

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Delaware Riverkeeper Network; Maya K. van Rossum; Riverkeeper, Inc.; Tracy Brown

(b) County of Residence of First Listed Plaintiff Bucks County, PA (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See attachment

DEFENDANTS

New Jersey Department of Environmental Protection, Shawn LaTourette, Commissioner

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

See attachment

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF, DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PERSONAL INJURY, PRISONER PETITIONS, LABOR, IMMIGRATION, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Endangered Species Act, 16 U.S.C. § 1531 et. seq. Brief description of cause: Illegal take of an endangered species

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): Delaware Riverkeeper Network, et al. v. New York (E.D.N.Y.) JUDGE DOCKET NUMBER 1:24-cv-07416

DATE 10/24/2024 SIGNATURE OF ATTORNEY OF RECORD /s/ Kacy C. Manahan

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Attachment to Civil Cover Sheet

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

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

Plaintiffs,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION;
SHAWN LATOURETTE, *in his official
capacity as the Commissioner of the New
Jersey Department of Environmental
Protection*,

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 New Jersey Department of Environmental Protection (“NJDEP”), and Shawn LaTourette, in his official capacity as the Commissioner of NJDEP (collectively, “Defendants”) to comply with the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA” or the “Act”). Delaware Riverkeeper Network and Maya K. van Rossum’s principal place of business is at 925 Canal Street, Suite 3701, Bristol, PA 19007. Riverkeeper, Inc. and Tracy Brown’s principal place of business is at 20 Secor Road, Ossining, NY 10562. Defendants’ principal place of business is at 401 E. State Street, 7th Floor, East Wing, Trenton, NJ 08625. In support thereof, Plaintiffs 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 from fisheries that use certain fishing equipment, such as gill nets and bottom trawls.

4. NJDEP authorizes and regulates commercial fishing, including the use of fishing equipment, in its sovereign waters under New Jersey’s legal framework. State-authorized commercial fisheries are allowed to use state-licensed 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 New Jersey’s sovereign waters, including summer flounder, longfin inshore squid, bluefish, scup, tautog, winter flounder, weakfish, winter skate, silver hake, shad, and little skate fisheries. 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 licensed 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. The Secretary of Commerce and Defendants received notice via certified mail on July 22 and July 23, 2024, respectively. 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 New Jersey 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 Trenton, NJ and Atlantic sturgeon bycatch occurs in this district's coastal waters, as authorized in this district by NJDEP, 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 New Jersey and in the Middle and Lower Delaware River regions 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 8,446 members residing in the state of New Jersey. Many of these members use and enjoy both the Delaware and Hudson Rivers. 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 the Atlantic 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 New Jersey.

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, 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, NJDEP, is a person within the meaning of the Act. NJDEP is headquartered at 401 E. State Street, 7th Floor, East Wing, Trenton, NJ 08625. NJDEP is a New Jersey state agency with the authority to promulgate the requirements for commercial fishing operations. NJDEP Division of Fish and Wildlife issues the required licenses or permits for commercial fishing operations.

20. Defendant, Shawn LaTourette, is the Commissioner of NJDEP. Mr. LaTourette is the leader of NJDEP and oversees the NJDEP staff and programs. Mr. LaTourette 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, 785 (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 activity under its laws and regulations that likely results in a take. *See Cox*, 127 F.3d at 163–64; *Def. 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); *Def. 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).

New Jersey Legal Framework

36. NJDEP 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. *See generally* N.J. ADMIN. CODE §§ 7:25-18.1–7:25-24.17 (1992).

37. A New Jersey state-issued permit is required to operate a directed tautog fishery, *id.* § 18.12(c)(2), or directed summer flounder fishery, *id.* § 18.12(i)(1), in the waters of New Jersey. A New Jersey state-issued permit is required to take any shad for commercial purposes in the waters of New Jersey. *Id.* § 18.12(e)(1).

38. There are regulations governing operations, but no permit or license requirements for the commercial harvest of weakfish, *id.* § 18.12(a), winter flounder, *id.* § 18.12(j), and scup fisheries, *id.* § 18.12(k), within New Jersey waters.

