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Strahan v. Linnon: A Missed Opportunity For Testing The Use Of Section 7(a)(1) As An Action-Forcing Provision

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STRAHAN v. LINNON:
A MISSED OPPORTUNITY FOR TESTING THE USE
OF SECTION 7(a)(1) AS AN ACTION-FORCING
PROVISION

Amber Shell Ward*

I. INTRODUCTION

In its 1997 decision, Strahan v. Linnon,1 the United States District Court for the District of Massachusetts summarily rejected the claims of Max Strahan, a whale enthusiast and citizen activist. Following two occasions upon which a United States Coast Guard vessel struck and killed an endangered Northern Right whale,2 Strahan brought numerous claims, alleging various violations under the Endangered Species Act (ESA) and other relevant environmental statutes. The defendants, namely the United States Coast Guard and the National Marine Fisheries Service (NMFS), were granted summary judgment on every count. Although the court's decision was reasonable in light of applicable case and statutory law, its inability to find any material issue of fact was perhaps unduly harsh.

Strahan generally attacked the results of the ESA's section 7 consultation process, and the defendants' dilatory, but on-going compliance efforts.

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2. On July 6, 1991, the Coast Guard Cutter Chase, struck and killed a Northern Right whale calf off the Delaware coast. On January 5, 1993, the Cutter Point Francis, allegedly traveling at full speed, also struck and killed a Right whale calf. Strahan v. Linnon, 967 F. Supp. 581, app. 612. In its defense, the Coast Guard stated that its vessels do not have the technical capability to determine when protected marine mammals are present. Instead, the Coast Guard must rely on physical observation. Id. at 588 (Note: The appendix of 967 F. Supp. pages 609-632 contains a "Memorandum and Order" issued by the United States District Court for the District of Massachusetts on May 2, 1995. The case which is the subject of this note is reported on pages 581-609. Future cites to the 1995 Memorandum will be denoted by "app.").
The thrust of his grievance was that the defendants failed to adequately insure that the Northern Right whale will not be further jeopardized by the actions and inaction of the defendants.\textsuperscript{3} Due deference and findings of 'sufficiency' and 'adequacy' prevailed in the court's checklist of summary judgments. The court repeatedly offered less than effective arguments in support of its rulings. Departing somewhat from its stronger stance in the original suit, the court did not include any forceful language in its rulings and appeared content to leave matters to the discretion of the defendants.

Rather than seizing an ample opportunity to flex the substantive might of the ESA conservation mandates, the court effectively relegated the statute to a series of procedural obstacles. The following discussion will focus on the court's handling of the ESA claims and will examine the potential of section 7(a)(1)\textsuperscript{4} as a strong mechanism for promoting species conservation and enforcing species recovery planning.

II. LEGAL BACKGROUND

A. The Endangered Species Act

The Endangered Species Act of 1973 (ESA)\textsuperscript{5} contains a variety of protections designed to save from extinction species that the Secretary of the Interior has designated as threatened or endangered.\textsuperscript{6} The Act outlines the major procedural requirements and the corresponding regulations provide further procedural and substantive guidance.\textsuperscript{7} Whenever a federal agency proposes to undertake an action that may affect an endangered species, section 7 of the Act prescribes a three step process which includes an initial screening to determine if an endangered species "may be present," and a biological assessment to determine if the species is likely to be

\textsuperscript{3} Id. at 589.

\textsuperscript{4} The Endangered Species Act of 1973 § 7(a)(1), 16 U.S.C. § 1536(a)(1) (1994). All in-text references to provisions of the ESA in this Note will cite to the section number of the Act and not the United States Code, as is customary in cases and commentaries on this topic.


\textsuperscript{6} The Endangered Species Act, § 4, 16 U.S.C. § 1533 authorizes the Secretary of the Interior to declare a species "endangered." In its application, the Act, in using the term "Secretary," is referring to the service within either the Department of Commerce or the Department of the Interior that is responsible for implementing the policies of the ESA. The Endangered Species Act § 3(15), 16 U.S.C. § 1532(15) (1994).

\textsuperscript{7} See 50 C.F.R. § 402 (1998).
affected. If these determinations are both affirmative, section 7(a)(1) requires that all federal agencies "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species. . . ."9

Section 7(a)(2) requires federal agencies to insure that any action it authorizes is "not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of habitat of such species."10 In order to fulfill this latter requirement, the responsible agency, either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), must issue a biological opinion stating its view as to whether the proposed action will have the likely effect of jeopardizing the continued existence of the species.11

Section 4(f) mandates that the responsible service "shall develop and implement plans for the conservation and survival of endangered species

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10. Id. § 7(a)(2).

