

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH URBINATI, JR.,)

Plaintiff,)

v.)

HOWARD LUTNICK, *et al.*,)

Defendants,)

and)

WHALE AND DOLPHIN)
CONSERVATION, INC.; CENTER)
FOR BIOLOGICAL DIVERSITY;)
CONSERVATION LAW FOUNDATION;)
and DEFENDERS OF WILDLIFE,)

Defendant-Intervenors)
(proposed).)

No. 1:26-cv-02884 (VSB) (RFT)

**CONSERVATION GROUPS'
MEMORANDUM IN SUPPORT
OF MOTION TO INTERVENE
AS DEFENDANTS**

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INTRODUCTION

To safeguard their interests in the survival and recovery of critically endangered North Atlantic right whales, Whale and Dolphin Conservation, Inc., Center for Biological Diversity, Conservation Law Foundation, and Defenders of Wildlife (Conservation Groups) move to intervene as defendants in this litigation pursuant to Federal Rule of Civil Procedure 24(a). Conservation Groups alternatively move to intervene as defendants under Federal Rule of Civil Procedure 24(b).

This case concerns a superyacht owner who contests a \$24,000 civil penalty issued by the National Oceanic and Atmospheric Administration (NOAA Fisheries) for knowingly violating the 2008 Vessel Speed Rule, which protects right whales from vessel strikes. *See* 73 Fed. Reg. 60,173 (Oct. 10, 2008). Yet the plaintiff-yacht-owner does not dispute his liability for these violations—instead, he seeks to dismantle the Rule, thereby placing an already imperiled species at greater risk of extinction.

The Vessel Speed Rule is essential for the survival and recovery of the right whale, which numbers only around 380 individuals. Vessel strikes are one of the two primary threats to the continued existence of the species (the other is fishing gear entanglements). Indeed, vessel strikes and entanglements are the *only* documented causes of mortality for right whales who survive their first year. In recognition of this threat, NOAA Fisheries promulgated the Vessel Speed Rule in 2008 after determining—based on the best scientific information available—that

requiring large vessels to slow down in certain areas at certain times reduces the risk of fatal strikes, helping to ensure the survival of the species and put it on the road to recovery.

Conservation Groups have significant interests at stake in this case. Beyond their interests in ensuring the survival and recovery of right whales and defense of the Vessel Speed Rule, they also have strong interests in the appropriate administration of the ESA and MMPA via regulation to protect other vulnerable species. Further, this case implicates Conservation Groups' future work under multiple environmental protection statutes that contain similar language to the rulemaking authority delegation clauses at issue here, such as the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and Toxic Substances Control Act.

Yet now the agency is actively reconsidering the Vessel Speed Rule. On March 4, 2026, NOAA Fisheries published an advance notice of proposed rulemaking in the Federal Register proposing to replace vessel-speed restrictions with alternative management areas and unproven technological alternatives. 91 Fed. Reg. 10,580 (Mar. 4, 2026). This development casts significant doubt on Defendants' willingness and ability to vigorously defend all aspects of the Rule throughout the course of this litigation.

To protect their unique interests, Conservation Groups therefore move to intervene as defendants in this litigation. Conservation Groups are entitled to intervene under Federal Rule of Civil Procedure 24(a) because: (1) this motion is timely; (2) they and their members have direct and legally cognizable interests in

the Vessel Speed Rule; (3) their interests may be impaired by this litigation; and (4) their interests may not be adequately represented by any existing party. In the alternative, Conservation Groups request this Court permit intervention under Rule 24(b).

BACKGROUND

I. THE NORTH ATLANTIC RIGHT WHALE

Norse and Basque whalers in Europe targeted the North Atlantic right whale as early as the ninth century, eventually extirpating the species from its eastern North Atlantic range. By the end of the nineteenth century, whalers had hunted the species to the point of commercial extinction in its western North Atlantic range. When the League of Nation's Convention for the Regulation of Whaling prohibiting killing right whales entered into force in 1935, there may have been as few as 100 surviving animals. The species is now primarily found in Canadian and U.S. waters in the Atlantic. Its only known calving grounds are in southeastern U.S. waters.