39. A New Jersey state-issued license is required to use a net to fish within New Jersey waters with limited exceptions. N.J. STAT. ANN. § 23:5-24.2(a) (2024). Such licenses include, but are not limited to, gill net licenses, Delaware Bay gill net permits, and otter or beam trawl licenses. *See id.*

40. New Jersey regulates the use of drifting gill nets by limiting the locations where such nets can be used to the Atlantic Ocean, Delaware Bay, and the tributaries of the Delaware Bay. N.J. ADMIN. CODE § 7:25-18.5(g)(5). New Jersey similarly further specifies allowable mesh size, net length, and temporal restrictions on when these nets can be used in the above areas. *Id.*

41. New Jersey also limits the use of staked and anchored gill nets to the Atlantic Ocean, Raritan Bay, Sandy Hook Bay, and the Delaware Bay and its tributaries. *Id.* § 18.5(g)(6). Unattended, overnight staked, or anchored gill nets set in the Atlantic Ocean are banned from

June 15 through October 31. *Id.* Unattended, overnight anchored gill nets set in the Delaware Bay are banned from June 15 through September 30. *Id.*

42. New Jersey regulations limit the use of otter or beam trawls within state waters, except for the Atlantic Ocean, during the hours between sunset and sunrise at a distance of greater than two miles from the coast line. *Id.* § 18.14(b).

43. In addition to the general net regulations that New Jersey has enacted, there are also specific provisions on the use of otter or beam trawls for the summer flounder, weakfish, winter flounder, bluefish, and scup commercial fisheries. *Id.* § 18.14(l)–(p).

44. For weakfish, winter flounder, and bluefish, New Jersey has defined open seasons for the use of certain types of gear by these commercial fisheries, which are applicable to the take of these species. *Id.* § 18.12(a)(1), (j), (b)(3).

45. New Jersey has not promulgated any specific commercial regulations for the longfin inshore squid, winter skate, silver hake, and little skate fisheries.

46. New Jersey retains, through the Commissioner and with the approval of the New Jersey Marine Fisheries Council, the power to modify quotas, trip limits, and/or seasons, quota allocation by gear type, as well as gear types and gear restrictions, incidental and bycatch allowance, application of the incidental and bycatch allowance to the quota, or reporting requirements, by notice, in order to maintain and/or to come into compliance with any fishery management plan approved by the Atlantic States Marine Fisheries Commission. *Id.* § 18.12(r).

FACTUAL ALLEGATIONS

47. 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.

48. 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 the 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).

49. 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.

50. 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).

51. 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.*

52. 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).

53. 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 far distances up and down the East Coast while at sea and return to their natal freshwater systems upon maturity to spawn. *Atlantic Sturgeon*, NOAA FISHERIES, www.fisheries.noaa.gov/species/atlantic-sturgeon (last updated Oct. 10, 2024).

54. The migratory nature of 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 the 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.*

55. 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 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].

56. 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 Mid-Atlantic Bight*, 75 INT'L COUNCIL FOR EXPLORATION SEA J. MARINE SCI. 563, 564–65 (2018) [hereinafter Breece]; Dunton at 26; Michael C. Melnychuk et al., *Informing Conservation Strategies for the Endangered Sturgeon Using Acoustic Telemetry and Multi-State Mark-Recapture Models*, 54 J. APPLIED ECOLOGY 914, 919 (2016) [hereinafter Melnychuk]. Trawls and gill nets passing through shallow waters when the Atlantic sturgeon is present can result in large bycatch. When examining otter trawls coastwide, over 64% of observed bycatch occurred within shallow waters less than 4.83 kilometers (~3 miles) from shore within New York/New Jersey state waters. Dunton at 26.

57. Atlantic sturgeon bycatch is occurring and documented within New Jersey's sovereign waters from the use of gill nets and trawls by the summer flounder, longfin inshore squid, bluefish, scup, tautog, winter flounder, weakfish, winter skate, silver hake, and little skate fisheries. Dunton at 26. One study found that the summer flounder fishery was responsible for 73% of the Atlantic sturgeon bycatch from trawling, much of which was from vessels engaged in the New Jersey summer flounder fishery landing catch. *Id.*

58. The summer flounder, bluefish, tautog, winter flounder, weakfish, winter skate, silver hake, little skate, and scup fisheries are all known to use both gill nets and trawls. *See* ATL. STATES MARINE FISHERIES COMM'N, ADDENDUM III TO THE FISHERY MANAGEMENT PLAN FOR

TAUTOG 5 (2002) (discussing Tautog); CORNELL COOP. EXTENSION MARINE PROGRAM, NEW YORK COMMERCIAL FISHERMAN OCEAN USE MAPPING 5–13 (2020) (discussing gill net and trawl use by the summer flounder, bluefish, tautog, winter flounder, weakfish, winter skate, silver hake, and little skate fisheries); E. Anderson et al., *The Silver Hake Stocks and Fishery off the Northeastern United States*, 42 MARINE FISHERIES REV. 12, 14 (1980) (discussing silver hake); *Scup*, NOAA FISHERIES, www.fisheries.noaa.gov/species/scup (last updated Sept. 6, 2024) (discussing scup); *Winter Flounder*, NOAA FISHERIES, www.fisheries.noaa.gov/species/winter-flounder (last updated Sept. 9, 2024) (discussing winter flounder); *Weakfish*, NEW JERSEY SCUBA DIVING, www.njscuba.net/marine-biology/marine-fishes/drums/weakfish/ (last visited Oct. 18, 2024) (discussing weakfish). The majority of longfin inshore squid are known to be harvested with trawls. *Longfin Squid*, NOAA FISHERIES, www.fisheries.noaa.gov/species/longfin-squid (last updated Sept. 6, 2024).

