

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

DELAWARE RIVERKEEPER NETWORK;
MAYA K. VAN ROSSUM, *the Delaware
Riverkeeper*; RIVERKEEPER, INC.; TRACY
BROWN, *the Hudson Riverkeeper*,

Plaintiffs,

v.

DELAWARE DEPARTMENT OF
NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL; SHAWN
GARVIN, *in his official capacity as the
Secretary of the Delaware Department of
Natural Resources and Environmental
Control*,

Defendants.

No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Delaware Riverkeeper Network, Maya K. van Rossum, the Delaware Riverkeeper, Riverkeeper, Inc., and Tracy Brown, the Hudson Riverkeeper (collectively, “Plaintiffs”), hereby file this Complaint for Declaratory and Injunctive Relief against Defendants Delaware Department of Natural Resources and Environmental Control (“Department” or “DNREC”), and Shawn Garvin, in his official capacity as Secretary of the Department (collectively, “Defendants”) to comply with the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA” or the “Act”) and, in support thereof, state the following:

INTRODUCTION

1. The Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) is a species of anadromous fish that was historically abundant in rivers and coastal waters of the east coast of

North America, ranging from southern Canada to northern Florida. While Atlantic sturgeon are still present throughout their historic range, their populations have significantly declined due to a myriad of factors.

2. The coastwide Atlantic sturgeon population consists of five distinct population segments (“DPS”), four of which are listed as endangered and one as threatened under the ESA. *See* 50 C.F.R. § 224.101 (2024) (listing New York Bight, Carolina, Chesapeake Bay, and South Atlantic DPS as endangered); 50 § C.F.R. 223.102 (2024) (listing Gulf of Maine DPS as threatened).

3. One of the most significant threats to the Atlantic sturgeon is its unintended capture, or bycatch, by commercial fisheries. Scientific studies find that the Atlantic sturgeon is most at risk of fisheries that use certain fishing equipment, such as gill nets and bottom trawls.

4. DNREC authorizes and regulates commercial fishing, including the use of fishing equipment, in its sovereign waters under Delaware’s legal framework. State-authorized commercial fisheries are allowed to use state-permitted fishing equipment in waters where Atlantic sturgeon are known to live, causing bycatch of Atlantic sturgeon. Studies show that Atlantic sturgeon are known bycatch in several commercial fisheries within Delaware’s sovereign waters, including the spiny dogfish, striped bass, and American shad fisheries. Bycatch is reasonably presumed to be occurring in other state-authorized commercial fisheries whose timing and gear overlap with the distribution and behavior of the Atlantic sturgeon. One such example would be the winter crab trawl fishery at the mouth of Delaware Bay. Thus, Defendants are both taking and causing the take of the endangered Atlantic sturgeon in violation of the ESA through their regulatory authority.

5. As of the date of filing, Defendants have not obtained an incidental take permit covering the state-authorized Atlantic sturgeon bycatch occurring at state-authorized commercial fisheries. Defendants have violated the ESA by failing to obtain an incidental take permit for the state-authorized bycatch occurring in commercial fisheries through the use of equipment permitted by the State.

6. Plaintiffs bring this action against Defendants to compel compliance with the ESA, and seek an injunction directing Defendants to adhere with the Act, and stop the unpermitted incidental take of Atlantic sturgeon, until which point the Defendants have obtained the required incidental take permit.

JURISDICTION AND VENUE

7. This court has subject matter jurisdiction over this action pursuant to 16 U.S.C. § 1540(c), (g)(1)(A) (action arising under the ESA citizen suit provision) and 28 U.S.C. § 1331 (federal question).

8. This court has the authority to grant declaratory relief pursuant to the ESA, 16 U.S.C. § 1540(g), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 (declaratory and injunctive relief).

9. Plaintiffs provided Defendants and the Secretary of Commerce the statutorily-required notice sixty days prior to commencing this action. 16 U.S.C. § 1540(g)(2). Plaintiffs provided notice via electronic mail and certified mail on July 18, 2024. Defendants and the Secretary of Commerce received notice via certified mail on July 22, 2024. Defendants have failed to remedy their violations of the Act. Therefore, by the date of this Complaint's filing, an actual controversy exists between the parties under the meaning of 28 U.S.C. § 2201. A true and

correct copy of Plaintiffs' Notice Letter is attached as Exhibit A and is incorporated herein by reference.

10. The United States has not commenced nor is diligently prosecuting a criminal action in court to redress the violations alleged in this complaint. *See* 16 U.S.C. § 1540(g)(2)(A)(iii).

