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PRELIMINARY STATEMENT

Plaintiffs Recreational Fishing Alliance (“Recreational Fishing”), The Fishermen’s Dock Cooperative, Inc. (“Fishermen”), Jersey Coast Anglers Association, Inc. (“Anglers”), Garden State Seafood Association (“Seafood”) and New Jersey Outdoor Alliance (“Outdoor”) (collectively, “Plaintiffs”) submit this Brief, together with the Verified Complaint and attached Exhibits dated June 25, 2015, in support of their application for a preliminary injunction.

Plaintiffs are a collection of concerned citizens groups that simply seek to preserve the ocean and its marine life from unwarranted intrusion through the 3D seismic survey presently being conducted by Defendants. As Plaintiffs’ application satisfies the elements required for the issuance of injunctive relief, Plaintiffs’ preliminary injunction application should be granted.

First, Plaintiffs possess a reasonable likelihood of success on the merits of its public nuisance claim. Defendants are presently conducting a 3D seismic survey off the coast of New Jersey whereby they are shooting airguns underwater at decibel levels that can exceed the sound emitted by the detonation of an atomic bomb. The airgun blasts are not being haphazardly discharged, but rather are essentially being shot systematically every few seconds of every minute of every day that the survey is being conducted and will continue to do so (unless enjoined by this Court) until the survey is completed. Critically, these blasts are interfering

with the oceanic ecosystem, including various endangered species subject to protection, and such interference constitutes a public nuisance. As such, Plaintiffs' satisfy the first prong warranting injunctive relief, as Plaintiffs' citizen's action lawsuit to abate Defendants' unreasonable interference is reasonably likely to succeed on the merits.

Next, Plaintiffs shall suffer irreparable harm in the absence of an injunction, in light of the probable permanent environmental impact of Defendants' survey. To this end, the 3D seismic survey admittedly will negatively impact the oceanic ecosystem, including the marine life therein. On the other hand, any impact to Defendants will be marginal at best. Indeed, there are no legitimate reason as to why the survey cannot be delayed pending either adjudication of Plaintiffs' claims or even further evaluation of Defendants' rushed suvey.

Finally, the public interest would best be served by enjoining Defendants from continuing with the seismic survey. The public possesses significant interest in maintaining the ecological value of the waters maintained off the coast of New Jersey. Unless and until an injunction is issued, the disturbance caused by Defendants' 3D seismic survey shall disturb, and potentially cripple, the subject ecological habitat and the cetacean species that traverse such waters.

STATEMENT OF FACTS¹

A. The Parties

Plaintiff Recreational Fishing Alliance is a national non-profit organization, established to safeguard the rights of saltwater anglers, protect marine, boat and tackle industry occupations and to ensure the long-term sustainability of our Nation's saltwater fisheries. (Verified Complaint, ¶ 7).

Plaintiff Fishermen's Dock Cooperative, Inc. is a New Jersey organization comprised of local fishermen mainly participating in trawl fishery. From 2012 to 2014, the Co-op averaged over 2.3 million dollars of landings annually in the June, July and August period. (Verified Complaint, ¶ 8).

Plaintiff Jersey Coast Anglers Association, Inc. is a non-profit organization, established in 1981 and comprised of more than 75 saltwater fishing clubs representing the rights of marine sport anglers. (Verified Complaint, ¶ 9).

Plaintiff Garden State Seafood Association is an organization dedicated to effective representation to protect the interests of New Jersey fishermen and New Jersey's fisheries dependent businesses. (Verified Complaint, ¶ 10).

Plaintiff New Jersey Outdoor Alliance is a New Jersey coalition of outdoorsmen and outdoorswomen dedicated to the conservation of natural

¹ The entirety of the Statement of Facts derives from the Verified Complaint filed contemporaneously herewith.

resources and environmental stewardship, championing the intrinsic value of fishing, hunting and trapping, among opinion leaders, policy makers and the public at-large. (Verified Complaint, ¶ 11).

Defendant National Science Foundation (“NSF”), owns the R/V Marcus G. Langseth, the vessel currently being used to conduct the Survey (“R/V Langseth”), and provides research funds for the Survey.² (Verified Complaint, ¶ 12).