Between the end of commercial whaling in the 1930s and the statutory protections afforded by the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) since the early 1970s, the right whale's population slowly grew to a high of about 490 individuals in 2010.¹ However, human activities are

¹ Heather Pettis & Philip Hamilton, *North Atlantic Right Whale Consortium 2011 Annual Report Card*, North Atlantic Right Whale Consortium, 2 (Nov. 2011), https://www.narwc.org/uploads/1/1/6/6/116623219/04._2011_report_card.pdf.

once again killing right whales at unsustainable rates. Vessel strikes² and fishing gear entanglements are inhibiting the species' recovery and threatening its survival.³

In 2010, the right whale population began declining again due to climate change-induced population shifts and increased entanglements and vessel strikes. Right whale deaths and injuries spiked dramatically starting in 2017, when NOAA Fisheries designated an active Unusual Mortality Event (UME) under the MMPA. More than twenty percent of the population has been tallied in the UME, including 43 confirmed deaths, 40 serious injuries (i.e., injuries that will likely result in mortality, *see* 50 C.F.R. § 229.2), and 87 morbidities (sublethal injuries and illnesses). *See supra* n.3.

The species has long been considered one of the “the world’s most critically endangered large whale species and one of the world’s most endangered mammals.” 73 Fed. Reg. at 60,173. The whale’s “low reproduction level and small population size” mean that “even low levels of human-caused mortality can pose a significant obstacle for [its] recovery.” *Id.*

² NOAA Fisheries, *North Atlantic Right Whale (Eubalaena glacialis) Vessel Speed Rule Assessment*, Office of Protected Resources, 1 (June 2020), https://media.fisheries.noaa.gov/2021-01/FINAL_NARW_Vessel_Speed_Rule_Report_Jun_2020.pdf.

³ NOAA Fisheries, *2017-2026 North Atlantic Right Whale Unusual Mortality Event*, <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2025-north-atlantic-right-whale-unusual-mortality-event>, last updated Feb. 12, 2026.

With only around 380 surviving animals in 2024, the right whale remains at risk of extinction.⁴ Alarmingly, scientists estimate that there are only 70 reproductively active females.⁵ According to NOAA Fisheries, “[e]very single female North Atlantic right whale and calf are vital to this endangered species’ recovery.” *See supra* n.5. The combined impacts of vessel strike injuries, entanglements, and climate-driven changes in prey availability have significantly decreased calving rates over the past decade. *Id.* With deaths outpacing births, “[t]he only solution is to significantly reduce human-caused mortality and injuries, as well as stressors on reproduction.” *Id.*

Vessel strikes kill or injure right whales through blunt force trauma and/or propeller strikes that result in deep, broad wounds, blood loss, crushed bones, and/or amputations. 73 Fed. Reg. at 60,174. Many living whales bear wounds or scars of nonlethal collisions, which can make right whales vulnerable to subsequent injury or death.⁶ For example, a female right whale nicknamed Lucky survived lacerations from a 1991 collision when she was a calf, only to die in January 2005

⁴ NOAA Fisheries, *Population size estimation of North Atlantic right whales from 1990-2024*, NOAA Technical Memorandum NMFS-NE-324 (Sept. 2025), <https://www.fisheries.noaa.gov/resource/peer-reviewed-research/population-size-estimate-north-atlantic-right-whales>; *see also supra* n.2 (“right whales are approaching extinction”).

⁵ NOAA Fisheries, *North Atlantic Right Whale Calving Season 2026*, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2026>, last updated Apr. 29, 2026.

⁶ NOAA Fisheries, *North Atlantic Right Whale (Eubalana glacialis), Stock Definition and Geographic Range*, 27 (Nov. 2024), <https://www.fisheries.noaa.gov/s3/2024-12/2023-sar-narw.pdf>.

when she became pregnant for the first time and the old wounds reopened. *See supra* n.5.

Right whales are prone to vessel strikes because of how much time they spend just below the surface of the water, “rendering them hidden to mariners but vulnerable to vessel collisions.” *See supra* n.2 at 3. The risk of collisions with mother-calf pairs is especially high because of how much time they spend resting and nursing near the water’s surface. *Id.* As NOAA Fisheries has stated, the “effect of vessel-related deaths on right whale recovery is especially significant because a disproportionate number of ship strike victims are female right whales.” 73 Fed. Reg. at 60,174. In March 2024, a 35-year-old female was found dead off Virginia with catastrophic injuries consistent with blunt force trauma from a vessel strike prior to death. Her dependent newborn calf—her sixth—could not have survived.⁷

NOAA Fisheries’ Recovery Plan for the North Atlantic Right Whale lists steps to “reduce or eliminate” vessel strike mortalities and injuries as one its highest priorities.⁸ “[D]eveloping and implementing an effective strategy to address this threat is essential to recovery of the species.” 73 Fed. Reg. at 60,174; *see also id.* (for “the North Atlantic right whale population to recover, vessel-related deaths and injuries must be reduced.”).