11. The Secretary of Commerce has not commenced an action to impose a penalty related to this action, nor is this action barred by any prior administrative penalty under the ESA. *See id.* § 1540(g)(2)(A)(ii).

12. Venue properly lies in the United States District Court for the District of Delaware pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(b)(2) as the Defendants have an office in Dover, Delaware and Atlantic sturgeon bycatch occurs in this district's coastal waters, as authorized in this district by DNREC, and the incidences of state-authorized bycatch are a substantial part of the events giving rise to the Plaintiffs' claims.

PARTIES

13. Plaintiff, Delaware Riverkeeper Network ("DRN"), is a not-for-profit 501(c)(3) membership organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. DRN has its principal place of business at 925 Canal Street, Suite 3701, Bristol, PA 19007. DRN works throughout the entire Delaware River Watershed, including the four states that comprise the watershed: Pennsylvania, New Jersey, Delaware, and New York. DRN also works at the federal level on decisions that impact the health of the Delaware River Watershed waterways and the ability to protect and restore them. DRN has an extensive and robust history of work in Delaware and in the Lower Delaware River region to protect the main stem of the river. DRN is committed to the recovery and conservation

of the Atlantic sturgeon species through, among other things, petitioning for better dissolved oxygen standards, supporting the listing of the Atlantic sturgeon under the Act, and opposing wastewater treatment outfall in Atlantic sturgeon habitat. DRN has members who live, recreate, vacation, and visit the Delaware River, and enjoy the natural resources of the Delaware River, such as the Atlantic sturgeon.

14. DRN has approximately 28,466 members in total, with approximately 878 members residing in the state of Delaware. Many of these members use and enjoy the Delaware River. DRN's members include individuals with professional, aesthetic, personal, and scientific interests in the Atlantic sturgeon, all of which depend on the continued survival of the Atlantic sturgeon.

15. Plaintiff, Maya K. van Rossum, the Delaware Riverkeeper, is the leader and Executive Director of DRN, serving in this role since 1994. Ms. van Rossum ensures that the Delaware River has a voice in all conversations that could bring harm or help to the watershed and its natural resources. Ms. van Rossum as the Delaware Riverkeeper regularly visits the Delaware River, Delaware Estuary, and areas adjacent to the watershed, including the areas where Atlantic sturgeon are present, and has taken family, friends, DRN members, and other interested people onto the Delaware River and its tributaries to educate them and to share with them the aesthetic beauty of the river and its inhabitants.

16. Plaintiff, Riverkeeper Inc. ("Riverkeeper"), is a non-profit corporation, whose mission is to protect and restore the Hudson River from source to sea and safeguard drinking water supplies, through advocacy rooted in community partnerships, science, and law. Riverkeeper envisions a future in which the Hudson River, its tributaries, and watershed are restored to ecological health and balance, and are free-flowing, resilient, and teeming with life.

Riverkeeper has been advocating for the protection of the Atlantic sturgeon for years, including petitioning for its listing as an endangered species under the Act, calling for the expansion of its designated “critical habitat,” opposing development that harms sturgeon, and fighting against impacts from anchorages. Its interest in sturgeon extends beyond the geographic bounds of the Hudson River Watershed, as many of the Hudson River Atlantic sturgeon have been known to migrate along the Atlantic Coast, including the coast of Delaware.

17. Riverkeeper has approximately 3,400 members, many of whom use and enjoy the Hudson River and New York Harbor and its tributaries. Riverkeeper’s members include individuals with professional, aesthetic, personal, recreational, and scientific interests in the Atlantic sturgeon.

18. Plaintiff, Tracy Brown, the Hudson Riverkeeper, has been the President of Riverkeeper since 2021. As the Hudson Riverkeeper, Ms. Brown regularly visits the Hudson River Estuary and areas throughout the Hudson River Watershed. In her role, Ms. Brown advocates for the protection of the Hudson River and its wildlife, including the Atlantic sturgeon.

19. Defendant, DNREC, is a person within the meaning of the Act. DNREC is headquartered at its Office of the Secretary located at 89 Kings Highway, Dover, DE 19901. DNREC is a Delaware state agency with the authority to promulgate the requirements for commercial fishing operations. DNREC Division of Fish and Wildlife issues the required licenses or permits for commercial fishing operations.

20. Defendant, Shawn Garvin, is the Secretary of DNREC. Mr. Garvin is the leader of DNREC and oversees the DNREC staff and programs. Mr. Garvin is named in his official capacity.