11. Id. § 7(b)(3)(A). An action jeopardizes the continued existence of a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990) (citing 50 C.F.R. § 402.02 (1988)). Substantial discretion is afforded to the agencies as to the content and scope of the biological opinion, even when an agency's biological opinion is based on "admittedly weak" information. Id. at 1415 (citing Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1459-60 (9th Cir. 1984), cert. denied, 471 U.S. 1108 (1985)). By complying with the reasonable and prudent alternatives spelled out in a biological opinion, an agency can typically avoid a judicial determination that it has placed a protected species in jeopardy, unless the decision to implement the biological opinion was arbitrary or capricious. Id.
and threatened species...”\textsuperscript{12} This requires identification of management actions necessary to achieve the plan’s recovery goals.\textsuperscript{13} Recovery plans, as they are known, must, “to the maximum extent practicable,” include a description of site-specific management actions, and objective, measurable criteria which, when satisfied, will result in delisting of the species.\textsuperscript{14} Arguably the most powerful provision of the Act, section 9 makes it unlawful for any “person,” including a federal agency,\textsuperscript{15} to “take” any endangered species.\textsuperscript{16} The term “take” is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”\textsuperscript{17} Although “harm” is not defined in the statute, the Secretary has defined it to mean “an act or omission which actually injures or kills wildlife, including acts which may annoy it to such an extent as to significantly disrupt essential behavioral patterns.”\textsuperscript{18} An agency is only permitted to “take” a protected species if it has obtained an “incidental taking” permit or statement.\textsuperscript{19} The fact that the ESA allows for the issuance of incidental take permits for instances where a taking is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity”

\begin{itemize}
\item \textsuperscript{13} Id. § 4(f)(1)(B), § 1533(f)(1)(B). The ESA requires that the NMFS consider the particular needs of ecosystems occupied by protected species. Id. § 4(f)(1)(A). In designating objective, measurable criteria for a recovery plan, the NMFS must address each of the five statutory delisting factors and measure whether threats to protected whales had been ameliorated; it is insufficient that recovery plan’s criteria would “likely lead” to a finding that the statutory delisting factors were met. See id. § 4(a)-(c),(f)(1)(B)(ii). See also Fund for Animals v. Babbitt, 903 F. Supp. 96, 111 (D.D.C. 1995).
\item \textsuperscript{14} The Endangered Species Act, § 4(f), 16 U.S.C. § 1533(f) (1994).
\item \textsuperscript{15} Id. § 3(13), § 1532(13) (1994).
\item \textsuperscript{16} Id. § 9(a)(1)(B), § 1538(a)(1)(B) (1994).
\item \textsuperscript{17} Id. § 3(19), § 1532(19) (1994). In Strahan v. Coxe, a recent, unrelated suit brought by Strahan, this court determined that “[t]he term ‘take’ is to be construed liberally [and] should be defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” Strahan v. Coxe, 939 F. Supp. 963, 983 (D. Mass. 1996). The regulations define the term “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.” 50 C.F.R. § 17.3(c) (1998).
\item \textsuperscript{18} 50 C.F.R. § 17.3(c) (1998).
\end{itemize}
indicates that Congress intended section 9 to prohibit indirect as well as deliberate takings.\textsuperscript{20}

\textbf{B. The Marine Mammal Protection Act}

For over twenty years, the Marine Mammal Protection Act of 1972 (MMPA)\textsuperscript{21} has been protecting various species of marine mammals from harm caused by human activity.\textsuperscript{22} Section 115b of the MMPA requires that the NMFS prepare plans for the conservation and survival of listed species.\textsuperscript{23} The Secretary is directed to “act expeditiously to implement each conservation plan.”\textsuperscript{24}

The MMPA also establishes a moratorium on the “taking” of marine mammals and marine products.\textsuperscript{25} “Take” is defined to mean “harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal.”\textsuperscript{26} In the corresponding regulations, “take” is defined to include “the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal.”\textsuperscript{27} Similar to the ESA, the MMPA contains a statutory exception for incidental takings.\textsuperscript{28} The MMPA exception provides that for activities other than commercial fishing, the Secretary shall, upon request, allow the incidental taking of “small numbers of marine

\textsuperscript{23} The Marine Mammal Protection Act of 1972, § 115b(b), 16 U.S.C. § 1383b (1994). All other in text references to provisions of the MMPA in this Note cite to the appropriate section of the United States Code.
\textsuperscript{27} 50 C.F.R. § 216.3 (1998).
mammals" if the total number of incidental takes will have a "negligible impact" on the species or stock.  