Defendant Lamont-Doherty Earth Observatory (“LDEO”) is operating the R/V Langseth during the Survey. (Verified Complaint, ¶ 18).

Defendant National Oceanic and Atmospheric Administration (“NOAA”), Office for Coastal Management (“OCM”), is responsible for providing the basis for protecting, restoring and responsibly developing the nation’s diverse coastal communities and marine resources.³ (Verified Complaint, ¶ 14).

Defendant National Marine Fisheries Service (“NMFS”), is a federal agency within NOAA in charge of the nation’s offshore living marine resources and their habitats.⁴ (Verified Complaint, ¶ 16). Defendant NMFS is responsible for maintaining productive and sustainable fisheries, safe sources of seafood, the

² Defendant France A. Córdova is the Director of the NSF. (Verified Complaint, ¶ 13).

³ Defendant Jeffrey L. Payne is the Acting Director of OCM within NOAA. (Verified Complaint, ¶ 15).

⁴ Defendant Eileen Sobeck is the Assistant Administrator for Defendant NMFS. (Verified Complaint, ¶ 17).

recovery and conservation of protected resources, and healthy ecosystems, including issuance of Incidental Harassment Authorizations. (Verified Complaint, ¶ 16).

B. Defendants' 3D Seismic Survey

i. Defendants' Proposed 2014 Survey

On or about December 16, 2013, Defendant LDEO filed an application with Defendant NMFS, proposing to conduct a high-energy, 3-D seismic survey on the R/V Langseth in the Northwest Atlantic Ocean, 25 ~ 85 km from the coast of New Jersey in June – July 2014, and sought an “Incidental Harassment Authorization” (“IHA”) under the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1371(a). (Verified Complaint, ¶ 19).

On or about July 1, 2014, Defendant NMFS issued a final Environmental Assessment (“EA”) and a “Finding of No Significant Impact (“FONSI”), determining that “no direct, indirect, or cumulatively significant impacts to the human environment would occur from implementing the [proposed survey].” (Verified Complaint, ¶ 20). In its FONSI, Defendant NMFS self-servingly noted that “[t]he potential risks associated with research seismic surveys are neither unique or unknown nor is there significant uncertainty about impacts.” (Verified Complaint, ¶ 21).

NMFS' representation in the FONSI notwithstanding, in or around June 2011, Defendant NSF issued a Programmatic Environmental Impact Statement ("PEIS"), addressing potential impacts that may result from geophysical exploration and scientific research using seismic surveys that are funded by Defendant NSF, or conducted by U.S. Geological Survey, and the conclusions drawn starkly contradicted the FONSI. (Verified Complaint, ¶ 22).

For example, whereas the FONSI issued by NFMS sought to downplay concerns regarding seismic testing, in the PEIS minimizing the unknown impact of same, Defendant NSF highlighted the fact that "the existing body of published and unpublished scientific literature on the impacts of seismic survey sound on marine invertebrates is limited, and there are no known systematic studies of the effects of sonar sound on invertebrates." (Verified Complaint, ¶ 23).

Also of concern, in the PEIS, Defendant NSF noted that several decapod crustacean (lobsters, crabs and shrimps) and cephalopod mollusk groups (octopuses and squids) typically spawn during the late spring and early fall months off the shores of New Jersey, and their larvae often move up to the surface water. (Verified Complaint, ¶ 24).

In the PEIS, Defendant NSF noted that "[essential fish habitat] for various life stage of numerous fish species, including Atlantic cod, Atlantic salmon,

Atlantic halibut, flounder, hake, herring and other pelagic species, occurs in or proximate to the Northwest Atlantic region.” (Verified Complaint, ¶ 25).

Thus, unlike the FNIS, the PEIS wholeheartedly acknowledged and revealed the extent that scientific research concerning the impact of seismic survey was limited and unknown. (Verified Complaint, ¶ 26). Moreover, despite the fact that the scientific studies cited in the PEIS consistently indicated significant reduction in catching rates after seismic testing, Defendant NSF erroneously concluded that such effect would be temporary. (Verified Complaint, ¶ 27).