59. There is also reported bycatch of the Atlantic sturgeon in the New Jersey American shad fishery. ATL. STATES MARINE FISHERIES COMM’N, REVIEW OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STURGEON 12 (2018). The American shad fishery in New Jersey utilizes gill nets, and reported a total of nine takes of the Atlantic sturgeon in 2015. *Id.* (noting that although no takes were reported in 2016, reporting of Atlantic sturgeon bycatch is voluntary and thus is likely underreported).

60. The Atlantic sturgeon is at a higher risk of bycatch in the New York and New Jersey region than in other coastal subregions. The fisheries in the coastal subregion of New York and New Jersey are estimated to recapture thirty percent of previously tagged Atlantic sturgeon, whereas the entire East Coast is estimated to recapture between eight and fourteen percent. Dunton at 26.

61. Similarly, Northeast Fisheries Observer Program (“NEFOP”) data show that “trawling within the [New York Bight] region appears to represent a bigger threat to Atlantic sturgeon recovery compared to other locations.” *Id.* at 28. Gill nets, concentrated off the coast of New Jersey, account for thirty percent of total observed bycatch occurring within state limits. *Id.* at 27. NEFOP data show that “[c]aptures in observed gill net fishing trips occurred more frequently off the coast of New Jersey.” *Id.* at 24.

62. 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). 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.

63. High rates of total mortality in the late spring along the Long Island coast, including the northern New Jersey coast, is likely due to bycatch. Melnychuk at 919. Deceased juvenile Atlantic sturgeon are frequently spotted “on beaches close to the Rockaway aggregation region . . . and adjacent to coastal areas that experience high-frequency bottom trawling.” Dunton at 28. The “incidental catch likely contributes to the high total mortality observed in late spring[.]” during the Atlantic sturgeon’s migration period. Melnychuk at 919. Observed rates of Atlantic sturgeon surviving initial capture by otter trawl are probably significantly inflated, because the effects of stress and injuries from capture may not materialize until weeks later. Dunton at 28.

64. Annual mortality of the New York Bight population is projected to be too high to allow for population recovery. The Atlantic States Marine Fisheries Commission estimates

that greater than 4% annual mortality rate of the 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). In New York and New Jersey, total annual mortality is estimated at nearly three times this threshold. Melnychuk at 919–20, 922 (estimating total annual mortality at 11.7%). Bycatch is the cause of over half of this mortality. *Id.* (estimating bycatch causes 5.86% of annual mortality).

65. The occurrence of illegal bycatch of Atlantic sturgeon from the operation of Defendants’ state-authorized fisheries is well-documented in studies and long recognized by New Jersey and federal regulators. *See* Dunton at 26; 77 Fed. Reg. at 5,883 (Feb. 6, 2012); ATL. STATES MARINE FISHERIES COMM’N, REVIEW OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STURGEON 18 (2019) (listing New Jersey as “developing” an incidental take permit for Atlantic sturgeon).

66. New Jersey’s current regulatory framework does not adequately address bycatch of the Atlantic sturgeon by commercial fisheries in its waters. Additional restrictions on use of gill and trawl nets and fishery operations are needed to account for Atlantic sturgeon habitat preference and behavior. *See* Dunton at 28.

CLAIMS FOR RELIEF

COUNT ONE

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

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

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

69. 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).

70. Defendants have the regulatory authority to allow or prohibit the take from any of the waters of the State. N.J. STAT. ANN. § 23:5-11.

71. Defendants exert control over fishing equipment within New Jersey State waters by requiring a state-issued license to use equipment such as gill nets and trawls and setting limitations for their use. *Id.* § 23:5-24.1.

72. Defendants' legal framework authorizes commercial fisheries in New Jersey's jurisdictional waters that use gill nets and trawls resulting in the bycatch of the Atlantic sturgeon in state waters. *See Coxe*, 127 F.3d at 163–64.

73. Defendants are liable for the Atlantic sturgeon bycatch that occurs at New Jersey commercial fisheries as a result of and caused by their authorization of the commercial fisheries and licensing of gill nets and trawls.

74. Defendants take Atlantic sturgeon by causing or contributing to the unlawful bycatch of the Atlantic sturgeon at commercial fisheries within New Jersey's jurisdictional waters through its regulatory framework that authorizes said fishing activities and equipment 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**

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

76. 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).