LEGAL FRAMEWORK

Endangered Species Act

21. The Act, 16 U.S.C. §§ 1531–1544, “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

22. The Act requires the Secretary of Commerce and the Secretary of the Interior (collectively, “Secretary”) to protect imperiled species by listing them as either “endangered” or “threatened.” *Id.* § 1533(a)(1).

23. The definition of “species” includes “subspecies” or DPS “of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16).

24. A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6).

25. A “person” under the Act includes “any officer, . . . [or] department, . . . of any State, . . . ; [or] any State” *Id.* § 1532(13).

26. The Act defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

27. A species is “harmed” when an act “actually kills or injures fish or wildlife.” 50 C.F.R. § 222.102 (2024). A species is harmed in instances of past and present deaths or injuries, as well as when there is “an imminent threat of death or injury.” *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784–85 (9th Cir. 1995).

28. A species is “captured” when someone has gained control over an animal through force for some period of time, such as when an animal is entangled in fishing gear. *See Strahan v. Holmes*, 595 F. Supp. 2d 161, 165 (D. Mass. 2009). An animal that is “captured” without being harmed has been taken for the purposes of the Act. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (explaining that every word in a statute should be given effect).

29. Section 9 of the Act, 16 U.S.C. § 1538 (“Section 9”), makes it unlawful for “any person” to “take any [endangered species of fish or wildlife] within the United States or the territorial sea of the United States” except as provided by the Act. *Id.* § 1538(a)(1)(B).

30. Section 9(g) of the Act makes it unlawful for “any person” to “attempt to commit, solicit another to commit, or cause to be committed, any offense defined in [Section 9].” *Id.* § 1538(g).

31. The Act’s prohibition on takes applies to governmental third-parties that have caused a take pursuant to their regulatory authority. *E.g.*, *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997). A regulatory entity causes a take pursuant to its authority when it “exerts control” over an activity. *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 148 F.3d 1231, 1251 (11th Cir. 1998). A regulatory entity has exerted control over an activity where it “purports to make lawful an activity that allegedly violates the ESA.” *Id.*

32. A regulatory entity’s liability for violations of the Act “depends on whether a risk of taking exists if [actors] comply with all applicable laws and regulations in place, not whether it is possible to avoid a taking if the laws and regulations are followed.” *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008). Therefore, a governmental third-party can be liable for violations of the Act where it licenses, authorizes, or otherwise allows for

an act under its laws and regulations that likely results in a take. *See Cox*, 127 F.3d at 163–64; *Defs. of Wildlife v. Env’t Prot. Agency*, 882 F.2d 1294, 1301 (8th Cir. 1989).

33. Governmental third-party liability has been found in regulatory schemes that authorize the use of equipment in “specifically the manner that is likely to result in a [take].” *Cox*, 127 F.3d at 164 (licensing commercial fisheries to use gill nets and lobster pots constitutes a take); *see also Volusia Cty.*, 148 F.3d at 1251 (authorizing beachfront lighting ordinance constitutes a take); *Defs. of Wildlife*, 882 F.2d at 1301 (registering pesticides constitutes a take); *Holsten*, 541 F. Supp. 2d at 1079 (authorizing animal traps in lynx habitat constitutes a take); *United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 90–91 (D. Mass. 1998) (permitting off-road vehicles constitutes a take); *Nat’l Wildlife Fed’n v. Hodel*, 23 Env’t Rep. Cas. (BNA) 1089, 1092–93 (E.D. Cal. 1985) (authorizing lead shot ammunition constitutes a take).

34. Section 10 of the Act, 16 U.S.C. § 1539 (“Section 10”), authorizes the Secretary to permit “any taking otherwise prohibited by section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.* § 1539(a)(1)(B).

35. The Secretary may issue the permit only after the applicant submits a conservation plan meeting the requirements identified in the Act. *Id.* § 1539(a)(2). The conservation plan must detail the anticipated impact that will result from the taking, mitigation methods and measures to minimize the anticipated impacts, including the funding available to implement mitigation, alternative actions the applicant considered and the reasoning for not pursuing the alternatives, and any other criteria that the Secretary may require. 50 C.F.R. § 17.22(b)(1) (2024).

Delaware State Legal Framework

36. DNREC regulates commercial fisheries through permits, licenses, and fishing limitations, such as establishing fishing seasons, limiting the size of fish that can be taken, and identifying the permissible fishing equipment. DEL. CODE ANN. tit. 7, § 903(a), (e), (f) (2024); *see generally* 7 DEL. ADMIN. CODE §§ 3500–3588 (2021).