On or about July 1, 2014, Defendant NMFS also issued an Incidental Harassment Authorization (“IHA”) for 15 whale species (92 individuals), 7 dolphin species (607 individuals), 3 seal species (160 individuals) and 1 porpoise species (3 individuals). (Verified Complaint, ¶ 28). The IHA contained the following restrictions on the hours of seismic testing operation:

“(r) The Langseth may continue marine geophysical surveys into night and low-light hours if the Holder of the Authorization initiates these segment(s) of the survey when the observers can view and effectively monitor the full relevant exclusive zones.

(s) The Authorization does not permit the Holder of this Authorization to initiate airgun array operations from a shut-down position at night or during low-light hours (such as in dense fog or heavy rain) when the visual observers cannot view and effectively monitor the full relevant exclusion zones.

(t) To the maximum extent practicable, the Holder of this Authorization should schedule seismic operations (*i.e.*, shooting the airguns) during daylight hours.”

(Verified Complaint, ¶ 29).

On the same day, on July 1, 2014, the R/V Langseth left New York Harbor and travelled off the coast of New Jersey. (Verified Complaint, ¶ 30). Thereafter, on or about July 3, 2014, New Jersey Department of Environmental Protection (“NJDEP”) filed a verified complaint for injunctive and declaratory relief in this District Court, alleging that Defendants improperly denied its review request and improperly issued the EA, FNSI and IHA for the proposed survey. (Verified Complaint, ¶ 31). On or about July 7, 2014, NJDEP moved for a temporary restraining order to stop the proposed survey. (Verified Complaint, ¶ 32). However, finding no procedural deficiencies in Defendants’ denial and issuance, the Court denied NJDEP’s attempt to stop the proposed survey. (Verified Complaint, ¶ 32). Ultimately, the initial survey was cancelled after encountering mechanical issues, and the R/V Langseth returned to New York on July 23, 2014. (Verified Complaint, ¶ 33).

ii. Defendants’ Proposed 2015 Survey

On or about December 19, 2014, Defendant LDEO submitted a report, titled “Protected Species Mitigation and Monitoring Report” (“Mitigation and Monitoring Report”), to Defendant NMFS. (Verified Complaint, ¶ 34). The alleged purpose of the Mitigation and Monitoring Report was to explain to the NMFS the extent of research conducted aboard the R/V Langseth, and to begin

positioning a request for the survey to be continued thereafter. (Verified Complaint, ¶ 35).

In the Mitigation and Monitoring Report, Defendant LDEO indicated that “[v]isual watches commenced each day before civil twilight dawn, beginning as soon as the safety radii were visible, and continued past civil twilight dusk until the safety radii became obscured. (Verified Complaint, ¶ 35). Start of observation times ranged from 5:05 to 5:20 local time, which end of observation times ranged from 20:30 to 20:55 local time.” (Verified Complaint, ¶ 35).

Despite the requirements set forth in the IHA, as revealed by the data provided in the Mitigation and Monitoring Report itself, the seismic survey was conducted even after mid-night when no observer may effectively monitor the full relevant exclusive zones. (Verified Complaint, ¶ 37). This constituted a violation of the terms of the IHA issued for the abandoned seismic survey and provides ample cause for concern that the IHA issued for the current seismic survey will be ignored by Defendant LDEO. (Verified Complaint, ¶ 37).

On or about December 21, 2014, Defendant LDEO filed a second application with Defendant NMFS, proposing to conduct a high-energy, 3-D seismic survey on the R/V Langseth in the Northwest Atlantic Ocean, 25 ~ 85 km from the coast of New Jersey in June – July 2015, and sought a second IHA. (Verified Complaint, ¶ 38). The survey, which is presently on-going, is collecting

data using a subarray of four airguns with a total discharge volume of $\sim 700 \text{ in}^3$. (Verified Complaint, ¶ 39). The airguns are a mixture of Bolt 1500 LL and Bolt 1900 LLX airguns ranging in size from 40 to 200 in^3 , with a firing pressure of 1,950 pounds per square inch. (Verified Complaint, ¶ 39). The airguns are to be fired every 5.4 seconds for approximately thirty days, and when fired will emit a source level from 246 to 253 decibels. (Verified Complaint, ¶ 39).