77. 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**

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

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

80. 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 New Jersey 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 New Jersey commercial fisheries;

C. Enjoin Defendants from illegally taking or authorizing, permitting, licensing, or otherwise causing incidental takes of 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.

Dated: 10/24/2024

Respectfully submitted,

/s/ Kacy C. Manahan

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Exhibit A



July 18, 2024

VIA CERTIFIED MAIL

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Re: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act Related to Unpermitted Incidental Takings of Endangered Atlantic Sturgeon.

Dear Commissioner LaTourette, Director Cimino, and Chief Brust,

On behalf of Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, "DRN"), the Hudson Riverkeeper, Tracy Brown, and Riverkeeper, Inc., this letter provides the NJ Department of Environmental Protection ("NJ DEP") with notice pursuant to Section 11(g) of the Endangered Species Act ("ESA"), that DRN intends to sue NJ DEP for violations of the ESA related to the NJ DEP's failure to apply for an incidental take permit for fishery operations within endangered Atlantic sturgeon habitat.

LEGAL BACKGROUND

The Endangered Species Act was enacted in 1973 to “provide a means whereby the 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, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions” entered into by the United States for fish, wildlife, or plant conservation purposes.¹ The ESA is administered by the Fish and Wildlife Service (“FWS”) in the Department of the Interior, and by the National Marine Fisheries Service (“NMFS”), also known as the NOAA Fisheries, in the Department of Commerce, as delegated by the Secretary of the Interior and the Secretary of Commerce respectively.

The Secretary of Commerce and the Secretary of Interior is tasked with the responsibility of determining whether a species is endangered or threatened, as well designating the critical habitat of such species and preparing a recovery plan for each listed species.² Once a species’ listing determination has been approved, Section 9 prohibits the “taking” of endangered and most threatened species.³ Congress intended the term “take” to be defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill fish or wildlife,⁴ and includes acts like harassing, harming, capturing, pursuing, trapping, collecting, transporting, or even attempting to engage in any of these actions against a protected species.⁵

Congress amended the ESA in 1982 to provide two avenues of relief where the Secretary determines that a taking is incidental and does not jeopardize the survival of a protected species. Section 7 provides the Secretary the option to issue Federal agencies an “incidental take statement” as part of a biological opinion that, when followed, exempts incidental takes from the Section 9 takings prohibition.⁶ Section 10 of the ESA allows “[a]nyone who believes that their otherwise-lawful activities will result in an ‘incidental take’ of a listed wildlife species” to apply for an incidental take permit by submitting a habitat conservation plan (“HCP”).⁷

¹ See 16 U.S.C. § 1531(b), (a).

² 16 U.S.C. § 1533(a)(1), (3).

³ *Id.* § 1538(a). See also *Id.* § 1533(d) (authorizing the Secretary to issue regulations for any listed threatened species which are “necessary and advisable to provide for the conservation of such species” including “any act prohibited under section 9(a)(1)”).

⁴ See S. Rep. No. 307, 93rd Cong., 1st Sess. 1, reprinted in 1973 U.S. Code Cong. & Admin. News 2989, 2995.

⁵ 16 U.S.C. § 1532(19). See *Palila v. Hawaii Dept. of Land & Nat. Resources*, 852 F.2d 1106 (9th Cir. 1988); 50 C.F.R. § 17.3.

⁶ 16 U.S.C. § 1536(b)(1)(4). Section 7 requires Federal agencies to consult on activities that may impact ESA-listed species, concluding with the issuance of a biological opinion that analyzes the effects of a proposed agency action to ESA-listed species and or designated critical habitat. If the proposed agency action may cause a take of an ESA-listed species, the biological opinion will include an incidental take statement that details reasonable and prudent measures to minimize harmful impacts and terms and conditions specifying how to implement those measures. Executing the measures and terms in the incidental take statement is required for the statement to qualify as a takings exemption.

⁷ 16 U.S.C. § 1539.

While an incidental take permit is not required for incidental takes resulting from federal activities evaluated in a biological opinion and subsequently described in an incidental take statement, an incidental take permit is required for any person whose take is “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.”⁸ Section 9(a)(1)(B) makes it “unlawful for any *person* subject to the jurisdiction of the United States to—(B) take any such species” listed pursuant to section 4 of the ESA.⁹ “Person” as defined by the ESA pertinently includes “any officer, ... [or] department, ... of any State, ... ; [or] any State”¹⁰ Accordingly, a State and its departments or their officers can be found in violation of Section 9 for incidental takes not excepted by an incidental take permit.