37. Delaware’s legal framework “effectuate[s] the State’s policy toward the management and conservation of coastal finfishery resources in cooperation with the federal government, local governments of this State and the governments of other states” and provides how “the users of this State’s finfishery resource can participate in the State’s responsibility of governing fishing for, and the taking of, finfish in a manner that is both biologically and socioeconomically sound.” DEL. CODE ANN. tit. 7, § 901(a).

38. The Department has broad authority to promulgate regulations controlling all aspects of commercial fishing operations in its state waters, such as identifying the types of allowable fishing gear, how the gear may be used, and restricting fishing in certain geographic areas and times. *See id.* § 903(e)(1)(c)–(e). The Department has the authority to issue permits and licenses, and to act on other applications related to commercial fishing. *Id.* § 903(f).

39. Delaware law defines “food fish” as “all species of finfish not specified as bait fish or game fish” and, as such, includes American shad, striped bass, and spiny dogfish. *Id.* § 906(30).

40. A “gill net” under Delaware law is

an upright net or fence of fiber or monofilament netting with a float line . . . on top, and a weighted line, . . . on the bottom in which finfish are caught in the meshes of the net. Finfish, of a size for which the net is designed, swim into the net and can pass only part way through a single mesh. The finfish becomes “gilled” and can neither go forward through the net nor backward out of the net. Gill nets may be suspended at the surface, in mid-water or close to the bottom by controlling the

number of floats on the float line and the size and number of weights on the weighted line.

Id. § 906(34). Delaware law recognizes several different types of gill nets, including anchor gill nets, *id.* § 906(2), bar nets, *id.* § 906(6), drift gill nets, *id.* § 906(23), fixed gill nets, *id.* § 906(29), pair trawls, *id.* § 906(50), parallel nets, *id.* § 906(51), run around gill nets, *id.* § 906(59), semidrift gill nets, *id.* § 906(62), and staked gill nets, *id.* § 906(64).

41. A “trawl net” or “seine trawl” is defined under Delaware law as a “bag, cone or funnel-shaped net with or without wings towed through the water or dragged over the bottom by [one] or more vessels or by motor power.” *Id.* § 906(68). Delaware law recognizes several different type of trawl nets, including bait seines or drag nets, *id.* § 906(5), beam trawls, *id.* § 906(7), common haul seines, *id.* § 906(11), Danish seines, *id.* § 906(13), long haul seines, *id.* § 906(44), long seines, *id.* § 906(46), otter trawls, *id.* § 906(49), pair trawls, *id.* § 906(50), purse seines, *id.* § 906(55), Scottish seines, *id.* § 906(60), and stop seines or stop nets, *id.* § 906(65).

42. It is illegal to fish for food fish in the tidal waters of Delaware with any fishing equipment or method except those authorized by Delaware law. *Id.* § 910. Delaware-authorized food fishing equipment include common haul seines operated without the use of power, *id.* § 910(a)(8), bait seines, *id.* § 910(a)(9), and gill nets that are “fished in more or less a straight line[,]” *id.* § 910(a)(14).

43. A Delaware state-issued commercial food fishing license is required for fishing with a gill net greater than two hundred feet and a gill net less than two hundred feet which is not fixed. *Id.* § 923(f); *see also id.* § 914 (outlining the commercial food fishing license requirements and fees).

44. A Delaware state-issued food fishing equipment permit is required to fish for food fish in the State's tidal waters with a common haul seine greater than three hundred feet, *id.* § 915(a), (b)(1), or with a gill net, *id.* §§ 915(a), (b)(6)–(7), 923(f).

45. Delaware law permits the use of trawl nets that are not operated by any mechanical power source. *Id.* § 927(a).

46. Delaware law identifies specific areas where certain fishing equipment, such as gill nets and trawls, cannot be used. *Id.* § 917 (prohibiting various types of fishing equipment in specific areas within the State); 7 DEL. ADMIN. CODE § 3514-3561 (identifying several rivers, creeks, bays, and canals where gill nets cannot be used to fish for food fish).

47. Delaware law specifies that gill nets used in the Delaware River, Delaware Bay and Atlantic Ocean must have a mesh size greater than three-and-one-eighth inches. 7 DEL. ADMIN. CODE § 3514-3562(2).

48. Delaware law further restricts the use of gill nets in tidal waters of the State between April 1 and May 10 to use of no more than an aggregate of one thousand yards of anchored, staked, fixed, or drifting gill nets. DEL. CODE ANN. tit. 7, § 923(d).