During the survey, which remains on-going, Defendant LDEO revealed its intention to utilize a Kongsberg EM 122 multibeam echosounder simultaneously during airgun operations to map the ocean floor. (Verified Complaint, ¶ 40). The echosounder operates between 10.5 and 13.0 kHz, with a maximum source level of 242 decibels. (Verified Complaint, ¶ 40). The survey also involves the use of (1) a sub-bottom profiler, which will emit pings with a pulse interval of one second, with a maximum radiated power of 204 decibels, and (2) an acoustic Doppler current profiler with an acoustic source level over 200 decibels. (Verified Complaint, ¶ 41).

The decibels created and generated by the various equipment is devastating on the surrounding oceanic environment, and is likely to cause various species to vacate the area (maybe permanently). (Verified Complaint, ¶ 42). In point of comparison, upon information and belief, the following explosions are less impactful on a decibel level than the equipment utilized to conduct the survey:

- Gunfire discharges create decibel levels between approximately 145 and 155 decibels;
- The decibels created by a space shuttle launching is between approximately also upwards of 150 decibels; and
- A 1 ton atom bomb creates a decibel level of 210 decibels within 250 feet of the blast.

(Verified Complaint, ¶ 43).

On or about May 5, 2015, Defendant NMFS issued a second FONSI, determining that issuance of a IHA for the 2015 survey would not significantly impact the quality of the human environment. (Verified Complaint, ¶ 44). In its 2015 FONSI, Defendant NMFS also noted that “[t]he potential risks associated with research seismic surveys are neither unique nor unknown nor is there significant uncertainty about impacts,” despite the fact that the PEIS clearly holds to the contrary. (Verified Complaint, ¶ 46).

On or about May 7, 2015, Defendant NMFS issued a new IHA for 19 whale species (245 individuals), 9 dolphin species (18,321 individuals), 3 seal species (6 individuals), and 1 porpoise species (4 individuals). (Verified Complaint, ¶ 47). In terms of the total number, the second IHA allows approximately 21 times more harassment take than the previous IHA, despite the fact that a larger airgun array will not be utilized in the 2015 survey. (Verified Complaint, ¶ 48).

More importantly, the final estimated takes drastically increased based upon the Marine Mammal Commission's comments during the public comment period.

For example:

- Bottlenose dolphins increased from 411 to 12,532;
- Atlantic spotted dolphins increased from 133 to 4,067; and
- Risso's dolphins increased from 50 to 1,532.

(Verified Complaint, ¶ 49). Despite this drastic increase in estimated takes, Defendant NMFS simply issued the second IHA without further discussing this issue, or providing a meaningful opportunity for the public to comment. (Verified Complaint, ¶ 50). This clearly evidences Defendant NMFS's intention to permit the survey under any circumstances. (Verified Complaint, ¶ 50).

On or about May 26, 2015, Defendant NSF issued a Final Amended EA for the 2015 survey (the "2015 EA"), seeking to have the survey conducted during the summer months. (Verified Complaint, ¶ 51). The 2015 EA also maintained the self-serving fiction that "[n]o long-term or significant effects would be expected on individual marine mammals, sea turtles, seabirds, fish, the populations to which they belong, or their habitats," despite the fact that Defendants had not commissioned or presented any studies, findings or conclusions on this issue at all. (Verified Complaint, ¶ 52). The 2015 EA was equally dismissive and deficient in addressing the impact the survey would have on spawning in the subject area. In its 2015 EA, Defendant NSF addressed only two spawning stocks (summer

flounder and black sea bass), despite its acknowledgement in the PEIS that there are other decapod crustacean and cephalopod mollusk groups, typically spawning in the subject area while the proposed survey is conducted. (Verified Complaint, ¶ 53).

Remarkably, the 2015 EA summarily swept aside various other oceanic concerns and risks to species flowing from the survey. (Verified Complaint, ¶ 54). Indeed, in the 2015 EA, Defendant NSF cited a scientific study which showed that four cephalopod species experienced damages to the statocyst, an organ responsible for equilibrium and movement, when they were exposed to low frequency sinusoidal wave sweeps, yet this issue was not addressed any further and no sufficient safe guards were addressed or discussed. (Verified Complaint, ¶ 54).

Likewise, although Defendant NSF also cited three recent scientific studies on the effect of seismic testing on fisheries, it summarily disregarded the recommendations/outcome of those studies, and deferred to the PEIS's unsubstantiated conclusion that no significant impacts on fish populations and associated essential fish habitat. (Verified Complaint, ¶ 55). Defendant NSF further attempted to minimize the survey's potential negative impacts on fisheries by simply suggesting that communication with fishing community would negate adverse impacts. (Verified Complaint, ¶ 55).