The Secretary cannot issue an incidental take permit if the applicant does not submit a conservation plan that details the anticipated impact that will result from the taking, mitigation methods and measures to minimize the anticipated impacts and the funding available to implement mitigation, the alternative actions to the taking and the reasoning for not using the alternatives, and any other criteria that the Secretary may require.¹¹ Congress intended the HCP program to address listed and at-risk species in an ecosystem context, generate long-term commitments to conserve such species, and deliver regulatory assurances to project proponents.¹² The HCP program functions not only to authorize incidental take, but also as a process to integrate non-Federal development and land-use activities with conservation goals, resolve conflicts between protection of listed species and economic activities on non-Federal lands, and create a climate of partnership and cooperation.¹³

The Atlantic sturgeon was first identified as a candidate species—a list that served to notify the public of the Services’ concern for a species that may warrant future listing—for listing under the ESA in 1991.¹⁴ Following the denial of a 1997 petition requesting the listing of the Atlantic sturgeon as threatened or endangered, the Services sponsored a 2003 workshop discussing the status of the species which culminated in a decision to review the Atlantic sturgeon for potential listing.¹⁵ In 2009, a second petition was submitted to list the Atlantic sturgeon throughout its range as endangered.¹⁶ Based on a review of all of the new information that the Services had obtained since 1997, it was determined that there were five distinct population segments (“DPS”) of Atlantic sturgeon that qualified as species under the ESA.¹⁷

⁸ *Id.* § 1539(a)(1)(B).

⁹ *Id.* § 1538(a)(1)(B) (emphasis added).

¹⁰ *Id.* § 1532(13).

¹¹ 50 C.F.R. § 17.22(b)(2).

¹² FISH AND WILDLIFE SERVICE AND NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK 2 (2016).

¹³ *Id.*

¹⁴ 77 Fed. Reg. 5879, 5880 (2012).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

FACTUAL BACKGROUND

Bycatch is the catching and discarding of species that fishers may catch, but do not want, cannot sell, or are not allowed to keep.¹⁸ NOAA Fisheries defines bycatch as “discarded catch of marine species and unobserved mortality due to direct encounter with fishing vessels and gear.”¹⁹ Bycatch often causes negative ecological impacts to the directly impacted animals, the species as a whole and the ecosystem at large. After bycatch, impacted animals are often unable to reproduce or they die, thereby inhibiting the growth of overfished stocks and increasing the risk of harm to protected species.²⁰

Atlantic sturgeon bycatch is recognized as an issue by NOAA Fisheries, the Atlantic States Marine Fisheries Committee (“ASMFC”), and the Mid-Atlantic Fishery Management Council (“MAFMC”). The Action Plan to Reduce Atlantic Sturgeon Bycatch in Federal Large Mesh Gillnet Fisheries produced by the Atlantic Sturgeon Bycatch Working Group²¹ recommended that MAFMC and NOAA take action to reduce the amount of Atlantic sturgeon bycatch in Federal gillnet fisheries.²² MAFMC jointly with the New England Fishery Management Council, are creating a framework to reduce bycatch of Atlantic sturgeon specifically in monkfish and spiny dogfish gillnet fisheries.²³ Furthermore, a recent update demonstrating relatively high bycatch estimates caused NMFS to “encourage the Councils to consider relatively more impactful approaches.”²⁴ The ASMFC acknowledged in its Research Priorities and Recommendations to Support Interjurisdictional Fisheries Management for Atlantic sturgeon that 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.”²⁵

The state of New Jersey, through the Fish and Wildlife division of NJ DEP, regulates recreational and commercial fishing in its sovereign waters.²⁶ The NJ DEP division of Fish

¹⁸ NOAA Fisheries, *Understanding Bycatch*, BYCATCH, <https://www.fisheries.noaa.gov/insight/understanding-bycatch> (last visited June 10, 2024).

¹⁹ *Id.*

²⁰ *Id.*

²¹ The Atlantic Sturgeon Bycatch Working Group was comprised of representatives from the Greater Atlantic Regional Fisheries Office, Northeast Fisheries Science Center, New York State Department of Environmental Conservation, Bureau of Marine Resources, New Jersey Department of Environmental Protection, Marine Fisheries, Delaware Division of Fish and, Maine Department of Marine Resources, Rhode Island Department of Environmental Management, Division of Marine Fisheries, Connecticut Department of Energy and Environmental Protection, Marine Fisheries Program. See SPENCER TALMAGE, ET AL., ACTION PLAN TO REDUCE ATLANTIC STURGEON BYCATCH IN FEDERAL LARGE MESH GILLNET FISHERIES 5 (2022).

²² *Id.*

²³ Mid-Atlantic Fishery Management Council, *Overview*, STURGEON BYCATCH FRAMEWORK, <https://www.mafmc.org/actions/sturgeon-bycatch-framework> (accessed June 10, 2024).

²⁴ *Id.*

²⁵ ATLANTIC STATES MARINE FISHERIES COMMISSION, RESEARCH PRIORITIES AND RECOMMENDATIONS TO SUPPORT INTERJURISDICTIONAL FISHERIES MANAGEMENT 2–3 (2017).