C. The Administrative Procedure Act

When a court reviews actions taken by an agency pursuant to the ESA, MMPA, or the National Environmental Policy Act (NEPA), it must apply the standards set forth in the judicial review provisions of the Administrative Procedure Act (APA). The proper standard of review is whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This is a very narrow scope of review, limited only to the administrative record already in existence at the time of the initial agency decision. Certain exceptions to this rule exist that allow a court to consider evidence outside the administrative record. One such exception can be made when the court finds that new or additional evidence has been produced that the agency should have considered, but failed to do so. It is left entirely within the discretion of the court to decide whether or not to consider any additional evidence.

29. Id. These permits may only be issued for a period of five years or less. Id.
The dispute in *Strahan v. Linnon*\(^{35}\) arose largely in response to two occasions in which a Coast Guard vessel struck and killed a Northern Right whale calf.\(^{36}\) In 1994, plaintiff Max Strahan filed a complaint pro se against two Admirals of the United States Coast Guard,\(^{37}\) alleging various violations of the ESA, MMPA, APA, and NEPA.\(^{38}\) Strahan, an officer of Green World, Inc., filed the original complaint "on behalf of" the Northern Right whale, the Humpback whale, the Fin whale, the Sei whale, the Blue whale, and the Minke whale.\(^{39}\) Relying on a prior decision, the court determined that Strahan could not bring suit "on behalf of" the whales because the whales, even if directly injured by the Coast Guard's activities, are animals and therefore lack standing to sue.\(^{40}\) The court established that Strahan had to show the Coast Guard's actions *in fact harmed* the whales and that, apart from his interest as a dedicated advocate, he is "directly

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36. *Id.* at 588.
37. The defendants were Rear Admiral John L. Linnon and Admiral Robert E. Kramek. *Id.*
38. *Id.* at 587.
39. *Id.* at app. 610. All but the Minke have been listed as endangered under the ESA, but the focus of the complaint is on the Northern Right whale. *See id.* (citing the Final Rule of the NMFS designating a critical habitat for the Northern Right whale. 59 Fed. Reg. 28,793 (1994)). Northern Right whales are the most endangered of the large whales, despite the fact that they have been federally protected from commercial whaling since 1935. *Strahan v. Coxe*, 939 F. Supp. 963, 968 (D. Mass. 1996) (citing 59 Fed. Reg. 28,793(1994)). Less than approximately 350 individual Right whales exist in the North Atlantic, and the population is feared to be near extinction. *Id.* Approximately half of all known Right whale calves in the North Atlantic use Massachusetts waters sometime during their first year of life. *Id.* (citing Right Whales in Massachusetts Waters, An Executive Summary, TRO Ex. 6 at 2).
affected” by any harm to the whales. Strahan met this requirement by showing that the Coast Guard’s activities would decrease the number of whales that he may observe and study.

The following year, the district court granted summary judgment for the defendants on several counts, but granted, in part, Strahan’s motion for a preliminary injunction, requiring that the Coast Guard promptly fulfill the procedural requirements of the ESA, MMPA and NEPA. The decree issued by the district court in 1995 described the Coast Guard’s inaction as “deleteriousness and neglect.” The defendants did not initiate formal procedures to address the impact of its activities on endangered marine mammals until after Strahan filed the original complaint. Consequently, the court found a genuine issue of material fact concerning whether Coast Guard vessels will in the future “take” more Northern Right whales in violation of the ESA.

Pursuant to the court’s 1995 order, the Coast Guard submitted a biological assessment to the NMFS. In its biological assessment, analyzing the impact of vessel operations, the Coast Guard recognized that the primary danger to whales from search and rescue operations is collision with vessels while the mammals are on the ocean surface and that because Northern Right whales typically feed and calf close to the ocean surface, they are most in danger of vessel strikes. Despite this finding, the Coast Guard asserted that the potential for collisions and other adverse impact on the species remains small. In its responding biological opinion, the NMFS concluded that long-term continuation of Coast Guard activities “may adversely affect, but is not likely to jeopardize the continued existence of populations of endangered” whales. The opinion also stated that in the event an endangered whale was injured or struck by a Coast Guard vessel,

42. Id.
44. Strahan v. Linnon, 967 F. Supp. at app. 610.
45. Id. at app. 625.
46. Id. at 581, 588.
47. Id. at app. 613-614 (citing the ESA Biological Assessment for the U.S. Atlantic Coast (Mar. 29,1995) at B-2).
48. Operating under the Department of Transportation, the Coast Guard performs extensive marine operations, including rescues at sea, navigation assistance, immigration enforcement and drug enforcement. Strahan v. Linnon, 967 F. Supp. at app. 611.
consultation would have to be reinitiated.\textsuperscript{49} Statistical evidence from the NMFS demonstrates that Coast Guard activities have in fact caused harm to whales.\textsuperscript{50}