Finally, Defendant NSF paid extraordinarily short-shrift to the public suggestion that the proposed survey be conducted in the September – October period to minimize any negative effects on fisheries. (Verified Complaint, ¶ 56). Remarkably, Defendant NSF minimized the public’s concerns by concluding that such suggestion “does not take into account that the research was proposed by researchers and students whose professional and academic careers depend upon the timely collection of these data and successful completion of the survey.” (Verified Complaint, ¶ 56). Thus, in Defendant NSF’s twisted world, the inconvenience to the researchers and students is of paramount priority, not that of the oceanic wildlife or the members of the public that traverse these waterways. (Verified Complaint, ¶ 56).

C. Defendants’ On-Going 2015 3D Seismic Survey

On or about June 1, 2015, the R/V Langseth left New York Harbor and traveled off the coast of New Jersey. (Verified Complaint, ¶ 57). Currently, the R/V Langseth is conducting the survey in the Subject Area. (Verified Complaint, ¶ 57). Contrary to its own suggestion in the PEIS and the 2015 EA, neither Defendant NSF nor Defendant LDEO has made any efforts to communicate with local fishermen to minimize potential adverse impacts on fisheries. (Verified Complaint, ¶ 59).

Since the survey was initiated, there have been three separate dead whale sightings in the surrounding areas:

- (1) On or about June 8, 2015 – a 18 foot Minke whale on Fire Island, New York;
- (2) On or about June 10, 2015 – a 40 foot fin whale approximately 18 miles off of Manasquan; and
- (3) On or about June 13, 2015 – an unidentifiable whale drifting about 50 miles east of Asbury Park.

(Verified Complaint, ¶ 60). Additionally, following the initiation of the survey, various species of fish, including bluefish, and marine mammals that were previously identified as inhabiting the waterways where the survey is being conducted have not been spotted there while the survey has been on going.

(Verified Complaint, ¶ 61).

Finally, several protected endangered species traverse the waterways impacted by Defendants' survey. (Verified Complaint, ¶ 62). These species include Blue Whale (*Balaenoptera musculus*), Fin Whale (*Balaenoptera physalus*), Humpback Whale (*Megaptera novaeangliae*), Sei Whale (*Balaenoptera borealis*), Sperm Whale (*Physeter macrocephalus*), North Atlantic Right Whale (*Eubalaena glacialis*), Kemp's Ridley Sea Turtles (*Lepidochelys kempii*), Loggerhead Sea Turtles (*Caretta caretta*), Green Sea Turtles (*Chelonia mydas*), Leatherback Sea Turtles (*Dermochelys ciruacea*), Hawksbill Sea Turtle (*Eretmochelys imbricata*), Atlantic Sturgeon (*Acipenser oxyrinchus*) and Shortnose Sturgeon (*Acipenser*

brevirostrum). (Verified Complaint, ¶ 62). Pursuant to Section 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. §1531 *et seq.*, Defendant NMFS issued the Biological Opinion (“BO”) dated May 7, 2015, determining that the survey is not likely to jeopardize the continued existence of the aforementioned endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. (Verified Complaint, ¶ 63).

However, Defendant NMFS failed to provide any impact analysis on (i) Hawksbill Sea Turtle, (ii) Atlantic Sturgeon and (iii) Shortnose Sturgeon, simply claiming, without any scientific or commercial data available, that these species are unlikely to be in the survey area. (Verified Complaint, ¶ 64). Such unsubstantiated conclusion should be invalidated and further analysis must be conducted for these endangered or threatened species. (Verified Complaint, ¶ 64).

LEGAL ARGUMENT

I. THE COURT SHOULD GRANT PLAINTIFFS’ APPLICATION FOR A PRELIMINARY INJUNCTION AGAINST DEFENDANTS

Plaintiffs as concerned citizens are entitled to preliminary injunctive relief enjoining Defendants from continuing with the presently on-going 3D seismic survey. A preliminary injunction is “an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Traister v. Velez, 2011 U.S. Dist. LEXIS 118261, at *5 (D.N.J. Oct.

