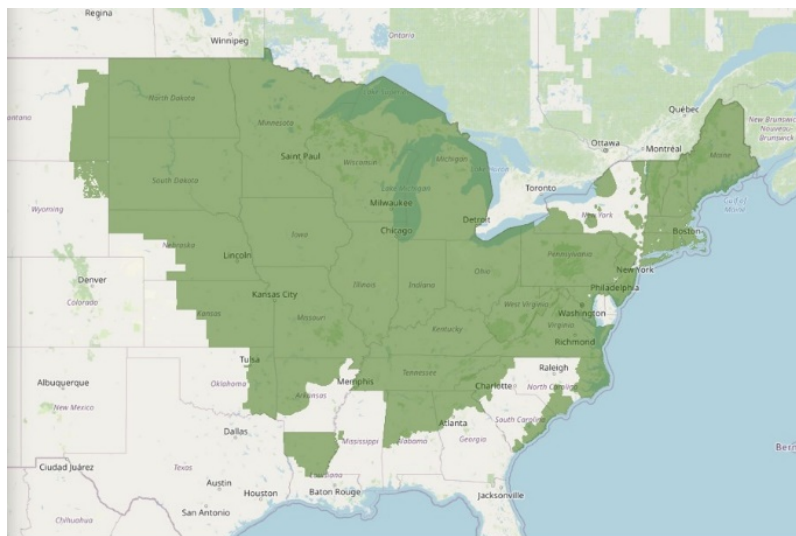
⁴¹ “Labor market impact of land protection: The Northern Spotted Owl.” Ann E. Ferris and Eyal G. Frank. Journal of Environmental Economics and Management,” Volume 109, September 2021, 102480. [Labor market impacts of land protection: The Northern Spotted Owl - ScienceDirect](#)

designated critical habitat associated with them, as this critical habitat accounts for over 107 million acres or 36,000 square miles of land area (the size of the state of Indiana).⁴²

H.J. Res. 46 has seven Republican cosponsors. A Senate companion has been introduced by U.S. Senator Cynthia Lummis (R-WY) and is cosponsored by seventeen Republican Senators. Witnesses from Oregon and Idaho will testify in support of this measure while the Biden administration will likely oppose it.

H.J. Res 49, Resolution Providing for Congressional Disapproval of the Listing of the Northern Long-Eared Bat under the Endangered Species Act (Rep. Pete Stauber, R-MN)

In November 29, 2022, the USFWS announced the up-listing of the Northern Long-Eared Bat (NLEB) from a threatened to an endangered species on the federal endangered species list.⁴³ This is the result, in part, of a 2020 ruling from Federal District Court Judge of the District of Columbia Emmitt Sullivan, who ruled in favor of a lawsuit from the Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Coal River Mountain Watch and the Ohio Valley Environmental Coalition.⁴⁴ By up-listing the NLEB, USFWS will further restrict activities on both private and public lands throughout the NLEB's range. The NLEB, which primarily lives in caves and abandoned mines in winter months and forested areas in summer months, is found in 37 states, the District of Columbia, and Canada. In its listing decision, the USFWS stated the main threat to the NLEB is a disease known as White-Nose Syndrome (WNS), not human activity.⁴⁵



USFWS range map for northern long-eared bat, *Myotis septentrionalis* accessed March 23, 2022 at <https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis/map>

Figure 3. Source: U.S. Fish and Wildlife Service

⁴² “USFWS Threatened & Endangered Species Active Critical Habitat Report.” U.S. Fish and Wildlife Service. 4/3/2023. [USFWS Threatened & Endangered Species Active Critical Habitat Report](#)

⁴³ “U.S. Fish and Wildlife Service extends effective date to reclassify northern long-eared bat as endangered.” Georgia Parham. U.S. Fish and Wildlife Service. [Effective date to reclassify northern long-eared bat as endangered extended | U.S. Fish & Wildlife Service \(fws.gov\)](#)

⁴⁴ <https://biologicaldiversity.org/w/news/press-releases/court-northern-long-eared-bat-was-unlawfully-denied-endangered-species-protection-2020-01-29/>