⁷ *See* NOAA Fisheries, *North Atlantic Right Whale Updates 2024*, <https://www.fisheries.noaa.gov/endangered-species-conservation/north-atlantic-right-whale-health-updates-2024>, last updated Dec. 5, 2025 (*see* Dead Female Right Whale (1950) Off Virginia, April 4, 2024).

⁸ NOAA Fisheries, *Recovery Plan for the North Atlantic Right Whale (Eubalaena glacialis)*, Revision, II (May 26, 2005), <https://repository.library.noaa.gov/view/noaa/3411>.

II. THE 2008 VESSEL SPEED RULE

Vessel strikes have long been recognized as an existential threat to the right whale. From 1986 to 2006, there were 19 known right whale deaths from vessel strikes. 71 Fed. Reg. 36,299, 36,300 (June 26, 2006). The actual number of deaths during this time was “almost certainly higher” given that most right whale deaths are not detected. *Id.*

In 1999, NOAA Fisheries initiated a series of stakeholder meetings to discuss ways to reduce vessel strikes. 71 Fed. Reg. at 36,301. In 2001, it commissioned a report based on these stakeholder meetings on recommended vessel strike reduction measures. It used that report as a baseline to develop a strategy that included research, regulation development, and international action. *Id.*; *see also* 69 Fed. Reg. 30,857, 30,858 (June 1, 2004). NOAA Fisheries initiated rulemaking under the ESA and MMPA via an advance notice of proposed rulemaking in 2004, 69 Fed. Reg. at 30,857; issued a proposed rule in 2006, 71 Fed. Reg. at 36,299; and finalized it in 2008, 73 Fed. Reg. at 60,173 (codified at 50 C.F.R. § 224.105). NOAA Fisheries based the Vessel Speed Rule on a comprehensive review of scientific data demonstrating that higher vessel speeds increase both the likelihood of a vessel striking a right whale and the probability that the strike will kill or seriously injure that whale. 73 Fed. Reg. at 60,176.

The Vessel Speed Rule requires vessels 65 feet or longer to slow to ten nautical miles per hour (“knots”) or less in certain areas at certain times of year. *See* 50 C.F.R. § 224.105(a)–(b). These are known as Seasonal Management Areas. *See* 73

Fed. Reg. at 60,178; *see also* 50 C.F.R. § 224.105(a)(1)–(3). The Rule contains an exemption allowing any regulated vessel to deviate from the speed limit for safety reasons when ocean or weather conditions demand it, so long as the deviation is attested to in its logbook. 50 C.F.R. § 224.105(c).⁹ As NOAA Fisheries has explained, when it begins an enforcement investigation, “vessel operators are given an opportunity to provide evidence that they deviated from the requirements of the rule to maintain safe maneuvering speed, specifically due to oceanographic, hydrographic and/or meteorological conditions on transits which were in alleged violation of the speed rule.” *See supra* n.2 at 31.

The Rule also established a voluntary Dynamic Management Area program. 73 Fed. Reg. at 60,179–80. When an aggregation of three or more right whales is sighted in an area not covered by a Seasonal Management Area, NOAA Fisheries sends out a notification asking (but not requiring) mariners to avoid the area or slow to ten knots or less when traveling through it. *Id.* at 60,180. These voluntary zones last for 15 days, unless extended based on resighting right whales in the same area. *Id.*

The Vessel Speed Rule originally contained a five-year sunset clause. *Id.* at 60,186. In June 2013, NOAA Fisheries proposed to make it permanent because “the justification for establishing the initial rule remains applicable and is supported by

⁹ The rule exempts outright vessels owned, operated by, or under contract to the federal government as well as law enforcement vessels of a state or political subdivision when engaging in law enforcement or search and rescue operations. 50 C.F.R. § 224.105(a).

subsequent studies regarding the diminished probability of lethal strikes” with the Rule in place. 78 Fed. Reg. 34,024, 34,026 (June 6, 2013). NOAA Fisheries made the Rule permanent in December 2013. 78 Fed. Reg. 73,726 (Dec. 9, 2013); *see also id.* at 73,734 (“New data, including new analysis of existing data and new information provided during the public comment period, further support the validity of vessel speed restrictions to protect right whales No known right whale deaths have occurred in speed restriction [areas] in the time since the restrictions were implemented.”). The agency did not change any substantive component of the Rule. *See id.* at 73,735. It committed to issuing a report within five years on the Rule’s economic impacts and conservation value. *Id.* at 73,734.