13, 2011) (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). The standard for a preliminary injunction requires Plaintiffs to establish the following four elements: (1) Plaintiffs are likely to succeed on the merits; (2) denying the injunction will result in irreparable harm; (3) granting the injunction will not result in great harm to the defendant; and (4) the injunction is in the public interest. Id. at *4. As Plaintiffs' application exceeds the prerequisites required for the relief requested, Plaintiffs' application should be granted.

A. Plaintiffs Have Demonstrated A Likelihood Of Success That The Impermissible Disturbance Created By Defendants' 3D Seismic Survey Constitutes A Public Nuisance.

By way of the within citizen's action Complaint, Plaintiffs seek abatement of the public nuisance created by Defendants' 3D seismic survey. See In re Lead Paint Litigation, 191 N.J. 405, 423, 426-27 (2007) (quoting Restatement (Second) of Torts § 821C (1979)). "[T]he tort of public nuisance fundamentally involves the vindication of a right common to the public." Id. at 425. As defined, pursuant to the Restatement (Second), "[a] public nuisance is an unreasonable interference with a right common to the general public." Id. (quoting Restatement (Second) of Torts § 821B (1979)). To be sure, Defendants as agencies of the federal government may be subjected to public nuisance claims. See State of Michigan v. United States Army Corps of Engineers, 758 F.3d 892, 902 (7th Cir. 2014).

“A public right is one common to all members of the general public. It is collective in nature ...” In re Lead Paint Litigation, supra, 191 N.J. at 426 (quoting *Restatement (Second) of Torts* § 821B (1979)). By way of example, “the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.” Id. The example postulated by the *Restatement (Second)* is directly on point.

Here, Plaintiffs, and the public at large, enjoy public rights within the very oceanic waterways subjected to Defendants’ 3D seismic survey. The public trust doctrine allows for public use of the water for navigation and fishing. City of Long Branch v. Jui Young Liu, 203 N.J. 464, 474 (2010). Such public rights further extend “to recreational uses, including bathing, swimming and other shore activities.” Id. at 475 (quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309 (1972)). Thus, as subsumed within the public trust doctrine, “the beach and the ocean must be open to all on equal terms and without preference ...” Secure Heritage, Inc. v. City of Cape May, 361 N.J. Super. 281, 301 (App. Div. 2003) (quoting Borough of Neptune City, supra, 61 N.J. at 309).

In addition to the established public right, Plaintiffs have demonstrated that Defendants' 3D seismic survey constitutes an unreasonable interference with that right. An interference may be deemed unreasonable where "the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and as the actor knows or has reason to know, has a significant effect upon the public right." In re Lead Paint Litigation, supra, 191 N.J. at 425 (quoting *Restatement (Second) of Torts* § 821B (1979)).

Defendants' 3D seismic survey concedes that the discharge of the airgun required to conduct the survey shall occur multiple times each and every minute of each and every day while the survey is being conducted. These airgun blasts are impactful and disruptive. Indeed, the decibels generated by the airgun blasts dwarfs the decibels created by the discharging of a firearm, the launching of a shuttle and is more akin to the detonation of an atomic bomb. Remarkably, rather than being generated independently as isolated events so that the decibels can be allowed to dissipate, such decibels are generated incessantly throughout the day.

Moreover, the impact of the airgun blasts further disturbs various species that have been identified as endangered pursuant to 16 U.S.C. § 1531, *et. seq.* (the "Endangered Species Act"). The purpose of the Endangered Species Act is "to provide a means whereby ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the

conservation of such endangered species and threatened species ...” 16 U.S.C. § 1531(b). In order to give effect to this purpose, the Endangered Species Act recognized and created a public right concerning the protection of endangered and threatened species. See 16 U.S.C. § 1540(g). This right is being impinged upon by Defendants through the commission of their survey.