⁴⁵ “Northern long-eared bat, devastated by a fungus, is now listed as endangered.” Associated Press. Nov 29, 2022. [Northern long-eared bat declared as endangered: NPR](#)

The USFWS first designated the NLEB as a threatened species in 2015. The agency first proposed the up-listing of the species in March 2022,⁴⁶ announcing the final rule in November 2022, with the implementation date of the rule being January 30, 2023.⁴⁷ After congressional and stakeholder backlash, including letters from Rep. Stauber and eleven other House members⁴⁸ and twelve U.S. Senators,⁴⁹ the USFWS extended the implementation date of the rule by 60 days to March 31, 2023.⁵⁰ On March 6, 2023, USFWS announced interim guidance to assist stakeholders in the transition to the up-listing.⁵¹

Management Implications of Threatened vs. Endangered

The main difference in management of the NLEB after the up-listing is it will no longer be eligible to be managed under section 4(d) of the ESA. Section 4(d) is intended to incentivize proactive management of species and allows for streamlined compliance for projects within species habitat that have a low risk of causing a “take” of the species. Prohibitions on activities within a species habitat must be necessary and advisable, as opposed to an endangered listing, which can lead to more restrictive management.⁵²

Now that the NLEB is listed as endangered, the USFWS plans to focus its recovery efforts in wooded areas where the NLEB nests in summer months, while a vaccine or other remedies for WNS are developed.⁵³ This plan of action will create additional red tape for forest management projects, timber sales, and public lands access within the NLEB range. This red tape would include the need for greater consultation with USFWS on any project that may affect NLEB habitat, which could potentially add years to the permitting process for certain projects. This same problem will exist for other projects such as roads, bridges, and pipelines that may travel through NLEB habitat. In fact, over the last three years, the USFWS says it has completed ESA consultations on 24,480 projects across the 37-state range for the NLEB. Many of those projects are in progress and the up-listing of the NLEB may cause greater exposure to litigation and additional regulatory obligations on these projects.⁵⁴ The USFWS has now identified 3,095 projects for which an incidental take statement will be needed as a result of the up-listing of the NLEB.⁵⁵

⁴⁶ “Northern Long-eared Bat.” U.S. Fish and Wildlife Service. [Northern Long-eared Bat \(Myotis septentrionalis\) | U.S. Fish & Wildlife Service \(fws.gov\)](#)

⁴⁷ Id

⁴⁸ <https://stauber.house.gov/media/press-releases/stauber-pushes-back-new-us-fish-and-wildlife-service-restrictions-state-led>

⁴⁹ <https://www.capito.senate.gov/news/press-releases/following-capito-letter-us-fish-and-wildlife-service-delays-northern-long-eared-bat-listing>

⁵⁰ “U.S. Fish and Wildlife Service extends effective date to reclassify northern long-eared bat as endangered.” Georgia Parham. U.S. Fish and Wildlife Service. [Effective date to reclassify northern long-eared bat as endangered extended | U.S. Fish & Wildlife Service \(fws.gov\)](#)

⁵¹ Northern Long-eared Bat.” U.S. Fish and Wildlife Service. [Northern Long-eared Bat \(Myotis septentrionalis\) | U.S. Fish & Wildlife Service \(fws.gov\)](#)

⁵² “Section 4(d) Rules Under the Endangered Species Act.” Frequently Asked Questions. October 2021. [Section 4\(d\) Rules Under the Endangered Species Act \(fws.gov\)](#)

⁵³ “Northern long-eared bat, devastated by a fungus, is now listed as endangered.” Associated Press. Nov 29, 2022. [Northern long-eared bat declared as endangered. NPR](#)

⁵⁴ “Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-eared Bat; Delay of Effective Date.” [Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-eared Bat; Delay of Effective Date \(fws.gov\)](#)

⁵⁵ Id

White-Nose Syndrome

The USFWS acknowledges that WNS is the primary driver for the NLEB's decline. First documented in 2006, WNS gets its name for the white, fuzzy spots that appear on infected bats and it primarily attacks bats' wings, muzzles, and ears when hibernating in caves and abandoned mines.⁵⁶ The disease causes bats to wake early from hibernation and to fly outside too early, in some cases causing them to burn off winter fat stores and starve to death. Most recent estimates show that twelve species of bats have been infected by WNS and millions of bats have died as a result, with NLEB populations declining an estimated 97 percent.⁵⁷