49. Delaware law further restricts the use of gill nets for commercial fishing between April 1 and June 30 to gill nets that that have a mesh size greater than three-and-one-eighth inches. 7 DEL. ADMIN. CODE § 3514-3562(1).

50. Delaware law further restricts the use of gill nets in the tidal waters of the State between May 10 and September 30 for fixed and drifting gill nets. DEL. CODE ANN. tit. 7, § 923. Fixed gill net use is limited to gill nets that are less than two hundred feet and restricted to certain locations within the State, such as within one-half nautical mile from the Delaware River and Bay and one thousand feet of the mean high-water line of all tributaries entering the

Delaware River and Bay. *Id.* § 923(a)–(b). Drifting gill net use is limited to aggregate gill nets less than one thousand yards between Monday and Friday except for legal state holidays. *Id.* § 923(c), (e).

51. Gill nets are not permitted to fish for American shad in the Atlantic Ocean at any time under Delaware law. 7 DEL. ADMIN. CODE § 3507-3592. It is not clear whether this prohibition also applies to the Delaware Bay. *See* DEL. CODE ANN. tit. 7, § 906(14) (defining “Delaware Bay”), (17) (defining “Delaware’s territorial sea”).

52. Delaware law permits commercial food fisherman to use gill nets to fish for striped bass with a valid food fishing equipment permit, 7 DEL. ADMIN. CODE § 3507-3505(1).

53. Delaware law prohibits commercial food fisherman from using fixed and drift gill nets on certain rivers and their tributaries, including the Delaware River, during the striped bass spawning season of April 1 through May 31. *Id.* § 3501-3502(1)–(2).

54. Delaware law further restricts the use of fixed gill nets in the Delaware River north of the southern shore of Appoquinimink River from January 1 to May 31. *Id.* § 3501-3502(5).

55. Delaware law refers to the Atlantic States Marine Fisheries Commission (“ASMFC”) management plan for spiny dogfish for its regulations addressing spiny dogfish fisheries. *Id.* § 3501-3581. The ASMFC does not restrict the equipment type, season, or locations for spiny dogfish commercial fishing.

56. All equipment used in the tidal waters of Delaware must have the permit number issued by the Department attached. DEL. CODE ANN. tit. 7, § 921. Fixed nets within Delaware tidal waters must be marked according to Delaware law. *Id.* § 920(a).

57. The Department is authorized under Delaware law to revoke any commercial food fishing license from a holder who does not file a monthly report on their catch by effort, species, and weight each month until the reporting requirements are fulfilled. *Id.* § 936(e).

58. The Department is further authorized to suspend or refuse to issue a commercial food fishing license to a commercial fisher who has committed three or more violations of any applicable provision of Delaware law. *Id.* § 937.

59. The Secretary of the Department may seek a temporary restraining order, a temporary injunction, or a permanent injunction for any violation of the provisions in its statute, regulations, or permits that is continuing or threatening to begin. *Id.* § 936(c).

FACTUAL ALLEGATIONS

60. The Atlantic sturgeon is a prehistoric species that has inhabited the Earth for 200 million years. Historically, the Atlantic sturgeon was a thriving species, but intense harvests from commercial fisheries led the species to collapse in the late 19th century. Legal harvest ceased in 1998, but the species has never recovered.

61. The extirpation of the species in the Northeast United States is profound. The Delaware River, the Hudson River, and the Kennebec River are the only rivers between the State of Delaware and the Canadian border that have documented extant populations of Atlantic sturgeon. Threatened and Endangered Status for Distinct Population Segments of Atlantic Sturgeon in the Northeast Region, 77 Fed. Reg. 5,880, 5,883 (Feb. 6, 2012) (codified at 50 C.F.R. §§ 223, 224).

62. In the late 19th century, the Delaware River boasted an estimated 180,000 female Atlantic sturgeon alone. Edward A. Hale et al., *Abundance Estimate for and Habitat Use by Early Juvenile Atlantic Sturgeon within the Delaware River Estuary*, TRANSACTIONS AM.

FISHERIES SOC'Y 1193, 1193 (2016). Today, the Delaware River Atlantic sturgeon population is estimated between 120 and 250 adults, a number which includes both males and females.

Shannon L. White et al., *Evaluating Sources of Bias in Pedigree Estimates of Breeding Population Size*, ECOLOGICAL APPLICATIONS, July 2022, at 1, 11.