Less than one month after the biological opinion was issued, a Coast Guard vessel struck a Humpback whale.\textsuperscript{51} The Whale Protection Program guidelines,\textsuperscript{52} which were applicable to Coast Guard operations, were apparently not effective in fulfilling their purpose. Also at this time, the Northern Right whale population was experiencing an increased number of mortalities.\textsuperscript{53} In light of these developments, the second biological opinion, issued in July of 1996, concluded that continued Coast Guard activities "may result in serious injury or mortality to the northern right whale, and \ldots are likely to jeopardize the continued existence of the species."\textsuperscript{54} In its opinion the NMFS also proposed a reasonable and prudent alternative, as required under the regulations implementing section 7 of the ESA, concluding that implementation of the alternative was necessary to ensure that Coast Guard vessel operations avoid striking whales to the maximum extent

\begin{enumerate}
\item The NMFS has recognized that vessel traffic may subject whales to impacts ranging from displacing cow-calf pairs from near-shore waters, to expending increased energy when feeding is disrupted or migratory paths rerouted. Approaching Marine Mammals, 57 Fed. Reg. 34,101 (1992). Specifically, vessel activities have the potential to "change whale behavior, disrupt feeding practices, disturb courtship rituals, disperse food sources and injure or kill whales through collisions." Strahan v. Linnon, 967 F. Supp. at app. 610-611 (citing 59 Fed. Reg. 28,796 (1994)). One set of statistics reports that as much as 11\% of identified Northern Right whales were found to have propeller scars from large vessels, and it has been documented that nearly 30\% of Right whale mortalities are the result of collisions with vessels. \textit{Id.} at app. 611.
\item In 1994, the First Coast Guard District, covering coastal New England, New York and portions of New Jersey, adopted a Whale Protection Program ("Marine Mammal and Endangered Species Protection Program") which, in part, established guidelines for the operation of Coast Guard vessels. It requires that all vessels navigating through Northern Right whale critical habitat areas "use caution and be alert for whales." In addition, the guidelines outline specific procedures to follow once a whale has been sighted. Strahan v. Linnon, 967 F. Supp. at app. at 612 (citing the ESA Biological Assessment for the U.S. Atlantic Coast (Mar. 29, 1995) at 4-2).
\item Strahan v. Linnon, 967 F. Supp. at 589.
\end{enumerate}
possible. In its Final Environmental Impact Statement, the Coast Guard stated that “adoption and implementation” of the Atlantic Protected Living Marine Resources (APLMR) Initiative was the Preferred Alternative. The APLMR included an Internal Program and a Conservation Program, to accomplish its missions, including protection of the environment, while also fulfilling its obligations to protected listed species.

Unsatisfied with these conservation efforts, Strahan filed an amended complaint containing over twenty counts, claiming that the defendants had violated provisions of the ESA, MMPA, NEPA and APA by inadequately addressing the impact of Coast Guard activities on endangered whale species and by failing to insure that Northern Right whale populations will not be further jeopardized. Strahan also sought declaratory judgment that the “takings” of three endangered whales constituted a violation of MMPA. In a separate proceeding, the court allowed Strahan to supplement the administrative record, to a limited extent, with evidence regarding information that the agency improperly failed to consider, as well as information to aid the court’s comprehension of technical aspects of the defendants’ activities concerning implementation of recovery plans. In response, the defendants filed a motion for summary judgment on all

55. Id. at 26.
59. Id. at 600.
60. Strahan v. Linnon, 966 F. Supp. 111 (D. Mass. 1997). Strahan was not allowed to supplement the administrative record with evidence concerning the size of the population, photographs of interactions between humans and whales, timing of development of recovery plans for listed whale species, and circumstances surrounding the 1995 incident in which a Coast Guard vessel struck a Humpback whale. Id.
counts, arguing that they had fulfilled the consultation and conservation requirements which would adequately protect the endangered whale populations.\textsuperscript{61}

The district court fully granted the defendants motion for summary judgment and denied Strahan's motion for partial summary judgment. Specifically, the court found that the APLMR Initiative sufficiently reduces the risk of harm to endangered marine mammals and that Strahan failed to establish that future harm to the species would \textit{actually} occur.\textsuperscript{62} The court also noted that the defendants "must remain vigilant in their protection of the species" because the conservation mandates under the ESA impose a continuing responsibility which did not cease at the close of the litigation.\textsuperscript{63}