The USFWS administers three grant programs designed to spur scientific research into fighting WNS: 1) research and development of biotechnological tools (\$1.5 million total, \$300,000 per grant);⁵⁸ 2) grants to State and Tribes (\$1.8 million in Fiscal Year 2022);⁵⁹ and 3) additional research grants.⁶⁰

The USFWS has identified other sources of NLEB mortality including⁶¹:

- Wind energy-related mortality;
- Summer habitat loss, including highway construction, commercial development, surface mining, and wind facility construction;
- Winter habitat loss and disturbance, including construction of gates that block bat access to caves and mines, any change in airflow that causing increased temperatures, and human disturbance while hibernating; and
- Climate Change

USFWS acknowledges that none of these factors has shown to cause any significant population decline or habitat loss.⁶²

Habitat Conservation Plans (HCPs)

In an effort to help mitigate against some of the effects of the up-listing, states and others have taken action. For example, the states of Minnesota, Wisconsin, and Michigan have reached agreement on an HCP with the USFWS. Under this Lake States Forest Management Bat Habitat Conservation Plan HCP, landowners are able to voluntarily conserve NLEB habitat in exchange for certain activities being permitted on their lands that may cause incidental harm to a covered species.⁶³ The activities covered under this HCP are timber harvest and related forest

⁵⁶ "Northern long-eared bat, devastated by a fungus, is now listed as endangered." Associated Press. Nov 29, 2022. [Northern long-eared bat declared as endangered : NPR](#)

⁵⁷ Id

⁵⁸ "Research and Development of Biotechnological Tool for White-nose syndrome." [White-Nose Syndrome \(whitenosesyndrome.org\)](#)

⁵⁹ "WNS Grants to States and Tribes." [White-Nose Syndrome \(whitenosesyndrome.org\)](#)

⁶⁰ "Research Grants." [White-Nose Syndrome \(whitenosesyndrome.org\)](#)

⁶¹ "Northern Long-eared Bat." U.S. Fish and Wildlife Service. [Northern Long-eared Bat \(Myotis septentrionalis\) | U.S. Fish & Wildlife Service \(fws.gov\)](#)

⁶² "Northern Long-eared Bat." U.S. Fish and Wildlife Service. [Northern Long-eared Bat \(Myotis septentrionalis\) | U.S. Fish & Wildlife Service \(fws.gov\)](#)

⁶³ "Lake States Forest Management Bat Habitat Conservation Plan." Wisconsin Department of Natural Resources. [Lake States Forest Management Bat Habitat Conservation Plan || Wisconsin DNR](#)

management, road and trail construction, prescribed fire, and conservation strategy implementation.⁶⁴ However, even with this HCP in place, complications can still arise between USFWS and the U.S. Forest Service in implementing the plan, adding unnecessary delays to projects. In addition, only a few states within the NLEB range have approved HCPs, leaving many states with no protections for activities that could incidentally affect NLEB habitat.

H.J. Res. 49 has nine Republican cosponsors. A Senate companion has been introduced by U.S. Senator Markwayne Mullin (R-OK) and is cosponsored by ten Republican Senators. A witness from Minnesota will testify in support of this CRA and will discuss alternatives to the up-listing while the Biden administration will likely oppose the measure.