63. In 1998, the adult wild Atlantic sturgeon population in the Hudson River was estimated to be around 870 individual fish. The Hudson River's population of adult Atlantic sturgeon was estimated at 466 individuals in 2014. *Atlantic Sturgeon Population Estimates*, NOAA FISHERIES, www.fisheries.noaa.gov/national/endangered-species-conservation/atlantic-sturgeon-population-estimates (last updated Nov. 10, 2020).

64. The low population numbers of the Atlantic sturgeon prompted several petitions for its listing under the Act. The initial petition for listing was denied in 1997. However, in 2012, the National Marine Fisheries Service listed the New York Bight DPS as endangered under the Act. *Threatened and Endangered Status for Distinct Population Segments of Atlantic Sturgeon in the Northeast Region*, 77 Fed. Reg. at 5,883. The Atlantic sturgeon that spawn in the Delaware and Hudson Rivers are part of the New York Bight DPS. *Id.*

65. The Atlantic sturgeon is significantly threatened by the risk of bycatch from federal and state fisheries. Bycatch is the catching and discarding of a species that is not the target species. *Understanding Bycatch*, NOAA FISHERIES, www.fisheries.noaa.gov/insight/understanding-bycatch (last visited Oct. 18, 2024).

66. The Atlantic sturgeon is an anadromous species that is born in freshwater and migrates to the sea. Immature sturgeon—including those from the Delaware and Hudson River populations—travel widely up and down the East Coast while at sea, and return to their natal

freshwater system upon maturity to spawn. *Atlantic Sturgeon*, NOAA FISHERIES, www.fisheries.noaa.gov/species/atlantic-sturgeon (last updated Sept. 24, 2024).

67. The migratory nature of the Atlantic sturgeon makes them “vulnerable to threats in coastal waters and non-natal estuaries,” such as bycatch, even when the fisheries engaging in bycatch are located far from where Atlantic sturgeon spawn. Isaac Wirgin et al., *Population Structure and Broad-Scale Movements of Atlantic Sturgeon Along the North American Atlantic Coast Inferred from Genetic Analysis*, REVS. FISHERIES SCI. & AQUACULTURE, Aug. 4, 2024, at 2–3. Bycatch may contribute to “the failure of some populations to rebuild despite the protections that they have been afforded recently within their natal estuaries.” *Id.*

68. Lack of bycatch reporting is an issue for Atlantic sturgeon conservation and population recovery. There are “severe data limitations restricting the type, scope, and usefulness of assessment methodologies that can be applied to Atlantic sturgeon” and “major uncertainties in the scope for direct harm arising from interaction with ongoing human activities (e.g., bycatch, ship strikes) to the recovery of Atlantic sturgeon.” ATL. STATES MARINE FISHERIES COMM’N, RESEARCH PRIORITIES AND RECOMMENDATIONS TO SUPPORT INTERJURISDICTIONAL FISHERIES MANAGEMENT 2–3 (2017).

69. The termination of the bycatch reporting program in Delaware in 2012, following the Atlantic sturgeon’s listing under the ESA, leaves voluntary reports as the main source of Delaware’s Atlantic sturgeon bycatch data. ATL. STATES MARINE FISHERIES COMM’N, REVIEW OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STURGEON FOR 2016 FISHING YEAR 12 (2018). Fishery-dependent bycatch is “likely underreported due to majority reporting through voluntarily-based programs.” *Id.* For example, fishery-dependent data sources for 2015-2016 report no Atlantic sturgeon bycatch. *Id.* However, fishery-independent data

sources report that six Atlantic sturgeon in 2015 and four Atlantic sturgeon in 2016 were caught in otter trawls, and sixty-one Atlantic sturgeon in 2015 and seven Atlantic sturgeon in 2016 were caught in gill and trammel nets. *Id.* at 14.

70. Studies show Atlantic sturgeon bycatch is most likely to occur during the Atlantic sturgeon migration, and that certain types of fishing gear used by commercial fisheries, such as gill nets and otter trawls, are more likely to cause the bycatch of Atlantic sturgeon. Keith J. Dunton et al., *Marine Distribution and Habitat Use of Atlantic Sturgeon in New York Lead to Fisheries Interaction and Bycatch*, 7 MARINE & COASTAL FISHERIES: DYNAMICS, MGMT., & ECOSYSTEM SCI. 18, 18, 26 (2015) [hereinafter Dunton].