NOAA Fisheries finalized that report in June 2020. *See supra* n.2. It showed that the number of documented right whale mortalities and serious injuries from vessel strikes decreased from 12 during the decade prior to the Rule’s implementation to eight in the decade since implementation. *Id.* at i. “This overall decline demonstrates progress but also indicates additional action is warranted to further reduce the threat of vessel collisions.” *Id.* Moreover, its “investigation of navigational safety revealed no indication of impacts from implementation of the speed rule.” *Id.* Finally, “the yearly cost to industry is estimated to be \$28.3 to \$39.4 million annually, with the majority of the cost (58–70%) borne by the container ship sector.” *Id.*

Given alarming population declines, Conservation Groups and others vigorously advocated for years for NOAA Fisheries to expand the Vessel Speed Rule

beyond its current scope. *See* 87 Fed. Reg. 46,921 (Aug. 1, 2022). Yet more than two years after publishing the proposed rule, during which time at least four more right whale deaths by vessel strikes occurred in southeastern U.S. waters, *see supra* n.2, the agency ultimately withdrew the proposed rule. *See* 90 Fed. Reg. 4711 (Jan. 16, 2025).

On March 4, 2026, NOAA Fisheries published in the Federal Register an advance notice of proposed rulemaking and requested public comment on a “possible deregulatory action to modify” the Rule “by replacing current seasonal speed restrictions with alternative” management measures. 91 Fed. Reg. at 10,580. The notice asserted that “the goal of this initiative is to reduce unnecessary regulatory and economic burdens on the regulated community[.]” *Id.*

III. PLAINTIFF’S CHALLENGE TO THE RULE AND ITS APPLICATION

To avoid paying a \$25,000 citation, the plaintiff-yacht-owner alleges that the Rule and its application are unlawful or even unconstitutional. Plaintiff alleges that, in promulgating the Vessel Speed Rule, NOAA Fisheries exceeded its rulemaking authorities under the ESA and MMPA to implement necessary and appropriate regulations to effect statutory purposes. ECF No. 1 at ¶¶ 45–54 (Count I). In the alternative, Plaintiff asserts that the Rule is unconstitutional because it runs afoul of the nondelegation doctrine. *Id.* at ¶¶ 55–65 (Count II). Finally, Plaintiff alleges that, because his citation was upheld by an administrative law judge rather than an Article III judge, his constitutional right to adjudication by an “independent judge” was violated. *Id.* at ¶¶ 66–75.

LEGAL STANDARD

Courts “must” allow a party to intervene under Federal Rule of Civil Procedure 24(a) when the movant: (1) submits a “timely” motion; (2) “show[s] an interest in the action;” (3) “demonstrate[s] that the interest may be impaired by the disposition of the action;” and (4) “show[s] that the interest is not protected adequately by the parties to the action.” *In re N.Y.C. Policing During Summer 2020 Demonstrations*, 27 F.4th 792, 799 (2d Cir. 2022) (citation modified).

Alternatively, courts may permit a party to intervene when an application is “timely” and the applicant “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1).

ARGUMENT

I. CONSERVATION GROUPS ARE ENTITLED TO INTERVENE AS OF RIGHT

Conservation Groups are entitled to intervene as of right. Their motion is timely; they have legally protectable interests at stake in this lawsuit; their interests are threatened by Plaintiff’s lawsuit; and their interests may not be adequately represented by an existing party in this matter.¹⁰

¹⁰ While Conservation Groups need not demonstrate Article III standing to intervene, the attached declarations establish Conservation Groups and their members’ scientific, professional, recreational, and aesthetic interests in right whales sufficient to demonstrate standing in this matter. *See* Asmutis-Silvia Decl. (Ex. 1); Bartlett Decl. (Ex. 2); Sakashita Decl. (Ex. 3); Patek Decl. (Ex. 4); Mahoney Decl. (Ex. 5) Senatore Decl. (Ex. 6); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992); *Ctr. for Biological Diversity v. U.S. Env’t Prot. Agency*, 542 F. Supp. 3d 232, 240 (S.D.N.Y. 2021).

A. Conservation Groups' Motion is Timely

Because this litigation is in its earliest stage, Conservation Groups' motion is timely.