H.R. 1213: “Restoring Effective Science-based Conservation Under Environmental laws protecting Whales Act of 2023” (Rep. Raul Grijalva, D-AZ)

American Lobster Fishery and Atlantic Large Whale Take Reduction Plan

The Northeast/Mid-American lobster fishery operates under a dual management system whereby the Atlantic States Marine Fisheries Commission manages the fishery in state waters (0 to 3 miles from shore) and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS) manages the fishery in federal waters (3 to 200 miles from shore) from Maine through Cape Hatteras, North Carolina.⁶⁵

With some exceptions, the Marine Mammal Protection Act of 1972 (MMPA, P.L. 92-522) prohibits the “take” of marine mammals—including harassment, hunting, capturing, collecting, or killing—in U.S. waters and by U.S. citizens on the high seas. Under section 118(f) of MMPA, NMFS is required to develop and implement a “take reduction plan” to assist in the recovery or to prevent the depletion of strategic stock that interacts with a Category I or II fishery.⁶⁶ MMPA defines Category I or II as fisheries that have frequent or occasional incidental mortality and serious injury of marine mammals, respectively.⁶⁷ Under MMPA, a strategic stock means marine mammals that are listed under the ESA or whose “level of direct human-caused mortality exceeds the potential biological removal level”.⁶⁸ The Northeast/Mid-Atlantic American lobster trap/pot is listed by NMFS as Category I fishery.⁶⁹

The North Atlantic right whale is one of the world’s most endangered large whale species with the latest preliminary estimate suggesting that there are fewer than 350 remaining.⁷⁰ NMFS established the Atlantic Large Whale Take Reduction Team (Team) on August 6, 1996 to

⁶⁴ “Lake State Forest Management Bat Habitat Conservation Plan.” Michigan Department of Natural Resources. January 2023. Paola Bernazzini. [Lake States Forest Management Bat Habitat Conservation Plan](#)

⁶⁵ NOAA, About the Species: American Lobster <https://www.fisheries.noaa.gov/species/american-lobster>

⁶⁶ Section 118(f) of MMPA, P.L. 92-522.

⁶⁷ The MMPA requires NOAA Fisheries to publish an annual list of commercial fisheries and classify each fishery based on whether it has frequent (Category I), occasional (Category II), or remote likelihood (Category III) of incidental mortality and serious injury of marine mammals. <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-list-fisheries>

⁶⁸ 16 U.S.C. 1362(19)

⁶⁹ 88 FR 16899 - <https://www.federalregister.gov/documents/2023/03/21/2023-05762/list-of-fisheries-for-2023>

⁷⁰ NOAA, About the Species: North Atlantic right whale. <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>

prepare an Atlantic Large Whale Take Reduction Plan (Take Reduction Plan).⁷¹ The Take Reduction Plan focuses on the management measures for fisheries as it relates to three large whale species: the North Atlantic right whale, humpback whale, and fin whale. The Team has 60 members, including 23 trap/pot and gillnet fishermen or fishery representatives.⁷² The Take Reduction Plan was finalized in 1997,⁷³ but has been amended several times as explained below.⁷⁴

In 2010, NMFS completed a Biological Opinion (BiOp) on the operation of the American lobster fishery. Three environmental groups, the Center for Biological Diversity, Defenders of Wildlife and the Humane Society of the United States, sued the agency.⁷⁵ While the lawsuit was pending, NMFS issued a new BiOp in 2012.⁷⁶ Those same environmental groups also sued on the 2012 BiOp, but the case was settled when NMFS agreed to issue a new BiOp and implement a new Take Reduction Plan.⁷⁷ In 2014, NMFS issued another BiOp and regulations amending the Take Reduction Plan.⁷⁸ These were also the subject of a lawsuit in 2018, by the same three environmental groups.⁷⁹ As this lawsuit was ongoing, the Maine Congressional delegation expressed concerns over the accuracy of the data and assumptions NMFS was using to craft new regulations on Maine's lobstermen.⁸⁰ In April 2020, the District of Columbia United States District Court Chief Judge James Boasberg ruled that NMFS' management of the American lobster fishery violated the ESA.⁸¹ The court gave NMFS until May 31, 2021 to finalize the new regulations, including a new Take Reduction Plan.⁸²

On December 31, 2020, NMFS released its new proposed rule.⁸³ The proposed rule stated that "For the years 2009 through 2018, an average of five entanglement-related serious injuries and mortalities a year were observed. Only 0.2 a year could be attributed with certainty to U.S. fisheries and only 0.7 a year to Canadian fisheries. An annual average of four documented incidental entanglement mortalities and serious injuries could not be attributed to a country."⁸⁴ Even though there is not enough data to connect the majority of entanglement-related injuries or