71. The Atlantic sturgeon migration and aggregation in shallow marine distributions place the species at risk for bycatch in coastal trawl and gill net fisheries especially between April to June and October to November. Matthew W. Breece et al., *Satellite Driven Distribution Models of Endangered Atlantic Sturgeon Occurrence in the Bight*, 75 INT'L COUNCIL FOR EXPLORATION SEA J. MARINE SCI. 563, 564–65 (2018) [hereinafter Breece] (describing Atlantic sturgeon migration patterns in coastal waters of Delaware); Dunton at 26 (describing Atlantic sturgeon migration patterns in coastal waters of New York); Michael C. Melnychuk et al., *Informing Conservation Strategies for the Endangered Atlantic Sturgeon Using Acoustic Telemetry and Multi-State Mark-Recapture Models*, 54 J. APPLIED ECOLOGY 914, 919 (2016) [hereinafter Melnychuk] (describing Atlantic sturgeon migration patterns in coastal waters of New York and New Jersey). Trawls and gill nets passing through shallow waters when the Atlantic sturgeon are present can result in large bycatch. When examining otter trawls coastwide, over 64% of observed bycatch occurred within the shallow waters less than 4.83 kilometers (~3 miles) from shore within New York/New Jersey state waters. Dunton at 26.

72. Atlantic sturgeon bycatch is occurring and documented within Delaware's sovereign waters in gill nets and trawls. Andrew B. Stein et al., *Atlantic Sturgeon Marine Bycatch and Mortality on the Continental Shelf of the Northeast United States*, 24 N. AM. J. FISHERIES MGMT. 171, 175–76 (2004) (documenting Atlantic sturgeon bycatch incidences from otter trawls, sink gill nets, and drift gill nets in Delaware from 1989 to 2000); ATL. STURGEON PLAN REVIEW TEAM, REVIEW OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STURGEON FOR 2004 13 (2006) (documenting 274 reports of Atlantic sturgeon bycatch in gill nets in 2004).

73. Striped bass commercial fisheries commonly use trawls and gill nets. *Atlantic Striped Bass*, NOAA FISHERIES, www.fisheries.noaa.gov/species/atlantic-striped-bass (last updated Sept. 6, 2024). There is Atlantic sturgeon bycatch in the gillnet fishery harvesting striped bass in Delaware. ATL. STRIPED BASS MGMT. BD., PROCEEDINGS OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION ATLANTIC STRIPED BASS MANAGEMENT BOARD 47 (2023). In 2005, the Atlantic Sturgeon Plan Review Team reported that Delaware caught an estimated eighty-two Atlantic sturgeon in striped bass gill net fisheries. ATL. STURGEON PLAN REVIEW TEAM, REVIEW OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STURGEON FOR 2005 10 (2006).

74. Spiny dogfish commercial fisheries commonly use gill nets. *Atlantic Spiny Dogfish*, NOAA FISHERIES, www.fisheries.noaa.gov/species/atlantic-spiny-dogfish (last updated Aug. 8, 2024). Delaware is a recognized hot spot for Atlantic sturgeon bycatch in spiny dogfish fisheries. SPINY DOGFISH MGMT. BD., DRAFT PROCEEDINGS OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION SPINY DOGFISH MANAGEMENT BOARD 4 (2023).

75. There are American shad gill net fisheries in Delaware and New Jersey on either side of the Delaware Bay. Although there were no reports of Atlantic sturgeon bycatch in Delaware in 2015 from American shad gill net fisheries, there were nine voluntary reports of Atlantic sturgeon bycatch in American shad gill net fisheries in New Jersey in 2015. It can be reasonably inferred that bycatch of Atlantic sturgeon also occurred in Delaware at its American shad gill net fisheries despite the lack of reporting, because shad fisheries in both states largely operate in the same way, using similar equipment in waters where Atlantic sturgeon are known to be present.

76. Bycatch can be reasonably presumed to be occurring at any fishery in Delaware that operates between April and October using gill nets or otter trawls, such as the winter crab trawl fishery located at the mouth of the Delaware Bay, despite lack of documentation due to identified issues with voluntary and fishery-dependent reporting.

77. After becoming bycatch, the impacted animals are often unable to reproduce, and may even die. *Understanding Bycatch*, NOAA FISHERIES, www.fisheries.noaa.gov/insight/understanding-bycatch (last visited Oct. 18, 2024). Observed rates of Atlantic sturgeon surviving bycatch by otter trawl are probably significantly inflated, because the Atlantic sturgeon that survive capture and are released alive likely experience delayed effects of stress and injuries for weeks after the initial capture, including delayed onset of mortality. Dunton at 28.