Thus, Defendants’ conduct is “of a continuing nature” and shall “significantly effect upon the public right” by disrupting the myriad aquatic life within the affected area, including those of various endangered species.⁵

B. Plaintiffs Have Demonstrated That They Have Suffered Irreparable Harm As A Result Of Defendants’ 3D Seismic Survey.

Given the unwarranted disturbance perpetuated by Defendants’ 3D seismic survey, Plaintiffs have demonstrated that they will suffer irreparable harm unless Defendants’ conduct is enjoined. A party seeking a preliminary injunction must make “a clear showing of immediate irreparable injury.” AV Solutions, LLC v. Keystone Enter. Servs., LLC, 2011 U.S. Dist. LEXIS 78882, at *6 (D.N.J. July 19, 2011). To show irreparable harm Plaintiffs must demonstrate potential harm

⁵ As concerns the permanency of the disruption, Defendants have not permitted sufficient evaluation of the potential impact of the proposed survey on the affected oceanic waterways and cetacean species therein. This claim is presently being pursued by the State of New Jersey, Department of Environmental Protection and other named Plaintiffs in the United States District Court for the District of New Jersey.

which cannot be redressed by a legal remedy. Id. What constitutes irreparable harm in a particular case depends on the facts and circumstances of that case.”

South Camden Citizens in Action v. New Jersey Dep't. of Env'tl. Prot., 145 F. Supp. 2d 446, 498 (D.N.J. 2001) (citing Oburn v. Shapp, 521 F.2d 142, 151 (3d Cir. 1975)).

As concerns the injury in the present matter, “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987); see also Natural Resources Defense Council v. Texaco Refining and Marketing, Inc., 906 F.2d 934, 941 (3d Cir. 1990); South Camden Citizens in Action, *supra*, 145 F. Supp. 2d at 499.

Succinctly, Defendants’ survey, should it continue unabated, shall cause irreparable harm to the ecological systems where the survey is conducted and beyond. Indeed, the very intrusion and disturbance created by the 3D seismic survey shall negatively impact the coastal ecosystem, as well as the sustainability of the recreational and commercial fisheries. For example, one European study showed that catch rates for cod and haddock went down by 40 to 80 percent following seismic testing. At present, various members of Plaintiffs have noticed a complete abandonment of the areas by various species of fish that inhabit the subject areas. Additionally, various marine mammals that ordinarily traverse the

area have died, or are no longer located within the area. As Defendants have not proffered sufficient substantive information addressing these concerns, Defendants' continued various irreparable harm to the oceanic environment in which the survey is being conducted should not be permitted to continue.

C. An Injunction Against Defendants Would Not Inflict Great Harm On Defendants.

The entry of a preliminary injunction against Defendants would not result in great harm to them, or the survey. As Defendants readily admit, the 3D seismic survey itself seeks to analyze sediment change off of the New Jersey coast, which change has been on-going for millions of years. Outside of possible inconvenience to Defendants, the purpose of the survey will not be impacted should it be delayed. On this issue, however, the timing of the seismic survey could be coordinated with local fishermen so that any potential negative impacts on such commercial and recreational industry and the species subjected to the tests may be minimized (*i.e.*, avoiding minimal dipeak fishing and recreational season, as well as the spawning season of various species). If the survey is ultimately deemed permissible after further vetting, it can always be conducted at a later date after appropriate safeguards are put in place.

On the other hand, were the survey to proceed without preliminary restraints being entered, and were Plaintiffs subsequently to prevail concerning its claims, it would be too late to redress the environmental impact wrought by Defendants.

Thus, when balancing the potential harm to Defendants, where the injury to the environment is “sufficiently likely ... the balance of harms will usually favor the issuance of an injunction to protect the environment.” Amoco Prod. Co. *supra*, 480 U.S. at 545 (1987).

D. An Injunction Against Defendants Is In The Public Interest

As has been demonstrated throughout, at the core of Plaintiffs’ public nuisance claim, the public interest shall be served by the issuance of an injunction against Defendants. The protection of the impacted oceanic ecosystems and resources, as well the enabling of commercial and recreational use of the subject area, are all of public interest, and compel the issuance of an injunction to prevent any additional harm from occurring.

CONCLUSION

For the foregoing reasons, plaintiffs Recreational Fishing Alliance, The Fishermen's Dock Cooperative, Inc., Jersey Coast Anglers Association, Inc., Garden State Seafood Association and New Jersey Outdoor Alliance respectfully request that the Court grant Plaintiffs' application for a preliminary injunction against Defendants and enjoin Defendants from continuing with their 3D seismic survey.

Respectfully submitted,

WILENTZ, GOLDMAN & SPITZER, P.A.
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