⁷¹ 61 FR 40819 - <https://www.govinfo.gov/app/details/FR-1996-08-06/96-20026>

⁷² NOAA, Atlantic Large Whale Take Reduction Team. <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-team>

⁷³ 64 FR 7529 - <https://www.federalregister.gov/citation/64-FR-7529>

⁷⁴ NOAA, Atlantic Large Whale Take Reduction Plan Regulations From 1997-2015. <https://www.fisheries.noaa.gov/action/atlantic-large-whale-take-reduction-plan-regulations-1997-2015>

⁷⁵ Lyons, C. *Lawsuit Pits Whales Against Lobster Fishery*, November 1, 2011.

<https://www.bostonmagazine.com/news/2011/11/01/lawsuit-pits-whales-lobsters/>

⁷⁶ Case 1:18-cv-00112 https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/NARW-2014-BiOp-Complaint-1-18-18.pdf

⁷⁷ Id.

⁷⁸ 79 FR 36586 - <https://www.federalregister.gov/documents/2014/06/27/2014-14936/taking-of-marine-mammals-incidental-to-commercial-fishing-operations-atlantic-large-whale-take>

⁷⁹ Case 1:18-cv-00112 https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/NARW-2014-BiOp-Complaint-1-18-18.pdf

⁸⁰ Press Release: *Maine Delegation Calls on Feds to Answer for Shortcomings in Data, Correct Inaccuracies before Releasing New Rules on Lobstermen*, December 4, 2019. <https://golden.house.gov/media/press-releases/maine-delegation-calls-on-feds-to-answer-for-shortcomings-in-data-correct-inaccuracies-before-releasing-new-rules-on-lobstermen>

⁸¹ Case 1:18-cv-00112-JEB https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/91-Memo-Opinion-Re-MSJs-18-112.pdf

⁸² Moore, K. *Judge won't close offshore lobster area; grants NMFS more time for whale analysis*, August 20, 2020.

<https://www.nationalfisherman.com/northeast/judge-won-t-close-offshore-lobster-area-grants-nmfs-more-time-for-whale-analysis>

⁸³ 85 FR 86878 - <https://www.federalregister.gov/documents/2020/12/31/2020-28775/taking-of-marine-mammals-incidental-to-commercial-fishing-operations-atlantic-large-whale-take>

⁸⁴ Id.

mortalities to lobster fisheries, the proposed rule stated that “entanglement risk across U.S. fisheries needs to be reduced by 60 to 80 percent.”⁸⁵ On August 31, 2021, NMFS made public the final rule to modify the Take Reduction Plan and announced it would be published in the Federal Register on September 17, 2021.⁸⁶ The final rule included new requirements for gear marking, weak rope and inserts, and trawl lengths that would go into effect May 1, 2022.⁸⁷ Despite all of the changes incorporated in the new 2021 BiOp and the Final Rule amending the Take Reduction Plan, the same three environmental groups remained dissatisfied.⁸⁸ Before the final rule was published, they filed an Amended Complaint with the DC U.S. District Court on September 8, 2021.⁸⁹

After the final rule was published, the Maine Lobstermen’s Association (MLA) filed a lawsuit against the final rule and Maine Governor Janet Mills (D) joined the lawsuit.⁹⁰ MLA and Governor Mills alleged that NMFS acted arbitrarily by failing to rely on the best available scientific information and by failing to account for the positive impact of costly conservation measures already adopted by the Maine lobster fishery.⁹¹