²⁶ NJ Fish & Wildlife, *Licenses & Permits*, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

and Wildlife issues commercial fishing licenses and permits.²⁷ For species which New Jersey does not require a permit or license, commercial fishing operations are limited through state regulations which dictate the catch of the relevant species, such as Weakfish, Winter Flounder, and Scup.²⁸ Numerous studies analyzing Atlantic sturgeon bycatch have identified several types of commercial fisheries that are commonly and consistently found to cause bycatch of Atlantic sturgeon. Those studies which collect data on Atlantic sturgeon bycatch committed by fisheries in New Jersey affirm that there is an issue of Atlantic sturgeon bycatch in state authorized fisheries similar to the issue of Atlantic sturgeon bycatch in Federal fisheries as recognized by NOAA Fisheries and others working to reduce the instances of Atlantic sturgeon bycatch in Federal fisheries. Specifically, these studies find that a variety of different commercial fisheries in New Jersey engage in the bycatch of Atlantic sturgeon.²⁹ Those same fisheries are authorized to engage in commercial fishing in New Jersey through the states' authority through either a required permit³⁰ or license,³¹ or if one is not required, through abiding by the species' applicable regulations.³²

VIOLATIONS OF THE ENDANGERED SPECIES ACT

Through its authorization of commercial fisheries which are committing incidental takings of Atlantic sturgeon through bycatch without an incidental take permit required by Section 10, New Jersey is violating Section 9 of the ESA.

New Jersey is liable for the Atlantic sturgeon bycatch that occurs at its commercial fisheries as a result of its authorization for the commercial fishery to operate. Without New Jersey's authorization for the commercial fisheries to operate, the Atlantic sturgeon would not be exposed to the potential of bycatch, therefore, making New Jersey liable as a proximate cause of the taking of Atlantic sturgeon.³³ Furthermore, New Jersey is in violation of Section 10 for its failure to obtain an incidental take permit for Atlantic sturgeon bycatch committed by its authorized commercial fisheries.

New Jersey Allows Commercial Fisheries to Illegally Capture Sturgeon Through Bycatch

The definition of "take" includes both "harm" and "capture" as actions which are prohibited by Section 9. Capture which causes harm is subsumed under "harm" in the definition of take, and means that Congress must have intended a meaning distinct from "harm."³⁴ Therefore, even where a protected species is harmlessly captured, it has been

<https://dep.nj.gov/njfw/licenses-and-permits/> (last visited July 1, 2024).

²⁷ *Id.*

²⁸ See N.J. Admin. Code § 7:25-8.12 (a), (j), & (k) (imposing regulations upon the commercial fisheries for Weakfish, Winter Flounder, and Scup respectively).

²⁹ Keith J. Dunton et al., *Marine Distribution and Habitat Use of Atlantic Sturgeon in New York Lead to Fisheries Interactions and Bycatch*, 7 *Marine & Coastal Fisheries: Dynamics, Mgmt., & Ecosystem Sci.* 18 (2015).

³⁰ See, e.g., N.J. Admin. Code § 7:25-18.12, *infra* note 75.

³¹ See, e.g., N.J. Admin. Code § 7:25-18.12, *infra* note 76.

³² See, e.g., N.J. Admin. Code § 7:25-18.12, *infra* note 77.

³³ See *infra* notes 69–71.

³⁴ *C.f.* *Animal Welfare Inst. v. Martin*, 588 F.Supp.2d 70, 98 (D. Me. 2008) (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)) (stating that "[t]rapping that causes harm is subsumed under 'harm' and by adding the term 'trap,' Congress must have intended a meaning distinct from 'harm'").

subject to a prohibited take under the statute.”³⁵ Even if no member of the protected species has been harmed, a member of the protected species being captured is enough to constitute a “take” “as that term is expansively defined in the ESA.”³⁶ The ESA “explicitly prohibits such take in the absence of an [incidental take permit].”³⁷

An animal is “captured” when someone has gained control through force for some period of time.³⁸ As there is a “broad definition afforded to ‘take,’ ‘capture’ as a sub-component of ‘take’ according to the regulations, must also be construed broadly.”³⁹ Courts have found that a party gained control through force for some period of time where the protected species is merely entangled in fishing gear.⁴⁰

Fishing equipment used by the commercial fisheries in New Jersey is causing bycatch of Atlantic sturgeon. Consequently, the commercial fisheries are illegally capturing Atlantic sturgeon and violating Section 9’s prohibition on takes. The correlation between the commercial fisheries and their incidences of Atlantic sturgeon bycatch are documented and demonstrated by numerous scientific studies. For example, studies have shown that while Atlantic sturgeon have been subject to bycatch from the activities of 13 different commercial fisheries, “[t]he Summer Flounder fishery generated 73% of Atlantic Sturgeon trawl bycatch” and “[m]uch of the observed bycatch was from vessels engaged in the Summer Flounder fishery landing in New Jersey.”⁴¹