\textit{B. Arguments Presented}

Among the numerous counts brought by Strahan were several allegations of ESA violations, including a challenge to the adequacy of the NMFS Biological Opinion.\textsuperscript{64} Strahan claimed that the biological opinion failed to sufficiently evaluate the cumulative effects of the Coast Guard's activities\textsuperscript{65} and that the NMFS did not use the best scientific and commercial data.\textsuperscript{66} Finding no merit in Strahan's claim of inadequacy, the court ruled that the biological opinion was sufficient because it contained a discussion of the impact of non-Coast Guard vessels on the Northern Right whale and because the NMFS used the best scientific and commercial data available.\textsuperscript{67} The court employed a similar, but less stringent analysis of the

\begin{itemize}
\item \textsuperscript{61} Strahan v. Linnon, 967 F. Supp. at 589.
\item \textsuperscript{62} Id. at 608.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Strahan could not challenge the adequacy of the Biological Opinion under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(c)(1994), because it only authorizes suits against the Secretary which seek to compel him to perform a nondiscriminatory duty. Strahan v. Linnon, 967 F. Supp. at 592. However, the suit can be brought under the APA provision which provides for the right to judicial review of all final agency action for which there is no other adequate remedy in a court of law. \textit{Id.}
\item \textsuperscript{65} "Cumulative effects" are defined as "those effects of future State or private activities . . . that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02 (1998).
\item \textsuperscript{66} Strahan v. Linnon, 967 F. Supp. at 594.
\item \textsuperscript{67} Id. Although the NMFS did not perform a population viability analysis or model the effects of interactions between whales and vessels, the court found that these alleged deficiencies were not sufficient to satisfy the applicable "arbitrary or capricious" standard of the APA. \textit{Id.} \textit{See also} Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy, 898
Coast Guard's Biological Assessment, the sufficiency of which Strahan also challenged. The primary difference between a biological opinion and a biological assessment is that the contents of the biological assessment are discretionary and depend on the nature of the Federal action. Strahan's claims again failed to meet the arbitrary and capricious standard and the court granted summary judgment for the defendants.

Challenging the defendants' duty under section 4(f), Strahan claimed that the NMFS's failure to "develop and implement plans for the conservation and survival of 'endangered species'" constituted a violation of the ESA. In response to Strahan's claim that the Coast Guard's failure to develop plans for the conservation and survival of whales other than Northern Right and Humpbacks was a violation of the ESA, the defendants successfully argued that the ESA imposes no time limits for implementation of recovery plans. The court ruled that the fact that the NMFS has not issued recovery plans for Sei, Blue and Fin whales does not constitute a violation of section 4(f) of the ESA, and that the NMFS is required only to report to Congress on the status of its efforts to develop and implement recovery plans.

More importantly, although the recovery plan for Northern Right whales and Humpback whales is not yet implemented, the court ruled that since the NMFS is making progress towards implementation of the recovery plan, no ESA violation exists. Attacking the sufficiency of the plan, Strahan also claimed the APLMR Initiative was not an adequate conservation program in that it did not contain specific measures necessary to

F.2d 1410, 1414 (9th Cir. 1990).
71. Id. at 596. Because a section 4(f) recovery plan is synonymous with an MMPA section 115(b) conservation plan, the court considered the claims concerning these plans together. Id. at 599 n.23.
72. "[T]here is no statutory time limit within which the Secretary is required to develop and publish a recovery plan." Oregon Natural Resources Council v. Turner, 863 F. Supp. 1277, 1282-83 (D. Or. 1994). Also, the Secretary is authorized to establish a priority system in developing recovery plans, allocating resources to those species that will most likely benefit from development of a recovery plan. Id. at 1282. See also The Endangered Species Act § 4(f), 16 U.S.C. § 1533(f) (1994).
prevent further loss of the endangered whales.\textsuperscript{75} Specifically, Strahan claims that the recovery plan is insufficient because it fails to include annual census population viability and analysis, interim numerical goals, and speed limits or distance rules for non-Coast Guard vessels.\textsuperscript{76}