To determine timeliness, courts weigh: “(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.” *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). Courts consistently find intervention at early stages timely because it avoids prejudicing existing parties. *See, e.g., Olin Corp. v. Lamorak Ins. Co.*, 325 F.R.D. 85, 88 (S.D.N.Y. 2018) (collecting cases); *New York v. Abraham*, 204 F.R.D. 62, 65 (S.D.N.Y. 2001); *E.E.O.C. v. Rekrem, Inc.*, 199 F.R.D. 526, 528 (S.D.N.Y. 2001).

Conservation Groups' timely motion comes just four plus weeks after Plaintiff filed suit on April 8, 2026. Counsel for Defendants has not yet entered an appearance and the deadline to respond to the Complaint is still a few weeks away. The existing parties have not yet filed any responsive pleadings, substantive motions, or other briefs. At this early stage, intervention will not prejudice any party. *See E.E.O.C.* 199 F.R.D. at 528 (finding “original parties will not be prejudiced by intervention” when “motion was submitted less than two months after the filing of the ... complaint ... [and] before the defendant filed its answer.”). Conversely, Conservation Groups will suffer prejudice should this Court deny intervention, rendering them unable to defend the validity of the Vessel Speed Rule

or appeal any adverse decision. Finally, no “unusual circumstances” militate against a timeliness finding. *Herdman v. Town of Angelica*, 163 F.R.D. 180, 185 (W.D.N.Y. 1995) (citation omitted) (“no reason to find” a motion untimely when filed just ten weeks after the complaint).

B. Conservation Groups Have Substantial Interests at Stake

Conservation Groups have a “direct, substantial, and legally protectable interest” in this proceeding, which “may be impaired” without intervention. *N.Y.C. Policing*, 27 F.4th at 799 (quotations and citation omitted); see Fed. R. Civ. P. 24(a)(2).

Conservation Groups satisfy this requirement for several reasons. Their members have protected interests in the right whale’s survival and recovery. Conservation Groups’ members enjoy and deeply value being able to see and experience right whales. They travel specifically to view, study, or photograph right whales. See Asmutis-Silvia Decl. ¶¶ 12–13, 29 (Ex. 1); Bartlett Decl. ¶¶ 3–7 (Ex. 2). Sakashita Decl. ¶ 4 (Ex. 3); Patek Decl. ¶¶ 6–10 (Ex. 4); Mahoney Decl. ¶ 6 (Ex. 5) Senatore Decl. ¶ 5, (Ex. 6). These members have plans to continue seeking to experience right whales in the future. See Ex. 1 ¶ 13; Ex. 2 ¶ 9; Ex. 4 ¶ 10; Ex. 6 ¶ 5. They also have scientific, conservation, and professional interests in right whales. See Ex. 1 ¶¶ 14–27; Ex. 2 ¶ 10; Ex. 4 ¶¶ 4–6, 11–12. Accordingly, Conservation Groups’ members have legally protectable interests in protecting right whales from vessel strikes by defending the Vessel Speed Rule at issue in this litigation. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (“[T]he desire to use or

observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest[.]”); *Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, 542 F. Supp. 3d 232, 240 (S.D.N.Y. 2021) (finding “aesthetic ... [and] professional interests in the preservation of endangered” species legally protectable).¹¹

Conservation Groups have engaged in decades of advocacy to NOAA Fisheries to promulgate the Vessel Speed Rule and, subsequently, to expand its protections based on the best available scientific data. *See* Ex. 1 ¶¶ 37–41; Ex. 3 ¶¶ 3–15; Ex. 5 ¶¶ 5–7, 9, 11–15, 21; Ex. 6 ¶¶ 5–8, 12, 14–18. Conservation Groups have gone to court to defend the Vessel Speed Rule from attack. Recently, Conservation Groups participated as *amici* in similar litigation brought against the Vessel Speed Rule by a different yacht owner in the Middle District of Florida in *Eubanks v. Lutnick*, No. 8:25-CV-614-CEH-AAS.¹² This significant history of advocacy on the

¹¹ All four Conservation Groups have staff who are appointed as conservation members of the Atlantic Large Whale Take Reduction Team, which advises NOAA Fisheries on MMPA regulations intended to reduce right whale serious injuries and mortalities in commercial fisheries. *See* NOAA Fisheries, *Atlantic Large Whale Take Reduction Team, Team Members*, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/atlantic-large-whale-take-reduction-team#team-members> (last updated Apr. 22, 2026). This stakeholder team is convened under the MMPA and advises NMFS on regulations to reduce right whale mortalities and serious injuries in commercial fisheries. *See* 16 U.S.C. § 1387(f).