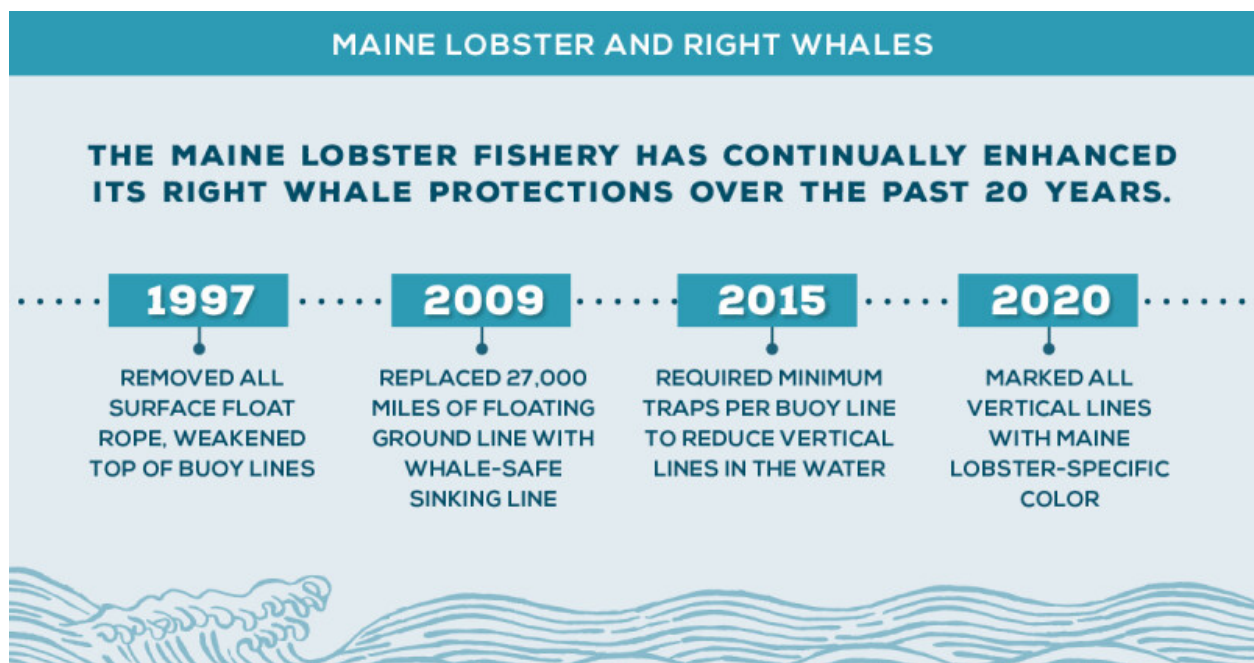


Figure 4. Source: The Maine Lobster Marketing Collaborative

⁸⁵ Id.

⁸⁶ NOAA, 2021 Atlantic Large Whale Take Reduction Plan Modifications, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/2021-atlantic-large-whale-take-reduction-plan>

⁸⁷ 86 FR 51970 - <https://www.federalregister.gov/documents/2021/09/17/2021-19040/taking-of-marine-mammals-incident-to-commercial-fishing-operations-atlantic-large-whale-take>

⁸⁸ Press Release: *New Legal Claims Challenge Feds’ Failure to Protect North Atlantic Right Whales From Deadly Fishing Gear Entanglement*, September 9, 2021. <https://biologicaldiversity.org/w/news/press-releases/new-legal-claims-challenge-feds-failure-to-protect-north-atlantic-right-whales-from-deadly-fishing-gear-entanglement-2021-09-09/>

⁸⁹ Civil Action No. 18-112 (JEB) - https://www.biologicaldiversity.org/species/mammals/North_Atlantic_right_whale/pdfs/North-Atlantic-Right-Whale-Complaint.pdf

⁹⁰ Case 1:21-cv-02509 - <https://divcomplatform.s3.amazonaws.com/www.nationalfisherman.com/images/cab534c552284c6f0a0cb453f25899ce.pdf>

⁹¹ Title I of division JJ of the Consolidated Appropriations Act of 2023, Public Law 117–328.

The same U.S. District Court Chief Judge, James Boasberg, heard both cases. He ruled in favor of the environmental groups⁹² and sided against MLA in their respective cases, but gave NMFS until December 2024 to issue new rules.⁹³ The MLA and Governor Mills appealed the decision, with that appeal currently pending.⁹⁴

At the end of the 117th Congress, the Maine Congressional Delegation successfully included a six-year “regulatory pause” for Maine’s lobster industry in the Omnibus appropriations bill.⁹⁵ The language in that public law stated that the 2021 BiOps and Take Reduction Plan provide ESA and MMPA compliance for the lobster and Jonah crab fishery until December 2028.