The court found that this was not a "fatal flaw" and that the Secretary is to be afforded discretion in determining the best means to meet the mandate of section 7(a)(1).\textsuperscript{77} The ESA provides that recovery plans must, "to the maximum extent practicable" identify site-specific management actions necessary to achieve conservation and survival of protected species.\textsuperscript{78} A plan which "fails to recommend corrective action or explain why it is impracticable or unnecessary to recommend such action would not meet the ESA's standard. Nor would a plan that completely ignores threats to conservation and survival of a species."\textsuperscript{79} Because courts generally afford an agency's decision a great deal of deference in instances when expert, scientific determinations are involved,\textsuperscript{80} Strahan would have had to show that the alleged deficiencies were "necessary to achieve the plan's goal for the conservation and survival of the species."\textsuperscript{81} Incidentally, the NMFS is currently implementing some of the measures suggested by Strahan in his complaint.\textsuperscript{82}

Strahan brought "takings" claims under both the ESA and the MMPA.\textsuperscript{83} The court expressly stated that there was "no dispute" that Coast Guard

\textsuperscript{75} Id. at 595-96.
\textsuperscript{76} Id. at 597.
\textsuperscript{77} Id. at 596.
\textsuperscript{79} Id. at 108.
\textsuperscript{80} \textit{See} Bay's Legal Fund v. Browner, 828 F. Supp. 102, 107 (D. Mass. 1993) ("[W]here there is a factual dispute involving issues of science, which implicates substantial agency expertise, deference is owed to the informed decision making of the responsible agency.").
\textsuperscript{81} Strahan v. Linnon, 967 F. Supp. at 598. (quoting The Endangered Species Act § 4(f)(1)(B)(i), 16 U.S.C. § 1533(f)(1)(B)(i) (1994)). In a rather unusual gesture, the court found suggestions made by one of Strahan's scientists "particularly compelling," and noted that the NMFS would be "well advised" to consider his proposals. Strahan v. Linnon, 967 F. Supp. at 598 n.21 (commenting on Dr. Stevenson's suggestions for a statistically-designed plan to monitor population trends).
\textsuperscript{82} Strahan v. Linnon, 967 F. Supp. at 598.
\textsuperscript{83} Id. at 599. The takings claims were divided into two categories: "takings" by Coast Guard vessels and "takings" by non-Coast Guard vessels which have been issued Certificates of Documentation by the Coast Guard. \textit{Id. See also} The Endangered Species Act § 9(a), 16 U.S.C. § 1538(a)(1994); 16 U.S.C. § 1372(a)(1)(1994.).
vessels have "taken" three endangered whales in the last seven years.\textsuperscript{84} Strahan sought declaratory judgment "that taking of Federally Protected Whales by the Coast Guard in the course of their operation of vessels on the marine waters of the [sic] United States without any 'small take permit' to do so . . . constitutes an illegal taking of the Northern Right Whale and other Federally Protected Whales and is in violation of the prohibitions of the MMPA."\textsuperscript{85} However, because the Coast Guard concedes that it violated the ESA and MMPA by taking three endangered whales, the court reasoned that such a declaration would be superfluous.\textsuperscript{86} The court further ruled that injunctive relief was not warranted because future takings would be unlikely.\textsuperscript{87} The First Circuit's standard for injunctive relief is whether "petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species."\textsuperscript{88} Despite the Coast Guard's admission that if its past practices were to continue, evidence presented by Strahan would be sufficient to satisfy the standard for injunctive relief, summary judgment was granted to the defendants.\textsuperscript{89}

IV. DISCUSSION

A. The Court Declined to Enforce Implementation of the Recovery Plan

Formally adopted by the Coast Guard in December of 1996 as the preferred alternative,\textsuperscript{90} the APLMR Initiative was not yet fully implemented by the defendants as of the issuance of the court's opinion.\textsuperscript{91} The specific mandate of the ESA is development and implementation of a recovery plan.\textsuperscript{92} However, the court effectively ruled that progress toward implementation was sufficient to fulfill the mandate of section 7(a)(1).\textsuperscript{93}

\textsuperscript{84} Strahan v. Linnon, 967 F. Supp. at 600.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{89} Strahan v. Linnon, 967 F. Supp. at 600.
\textsuperscript{90} Id. at 589.
\textsuperscript{91} Id. at 599.
\textsuperscript{93} See Strahan v. Linnon, 967 F. Supp. at 595-96. The court reasoned that "[a]n
Although this ruling is reasonable in light of statutory and case law, court-ordered implementation of the recovery plan may have better served the goal and spirit of the ESA.

Assuming that the recovery plan was substantively sufficient, Strahan was still unable to persuade the court that failure to implement the plan constituted a violation of the ESA. The court allowed progress in implementation to suffice. The decision undercut the jeopardy prohibition and replaced it with the potentially more subjective concept of adequate progress in implementation, which creates a risk for the species. Application of this standard suggests that even if the NMFS determines that an agency’s actions are likely to jeopardize the continued existence of a protected species, as long as the agency adopts the suggested alternative contained in the biological opinion and makes progress in implementation, it will satisfy its statutory obligations. By declining to include any qualifying language in its ruling, the court left unanswered the question of whether implementation is enforceable.