¹² The district court in *Eubanks* recognized that Conservation Groups’ “interest in the subject matter of the [Vessel Speed Rule] litigation is direct, substantial, and legally protectible” but denied Conservation Groups’ intervention on grounds they “failed to identify actions by the new presidential administration that indicates a risk of shift in policy,” *Eubanks v. Lutnick*, No. 8:25-CV-614-CEH-AAS, 2025 WL 2061792, at *4–5 (M.D. Fla. July 23, 2025). The circumstances, however, have changed significantly in subsequent months and demonstrate the strong risk of a

Vessel Speed Rule further establishes Conservation Groups’ direct, substantial, legally protectable interests in this matter. *See Great Atl. & Pac. Tea Co. v. Town of E. Hampton*, 178 F.R.D. 39, 42 (E.D.N.Y. 1998) (finding public interest group “has a sufficient interest to support intervention by right where the underlying action concerns legislation previously supported by the organization”); *Eubanks* 2025 WL 2061792, at *3 (“Conservation Groups have a nongeneralized interest in defending the Vessel Speed Rule because they have spent time advocating and litigating on behalf of the right whale” and “supported the [Rule] by petitioning [NOAA Fisheries] to expand the scope of the [Rule] in 2012 and 2020”).

Conservation Groups are also deeply concerned with the preservation of NOAA Fisheries and the U.S. Fish and Wildlife Service’s (collectively, the Services) broad rulemaking authority under the ESA and MMPA to protect other species central to Conservation Groups’ organizational missions. *See Asmutis-Silvia* (Ex. 1); *Sakashita Decl.* (Ex. 3); *Mahoney Decl.* (Ex. 5); *Senatore Decl.* (Ex. 6). They rely on the Services’ implementation of federal wildlife statutes through congressionally delegated rulemaking authorities such as the ESA (authorizing regulations “as may be appropriate to enforce”), MMPA (authorizing regulations “necessary and appropriate” to carry out the purposes of the Act), and Magnuson-Stevens Fishery

shift in Defendants’ policy. As discussed, *infra* Argument Section I.D., NOAA Fisheries’ March 4, 2026 advance notice of proposed rulemaking to eliminate the Vessel Speed Rule’s speed-based limitations casts significant doubt on Defendants’ ability and willingness to vigorously defend the Rule now. *See* 91 Fed. Reg. at 10,580.

Conservation and Management Act (MSA) (authorizing conservation and management measures, permit conditions, and prohibitions when “necessary and appropriate”) to protect, manage, and recover species in riverine, estuarine, and marine ecosystems. *See* Ex. 3 ¶ 5; Ex. 5 ¶¶ 26–29; Ex. 6 ¶¶ 23–27. Conservation Groups thus have an interest in how courts interpret the ESA, MMPA, and MSA’s “necessary” and/or “appropriate” provisions and analyze questions of statutory authority, the nondelegation doctrine, and the major questions doctrine.

C. The Disposition of This Case May Impair Conservation Groups’ Ability to Protect Their Interests

An applicant for intervention as of right must be “so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P. 24(a)(2); *see N.Y.C. Policing*, 27 F.4th at 799.

Conservation Groups satisfy this requirement because Plaintiff’s lawsuit requires the Court to address the legality and constitutionality of the Vessel Speed Rule and its enforcement, *see supra* Background Section III—and a disposition in Plaintiff’s favor would therefore eviscerate vessel strike protections for the right whale, directly impairing Conservation Groups’ and their members’ protectable interests in the species’ survival and recovery. *See supra* Argument Section I.B; *Eubanks*, 2025 WL 2061792, at *3 (recognizing that Conservation Groups’ interests in the Vessel Speed Rule may be impaired by plaintiffs’ challenge to the legality of the Rule). Such an outcome would further impair or entirely impede Conservation Groups’ advocacy in favor of expanding the Rule and its protections for right whales. More broadly, Plaintiff’s success would undermine the most powerful

statutory tools—the ESA, MMPA, MSA and other environmental statutes—that Conservation Groups rely upon in their advocacy to prevent the right whale’s and other species’ extinction and to promote their recovery. *See* Ex. 1 ¶¶ 6, 18; Ex. 3 ¶¶ 5, 13–14; Ex. 5 ¶¶ 7, 12, 21; Ex. 6 ¶¶ 8, 11, 13.

D. Conservation Groups’ Interests May Not Be Adequately Represented by Any Existing Party.

Finally, Conservation Groups’ interests may not be adequately represented by Defendants.