78. The ASMFC estimates that greater than 4% annual mortality rate of Atlantic sturgeon due to anthropogenic sources, such as bycatch, would put populations at risk. ATL. STATES MARINE FISHERIES COMM'N, ESTIMATION OF ATLANTIC STURGEON BYCATCH IN COASTAL ATLANTIC COMMERCIAL FISHERIES OF NEW ENGLAND AND THE MID-ATLANTIC 5

(2007). Annual Atlantic sturgeon bycatch mortality south of New York is estimated to be higher than 4%, which hinders recovery of the species. Melnychuk at 922.

79. Delaware's current regulatory framework cannot adequately address bycatch of the Atlantic sturgeon due to their habitat preference and behavior without implementing additional restrictions on use of gill and trawl nets and fishery operations. *See* Dunton at 28.

CLAIMS FOR RELIEF

COUNT ONE

Violation of the Endangered Species Act Section 9 – Illegal Take of Atlantic Sturgeon

80. Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in the paragraphs above.

81. Defendants are prohibited under 16 U.S.C. § 1538(a)(1)(B) from taking an endangered species.

82. Defendants are prohibited under 16 U.S.C. § 1538(g) from soliciting another to commit or causing to be committed any offense defined within Section 9, including taking an endangered species under 16 U.S.C. § 1538(a)(1)(B).

83. Defendants have broad regulatory authority to allow or prohibit the take of fish from any of the waters of the State. DEL. CODE ANN. tit. 7, § 903(a), (e), (f); *see generally* 7 DEL. ADMIN. CODE §§ 3500–3588.

84. Defendants exert control over all use of fishing equipment within Delaware state waters by requiring a state-issued license to use equipment such as gill nets and trawls and setting comprehensive limitations for their use. *Id.*

85. Defendants' legal framework authorizes commercial fisheries in Delaware's jurisdictional waters and permits the use of gill nets and trawls by said fisheries in a manner which causes bycatch of the Atlantic sturgeon in state waters. *See Coxe*, 127 F.3d at 163–64.

86. Defendants are liable for the Atlantic sturgeon bycatch that occurs at the State's commercial fisheries as a result of and caused by their authorization of the commercial fisheries and licensing of gill nets and trawls.

87. Defendants take Atlantic sturgeon by causing or contributing to the unlawful bycatch of the Atlantic sturgeon at commercial fisheries within Delaware's jurisdictional waters through its legal framework that authorizes said fishing activities, in violation of Section 9 of the Act, 16 U.S.C. § 1538(a)(1)(B), (g).

COUNT TWO

Violation of the Endangered Species Act Section 9 – Failure to Obtain an Incidental Take Permit

88. Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in the paragraphs above.

89. Defendants are obligated to obtain an incidental take permit prior to unintentional takes of endangered species during otherwise lawful activities. *Id.* § 1539(a)(1)(B).

90. Defendants' failure to obtain a permit for the take of Atlantic sturgeon violates, at minimum, Section 9 of the Act. *Id.* § 1538(a)(1)(B).

COUNT THREE

Violation of the Endangered Species Act Section 10 – Failure to Submit a Conservation Plan

91. Plaintiffs repeat, allege, and incorporate, as fully set forth herein, each and every allegation contained in the paragraphs above.

92. Upon information and belief, Defendants have not submitted a conservation plan necessary to obtain an incidental take permit.

93. Defendants failure to submit a conservation plan necessary to obtain an incidental take permit is a violation of Section 10 of the Act, *id.* § 1539(a)(1)(B), (2), and implementing regulations, 50 C.F.R. § 17.22(b)(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment for the following relief:

A. Declare Defendants have violated the Act by authorizing, permitting, licensing, or otherwise facilitating incidental takes of Atlantic sturgeon through their management of Delaware commercial fisheries as alleged herein;

B. Declare Defendants have violated the Act by failing to implement a conservation plan and obtain an incidental take permit for their management of Delaware commercial fisheries;

C. Enjoin Defendants from illegally taking or authorizing, permitting, licensing, or otherwise causing incidental takes of the Atlantic sturgeon except as authorized by and in compliance with an incidental take permit(s);

D. Retain continuing jurisdiction to review the Defendant's compliance with all judgements and orders herein;

E. Award Plaintiffs their reasonable attorneys' fees and costs associated with this action as provided by the Act, 16 U.S.C. § 1540(g)(4); and

F. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: October 24, 2024

/s/ Kenneth T. Kristl

Kenneth T. Kristl, Esq.
(DE Bar #5200)
Environmental & Natural Resources Law Clinic
Widener University Delaware Law School
4601 Concord Pike
Wilmington, DE 19803
(302) 530-8702
ktkristl@widener.edu

Attorney for Plaintiffs