Proposed Modifications to North Atlantic Right Whale Vessel Speed Restriction Rule

On August 1, 2022, NMFS published in the Federal Register a proposed rule that changes the current North Atlantic right whale vessel speed rule.⁹⁶ The proposed rule, which is still pending, would expand the geographic area (to the whole east coast) and size of vessels that are subject to the rule (includes vessels from 35 to 65 feet). The language included in the omnibus appropriations bill does not affect this rule nor does H.R. 1213.

Committee on Natural Resources Ranking Member Raul Grijalva (D-AZ) introduced H.R. 1213. The bill is cosponsored by seven Democrats, with none being from the New England region.

IV. MAJOR PROVISIONS AND ANALYSIS

H.J. Res. 29: Resolution Providing for Congressional Disapproval of the Lesser Prairie Chicken Listing under the Endangered Species Act (Rep. Tracey Mann, R-KS)

- Congress disapproves the rule submitted by the Director of the United States Fish and Wildlife Service relating to “Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status With Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment” (87 Fed. Reg. 72674 (November 25, 2022)), and such rule shall have no force or effect.

⁹² Press Release: *Court Victory: Federal Failure to Protect Right Whales from Deadly Entanglements Violates Law*, July 8, 2022. <https://biologicaldiversity.org/w/news/press-releases/court-victory-federal-failure-to-protect-right-whales-from-deadly-entanglements-violates-law-2022-07-08/>

⁹³ Whittle, P. *Lobster Rules to Protect Whale Will Wait 2 Years, Judge Says*, November 18, 2022.

<https://www.usnews.com/news/politics/articles/2022-11-18/lobster-rules-to-protect-whale-will-wait-2-years-judge-says>.

⁹⁴ Press Release: *Governor Mills Directs DMR to Push for Expedited Appeal of Court Decision Hurting Maine’s Vital Lobster Industry*, October 11, 2022. <https://www.maine.gov/governor/mills/news/governor-mills-directs-dmr-push-expedited-appeal-court-decision-hurting-maines-vital-lobster>

⁹⁵ Title I of division JJ of the Consolidated Appropriations Act of 2023, Public Law 117–328

⁹⁶ 50 CFR 224 - <https://www.federalregister.gov/documents/2022/08/01/2022-16211/amendments-to-the-north-atlantic-right-whale-vessel-strike-reduction-rule>.

H.J. Res., 46: Resolution Providing for Congressional Disapproval of the Recission of the Trump Critical Habitat Rule (Rep. Cliff Bentz R-OR)

- Congress disapproves the rule submitted by the National Marine Fisheries Service relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat” (87 Fed. Reg. 37757; published June 24, 2022), and such rule shall have no force or effect.

H.J. Res. 49: Resolution Providing for Congressional Disapproval of the Listing of the Northern Long-Eared Bat under the Endangered Species Act (Rep. Pete Stauber, R-MN)

- Congress disapproves the rule submitted by the United States Fish and Wildlife Service relating to “Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-Eared Bat” (87 Fed. Reg. 73488; published November 30, 2022), and such rule shall have no force or effect.

H.R. 1213: “Restoring Effective Science-based Conservation Under Environmental laws protecting Whales Act of 2023” (Rep. Raul Grijalva, D-AZ)

- Repeals Title I of division JJ of the Consolidated Appropriations Act of 2023, Public Law 117–328, which granted a six-year pause to the federal rules that significantly impact the Northeast Region’s (Maine through Rhode Island) American lobster and Jonah crab fisheries. Specifically, the language states that the 2021 BiOps and Take Reduction Plan provide ESA and MMPA compliance for the lobster and Jonah crab fishery until December 2028.

IV. COST

The Congressional Budget Office has not provided cost estimates for the three CRAs and H.R. 1213.

V. ADMINISTRATION POSITION

The administration will likely oppose all three CRAs while its position on H.R. 1213 is unknown at this time.

VI. EFFECT ON CURRENT LAW

[H.R. 1213](#)