The burden of demonstrating inadequate representation is generally “minimal,” and intervenors need only show that “that representation of [their] interest” by the existing parties “*may be*’ inadequate.” *N.Y.C. Policing*, 27 F.4th at 803 (emphasis added) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see* Fed. R. Civ. P. 24(a)(2). And though the Second Circuit has required “a more rigorous showing of inadequacy in cases where the [applicant] and a named party have the same ultimate objective,” *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001) (citations omitted), the U.S. Supreme Court recently observed that “this presumption applies only when interests overlap fully,” *Berger v. N. Carolina State Conf. of the NAACP*, 597 U.S. 179, 181, 197 (2022) (dicta) (citation modified) (noting overlap between the Secretary of Labor and union member’s interests but emphasizing “the interests were not ‘identical’—the union member sought relief against his union, full stop; meanwhile, the Secretary also had to bear in mind broader public-policy implications”).

Here, there are significant differences between Conservation Groups and Defendants' interests because Defendants are actively reconsidering the Vessel Speed Rule. On March 4, 2026, NOAA Fisheries published in the Federal Register an advance notice of proposed rulemaking and requested public comment on a "possible deregulatory action to modify" the Rule "by replacing current seasonal speed restrictions with alternative management areas" and "advanced, technology-based, strike avoidance measures[.]" 91 Fed. Reg. at 10,580. This notice raises the very real prospect that Defendants will not vigorously defend the Rule throughout the course of this litigation—and, accordingly, demonstrates that Defendants may not adequately represent Conservation Groups' interests in defending the rule. *See W. Energy All. v. Zinke*, 877 F.3d 1157, 1169 (10th Cir. 2017) (holding that defendant agency could not adequately represent conservation groups' interests in defending agency policy given recent executive orders directing review of the policy).

NOAA Fisheries' characterization in the Federal Register of the Vessel Speed Rule as creating "unnecessary regulatory and economic burdens" that it intends to "reduce" underscores that Defendants may not vigorously defend against all of Plaintiff's claims or arguments in this matter. 91 Fed. Reg. at 10,580. First, stating that the Rule is "unnecessary" casts doubt on whether Defendants will forcefully defend the Rule as "necessary" and "appropriate" for the continued survival and recovery of the right whale—a critical element in rebutting Plaintiff's claim that Defendants lack the statutory authority to promulgate the Vessel Speed Rule. *See* ECF No. 1 at ¶¶ 25, 28 (describing NOAA Fisheries' authority to issue regulations

“necessary and appropriate” to carry out the purpose of the MMPA and “appropriate to enforce” the ESA). Second, NOAA Fisheries’ statement that the Rule creates “unnecessary ... economic burdens” calls into question whether Defendants will adequately rebut Plaintiff’s erroneous argument that the rule creates “sweeping and economic regulatory consequence[s],” which is also relevant to Plaintiff’s statutory interpretation claims. ECF No. 1 at ¶¶ 10, 45–54. Defendants’ notice therefore casts substantial doubt on whether Defendants will “demonstrat[e] sufficient motivation to litigate vigorously and to present all colorable contentions,” a motivation necessary to conclude that Conservation Groups’ interests in this matter are adequately represented. *Nat. Res. Def. Council, Inc. v. N.Y. State Dep’t of Env’t Conservation*, 834 F.2d 60, 62 (2d Cir. 1987).

NOAA Fisheries’ advance notice of proposed rulemaking also illustrates the complex and contradictory nature of Defendants’ interests in the Vessel Speed Rule, further calling into question their ability to adequately represent Conservation Groups and their members’ particularized interests in protecting right whales. While NOAA Fisheries seeks to balance “information regarding potential safety risks” and solicits “quantifiable data on the economic consequences of the speed rule, especially where it may have impacted operations for shipping, fishing, tourism, or other industries,” 91 Fed. Reg. at 10,581, Conservation Groups are focused on protecting right whales and preventing vessel strikes. Defendants’ broader, more varied, and sometimes competing interests, combined with NOAA Fisheries’ affirmative statement that the Vessel Speed Rule is “unnecessary,”

demonstrates that “there is a likelihood that the [Conservation Groups] will make a more vigorous presentation of the [right whale protection] side of the argument than would [Defendants].” *New York Pub. Int. Rsch. Grp., Inc. v. Regents of Univ. of State of N. Y.*, 516 F.2d 350, 352 (2d Cir. 1975). And because, as previously described, “no nexus exists between the interests asserted [by Conservation Groups] and the contentions sought to be put forth” when responding to Plaintiff’s statutory interpretation claims, the difference in Conservation Groups’ and Defendants’ interests counsels against finding adequate representation in this matter. *Nat. Res. Def. Council, Inc.*, 834 F.2d at 62.