In light of the court’s stated displeasure with the defendant’s lax compliance efforts, it is somewhat surprising that the court required no more of the defendants, than that they “remain vigilant in their protection of the species.” After noting that the defendants had to be “cajoled by case management initiatives of [the] Court to participate in the procedures mandated by” the ESA, MMPA and NEPA the court still found it unnecessary to include action-forcing language or strong directives in its ruling. In light of the precarious state of the Northern Right whale, the court’s decision not to force implementation of the plan could put the species at even greater risk. Congress clearly stated that species conserva-
tion is of the highest priority and commanded that agencies develop and implement recovery plans to insure that conservation is achieved. Congress provided the statutory mandate, but it is up to the courts to enforce it. Because the statute does not impose any time constraints on implementation, the "progress in implementation" standard does not afford sufficient protection for Federally protected species.

B. The Court Declined to Find Violation of the Takings Prohibition

Although the Coast Guard has admittedly killed two Northern Right whales in violation of the ESA and MMPA, it has neither applied for, nor received the requisite permit from the NMFS. In its defense, the Coast Guard asserts that the NMFS indicated that it would not likely issue an MMPA "small take" permit authorizing any amount of vessel collisions with Northern Right whales because the severely depleted state of the population would prevent the requisite finding that the takes would have a "negligible impact" on the species.

The First Circuit's standard for injunctive relief is whether the activity has "actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species." The defendants admit that if the Coast Guard's activities were to continue, the evidence presented by Strahan would be sufficient to meet this standard, but assert that those takings did not occur while the present whale protection programs were in place. Instead of focusing on this issue, the court was persuaded by the Coast Guard's position, that the proper question was whether Strahan showed a "reasonable likelihood of future whale strikes by Coast Guard vessels."

102. The recovery plan does not mandate any actions, at any specific time, but rather presents a guideline for obtaining future goals. Oregon Natural Resource Council v. Turner, 863 F. Supp. 1277, 1284 (D. Or. 1994). Because the ESA does not include any time limits for the preparation or implementation of a recovery plan, it is difficult to determine whether delay is unreasonable. Id.
104. Id. at app. 612 (quoting 16 U.S.C. §1371(a)(5)(A)(i)).
105. Id. at 600 (quoting American Bald Eagle v. Bhatti, 9 F.3d 163, 166 (1st Cir. 1993)).
106. Id.
107. Id. at app. 625.
Because the Coast Guard was so resistant to applying for a small take permit, the court, in the original suit, found that there was "sufficient evidence to justify an order for initiation of an MMPA small take permit application to 'compel agency action unlawfully withheld or unreasonably delayed.'"\textsuperscript{108} In its 1995 decree, the court also stated that, "[a] declaratory judgment may ultimately prove necessary to disabuse the Coast Guard of its mistaken understanding of the unequivocal message of the ESA."\textsuperscript{109} The court further believed that, depending on the outcome of the consultation process, "[a] permanent injunction also may be required to prevent Right whale incidental takings."\textsuperscript{110}

In the subject decision, the court seems to have backed down considerably, affording the agency generously broad discretion, despite the fact that no recovery plan has been implemented to insure the continued preservation and conservation of the protected whales. The court's refusal to issue, as requested, a declaratory judgment that the three prior takings that resulted from Coast Guard vessel strikes constituted violations of the takings prohibitions of the ESA and MMPA is puzzling.\textsuperscript{111} In granting yet another motion for summary judgment for the defendants, the court appeared to be glossing over Strahan's numerous motions, perhaps not giving each one full consideration.

Ruling that injunctive relief was not warranted, the court found that, "if implemented, the protective measures in the APLMR and the 1996 Biological Opinion will insure . . . that future takings will not occur."\textsuperscript{112} The deficiency of this reasoning is that the recovery plan has not been implemented, and furthermore, there is no time limit on its implementation. The court's decision to grant summary judgments for the defendants does not appear to be sufficiently supported by the rationale and statements contained within the opinion. Alternatively, the court perhaps could have used section 7(a)(1) to force implementation of the recovery plan.