New Jersey is aware of the presence of Atlantic sturgeon. When the New York Bight population of Atlantic sturgeon was originally listed as endangered in 2012, NMFS stated that although “there have been reductions in fishing effort in state and Federal waters, which most likely would result in a reduction in bycatch mortality of Atlantic sturgeon,” “continued bycatch in state and federally-managed fisheries” remains a significant threat to the New York Bight Atlantic sturgeon.⁴²

Atlantic sturgeon bycatch has been repeatedly confirmed by both governmental and scientific communities alike as a threat to the species’ conservation since the Atlantic sturgeon’s listing as an endangered species.

Shallow marine distributions during migration and the formation of aggregations are placing Atlantic Sturgeon at risk for bycatch in coastal trawl and gill-net fisheries based in New York and New Jersey. Research survey and commercial fishery observer data suggest that interactions

³⁵ Martin, 588 F.Supp.2d at 98. *See also* Oceana, Inc. v. Gutierrez, 488 F.3d 1020, 1022 n.3 (D.C. Cir. 2007) (stating that “take” not only includes sea turtles that have been killed, but also those that have been caught and released); Ctr. for Biological Diversity v. Little, 2024 U.S. Dist. LEXIS 49611, at *29 (D. Idaho 2024).

³⁶ *C.f.* Martin, 588 F.Supp.2d at 98. (finding that “even if a lynx is harmlessly trapped, it has been subject to a prohibited take under the statute”).

³⁷ *Id.*

³⁸ Strahan v. Holmes, 595 F.Supp.2d 161, 165 (D. Mass. 2009).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Dunton, *supra* note 29 at 26.

⁴² 77 Fed. Reg. 5,880, 5,883 (Feb. 6, 2012).

between Atlantic Sturgeon and fisheries are most likely to occur during seasonal migrations along coastal New York during April to June and October to November.⁴³

Although “[t]he highest bycatch of Atlantic Sturgeon was observed in the Summer Flounder bottom trawl fishery and the Goosefish gill-net fishery[,]” Atlantic sturgeon were found to be captured as bycatch in 13 different fisheries: Summer Flounder, longfin inshore squid, Winter Flounder, Striped Bass, Winter Skate, Silver Hake, Weakfish, Bluefish, Red Hake, Scup, Little Skate, Tautog, and one unidentified species.⁴⁴

In fact, Atlantic Sturgeon may be the most at risk of experiencing bycatch in the New York and New Jersey region compared to the entire Atlantic Coast. The coastal subregion of New York and New Jersey is estimated to recapture thirty percent of tagged Atlantic sturgeon whereas the entire United States coast is only estimated to recapture between eight to fourteen percent.⁴⁵ An analysis of both tag reporting and data from the Northeast Fisheries Observer Program (“NEFOB”) demonstrates that “trawling within the [New York Bight] region appears to represent a bigger threat to Atlantic Sturgeon recovery compared to other locations.”⁴⁶

While most states in the region offer Atlantic Sturgeon *de facto* protection from bycatch by limiting or excluding trawling in state waters, New Jersey limits trawling only within a 3.22-km arc of coastline around navigable inlets, further compounding the problem of bycatch.⁴⁷ “The NEFOP data shows that 64% of Atlantic Sturgeon bycatch in otter trawling occurs in state waters, with a majority of incidents occur[ring] in known aggregation areas along wester Long Island,” including the area off of Highlands, New Jersey.⁴⁸ Notably, “[c]aptures in observed gill-net fishing trips occurred more frequently off the coast of New Jersey.”⁴⁹ It’s not just a specific type of fishing gear that results in higher than normal rates of Atlantic sturgeon bycatch off the coast of New Jersey, however, as “[m]uch of the observed bycatch was from vessels engaged in the Summer Flounder fishery landing catch in New Jersey” as a whole.⁵⁰

⁴³ Dunton et al., *supra* note 29 at 18, 26 (citing Personal Communication with Sheila Eyler, U.S. Fish & Wildlife Serv., Maryland Fishery Resources Office (on file with author Keith J. Dunton); Sheila Eyler et al., *Atlantic coast sturgeon tagging database*, U.S. FISH & WILDLIFE SERVICE (2009) (unpublished) (on file with the Maryland Fishery Resources Office) (Annapolis, Maryland)). *See also* 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, 176 (2004) (see Figure 3 on page 175 and Table 3 on page 176).

⁴⁴ Dunton et al., *supra* note 29 at 26.