Finally, Conservation Groups have been at odds with Defendants over their failure to adequately protect right whales from vessel strikes for many years. Between 1999 and 2008, several Groups sued NOAA Fisheries over its extended delay in acting to reduce vessel strikes. Ex. 2 ¶ 12. Conservation Groups subsequently petitioned the agency to expand the Vessel Speed Rule in 2012 and again in 2020 based on evidence that right whales needed additional vessel strike protections. See Ex. 1 ¶¶ 38–39; Ex. 2 ¶¶ 14, 17; Ex. 3 ¶ 22; Ex. 5 ¶ 9. When NOAA Fisheries failed to respond, Conservation Groups sued to challenge the agency’s unreasonable delay. See *Whale & Dolphin Conservation v. Nat’l Marine Fisheries Serv.*, 573 F. Supp. 3d 175, 179 (D.D.C. 2021). The long history of Conservation Groups being at odds with NOAA Fisheries regarding the adequacy of the Vessel Speed Rule further demonstrates that Defendants may not adequately represent the Groups’ interests here.

II. Alternatively, the Court Should Grant Permissive Intervention.

If the Court denies intervention as of right, Conservation Groups request leave to intervene under Federal Rule of Civil Procedure 24(b).

Permissive intervention is appropriate when an application is “timely” and the applicant “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1). In considering whether to grant permissive intervention, the court “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Id.* at 24(b)(3).

Conservation Groups satisfy the criteria for permissive intervention. First, as discussed above, Conservation Groups’ motion is timely. *Id.* at 24(b)(1); *see supra* Argument Section I.A. Second, Conservation Groups do not intend to assert any cross- or counterclaims. They intend to oppose Plaintiff’s claims and requests for relief. Fed. R. Civ. P. 24(b)(1)(B); *see* Proposed Answer at 19 (General Denial). Third, Conservation Groups’ involvement will cause no undue delay or prejudice to the existing parties. Fed. R. Civ. P. 24(b)(3). If the Court grants intervention, Proposed Intervenors intend to work with the other parties toward the efficient adjudication of the case. Considering their deep familiarity with the legal and factual background of the Vessel Speed Rule and right whale protection, as well as their expertise on the implications for other regulations implementing these statutes, Conservation Groups’ participation will helpfully “provide this Court with

a fuller picture” of the issues at stake in this litigation. *United States v. N.Y.C. Hous. Auth.*, 326 F.R.D. 411, 419 (S.D.N.Y. 2018).

Accordingly, the Court should at a minimum allow permissive intervention.

CONCLUSION

Conservation Groups respectfully request the Court grant their intervention in this matter as of right pursuant to Federal Rule of Civil Procedure 24(a). In the alternative, Conservation Groups respectfully request this Court grant them permissive intervention under Federal Rule of Civil Procedure 25(b).

Respectfully submitted this 11th day of May, 2026,

/s/ Erica A. Fuller

Erica A. Fuller (*pro hac vice*)
Conservation Law Foundation
62 Summer St.
Boston, MA 02110
(617) 850-1727 (tel)
efuller@clf.org

*Counsel for Conservation Law
Foundation*

/s/ Jane P. Davenport

Jane P. Davenport* (*pro hac vice*)
Defenders of Wildlife
1130 17th St. NW,
Washington, DC 20036
(202) 682-9400 (tel)
jdavenport@defenders.org

Counsel for Defenders of Wildlife

/s/ Kristen Monsell

Kristen Monsell* (*pro hac vice*)
Center for Biological Diversity
2100 Franklin St., Suite 375
Oakland, CA 94612
(510) 844-7137 (tel)
kmonsell@biologicaldiversity.org

*Counsel for Center for Biological
Diversity*

/s/ Kevin Cassidy

Kevin Cassidy (*pro hac vice*)
Earthrise Law Center
P.O. Box 445
Norwell, MA 02061
(781) 659-1696 (tel)
cassidy@lclark.edu

*Counsel for Whale and Dolphin
Conservation, Inc.*

**Applications to appear pro hac vice
forthcoming*

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(c), I certify that this memorandum complies with the word-count limitations of Local Rule 7.1(c) because it contains 5,429 words as calculated by Microsoft Word, excluding the caption, tables, signature blocks, and this certificate.

Respectfully submitted this 11th day of May, 2026.

/s/ Erica A. Fuller

Erica A. Fuller