\textsuperscript{108} \textit{Id.} at app. 627 (quoting 5 U.S.C. § 706(1) (1994)).
\textsuperscript{109} \textit{Id.} at app. 626.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{See id.} at 600.
\textsuperscript{112} \textit{Id.} at 601 (emphasis added).
C. Use of the Section 7(a)(1) Conservation Mandate as an Action-Forcing Provision

The Coast Guard’s emphasis on the importance of its operations is misplaced, because it was Congress’s clear intent “to require agencies to afford first priority to the declared national policy of saving endangered species,” and the omission of any qualifying language “reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” Although Congress intended that endangered species be afforded the “highest of priorities,” the court effectively made the ESA’s conservation mandate take a back seat to the Coast Guard’s “primary missions.” This is reflected in the opinion, when the court, after acknowledging that, if strictly construed, section 7(a)(1) “could require the Coast Guard to cease all operations along the Atlantic Coast,” determined that such an order would not be appropriate. The court undoubtedly based this determination on public safety concerns, however, it is possible that section 7(a)(1) could have been used to impose court-ordered implementation, in place of an injunction.

Under section 7(a)(1), the agency has an affirmative duty to bring endangered species to the point at which they may be removed from protected status. If properly understood to mean that the duty to

113. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 185 (1978). Under the ESA, “the balance of hardships and the public interest tips heavily in favor of protected species.” National Wildlife Federation v. Burlington Northern, 23 F.3d 1508, 1511 (9th Cir. 1994). Congress’s concern over the potential risk of losing endangered species to extinction was reflected in a 1973 Report of the House Committee on Merchant Marine and Fisheries on H.R. 37: “From the most narrow possible point of view, it is in the best interest of mankind to minimize the losses of genetic variations . . . They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.” H.R. REP. No. 93-412, at 5 (1973). In its Tennessee Valley Auth. v. Hill opinion the Supreme Court stated that Congress made a conscious decision to give endangered species priority over the “primary missions” of federal agencies, and that section 7 would at times require agencies to alter ongoing activities in order to meet the goals of the Act. Tennessee Valley Authority v. Hill, 437 U.S. at 185-86.


117. See The Endangered Species Act, § 7(a)(1), 16 U.S.C. §§ 1531(b), 1536(a)(1)
conserve imposes the duty to implement recovery plans, section 7(a)(1) has the potential for use as an action-forcing provision. It could be used as a prod to compel agencies to implement policies and programs that promote species conservation.

The provisions of the ESA must be read in concert. Section 2(c) identifies conservation as a primary purpose of the statute: “It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species, and shall utilize their authorities in furtherance of the purposes of this chapter.”

Section 3(3) defines “conservation” as recovery of species, or specifically, “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”

Section 4(f) offers the recovery plan as a means of detailing how to conserve species, clearly stating that “[t]he Secretary shall develop and implement [recovery] plans for the conservation and survival of . . . species listed pursuant to this chapter.”

Finally, section 7(a)(1) ties all of these provisions together by imposing a conservation mandate, requiring that all federal agencies “shall . . . utilize their authority in furtherance of the purposes of this chapter by carrying out programs for the conservation of . . . species listed pursuant to section [4].” The ESA’s conservation mandate can be best promoted by linking it to the recovery plans.

(1994). Once a species is listed as threatened or endangered, the NMFS “must do far more than merely avoid elimination of [the] protected species. It must bring these species back from the brink so that they may be removed from the protected class.” Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D.D.C. 1977).

118. The ESA requires all federal agencies to take affirmative action for the purpose of conserving endangered species, by utilizing their authority to achieve the purpose of the act. The Endangered Species Act § 4 (f), 16 U.S.C. § 1533(f) (1994).

119. Id. § 2(c)(1), 16 U.S.C. § 1531(c)(1).

120. Id. § 3(3), § 1532(3).

121. Id. § 4(f), § 1533(f).

122. Id. § 7(a)(1), § 1536(a)(1).
V. CONCLUSION

The Supreme Court has explicitly stated that the duty to conserve species is an affirmative mandate that cannot be overridden by or neglected because of agencies' "primary missions." 123 Although the court based its finding of "no likelihood of future takings" on the assumption that the recovery plan would be implemented, it declined to take any enforcement measures to insure that implementation would occur within a reasonable time frame. Allowing the defendants' primary missions to take precedence over ESA substantive mandates, the court left enforcement of recovery planning fully within the discretion of the defendants.

Since section 7(a)(1) requires all federal agencies to "conserve" endangered species, and since the ESA defines "conservation" in terms of species recovery, it follows that the recovery plan may be a powerful mandate for agency action. If the concept of recovery is relevant for interpreting other provisions of the ESA, it must also be relevant for interpreting the "duty to conserve." Whether the balance between enforceable procedural duties to prepare recovery plans and unenforceable recovery plan requirements is adequate to conserve endangered species remains an open question.