⁴⁵ *Id.*

⁴⁶ *Id.* at 31, Table 4 (above).

⁴⁷ *Id.* at 28; *see id.* at 31, Table 4 (above).

⁴⁸ *Id.* at 24, 28.

⁴⁹ *Id.* at 24.

⁵⁰ *Id.* at 26.

TABLE 4. Regional spatial restrictions for bottom trawling.

State	Bottom trawl limits	Regulatory code
Massachusetts	Spatial and temporal trawl closure areas to protect spawning fish	Code of Massachusetts Regulations, Title 322, section 8.09
New Hampshire	Complete ban on trawls in state waters	New Hampshire Revised Statutes Annotated, section 211.49
New Jersey	No trawling within 3.22 km of coast (limited exception for shrimp trawls)	New Jersey Administrative Code, Title 7:25, section 18.14(b)
New York	2.41–3.22-km arc seaward of inlets with Atlantic Ocean; various spatial restrictions within Atlantic Ocean, Long Island Sound, and inland bays	New York Environmental Law, section 13-0341
Delaware	Bottom trawling prohibited in state waters, except for scientific purposes	Delaware Code Annotated, Title 7, section 927
Maryland	Bottom trawling prohibited within 1.61 km of coastal shore or in Chesapeake Bay or bays behind the Atlantic barrier islands	Code of Maryland Regulations, Title 08.02, section 05.03

New Jersey could adopt more restricted trawl zones similar to those of neighboring states to protect important sturgeon aggregation areas (see Table 4 above) or employ less restrictive spatial and temporal closures to protect migrating fish.⁵¹ New Jersey's tolerance of trawling and other fishing practices in its sovereign waters and its failure to take action on the sturgeon bycatch has facilitated and is facilitating the ongoing take of sturgeon.

New Jersey Allows Commercial Fisheries to Illegally Harm Atlantic Sturgeon Through Bycatch

In addition to simply capturing Atlantic sturgeon, bycatch is causing an immediate harm and death to Atlantic sturgeon, which constitutes another illegal taking under Section 9. The Secretary of the Interior defined "harm" referenced in the definition of "take" as "an act which actually kills or injures wildlife."⁵² The Ninth Circuit interpreted the term "actually" in this definition to include not only instances of past and present deaths or injuries, but also instances where there is "an imminent threat of death or injury."⁵³ The Ninth Circuit does not look for absolute certainty, but instead requires that this imminent threat be "reasonably certain"⁵⁴ or "sufficiently likely" to occur.⁵⁵ District courts outside the Ninth Circuit have followed this logic that a showing of historic injury or absolute certainty of injury is not required to find harm, and a reasonable certainty of imminent harm is sufficient.⁵⁶ Requiring absolute certainty to constitute a taking "would frustrate the purpose of the ESA to protect endangered species before they are injured."⁵⁷

⁵¹ See *e.g. id.* at 28-29.

⁵² 50 C.F.R. § 17.3.

⁵³ *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784-85 (9th Cir. 1995); *Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996).

⁵⁴ *Rosboro*, 50 F.3d at 784; *Murrelet*, 83 F.3d at 1066.

⁵⁵ *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994).

⁵⁶ *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F.Supp.2d 540, 563-64 (D. Md. 2009); *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 11 F. Supp. 2d 529, 552 (D. V.I. 1998); *Humane Soc'y of U.S. v. Kienzle*, 333 F. Supp. 3d 1236, 1251 (D. N.M. 2018).

⁵⁷ *Beech Ridge*, 675 F.Supp.2d at 563-64.

Harm as a result of a bycatch is not limited to death or “observable physical trauma” to the protected species.⁵⁸ Even where there is no sign of a serious physical injury, the catch itself can cause harm to the animal through stress that is associated with the capture and can impact the animal’s lifespan or ability to reproduce.⁵⁹ Consequently, Section 9 prohibits harm that manifests as death from bycatch as well as the consequences of bycatch on the Atlantic sturgeon’s lifespan or its ability to reproduce.

ASMFC population projections predict that 4% total annual mortality of Atlantic sturgeon due to bycatch would put recovering populations at risk.⁶⁰ Alarmingly, Michael Melnychuk, et al. found that approximately 6% cumulative mortality was already estimated for tagged subadult sturgeon during relatively short periods of twelve to seventeen weeks in late spring, and total annual mortality estimates were twice this level (11.7%).⁶¹ The study concluded that total mortality could be too high for species recovery, depending on the impacts of bycatch: “[i]f mortality along coastal Long Island[, which includes parts of New Jersey,] is greater than typical levels along the greater Atlantic Coast and Hudson River, and if our study period is representative of longer-term trends, then annual total mortality of the Hudson River population is presently too high to allow for recovery.”⁶²

Melnichuk, et al. compared the estimated natural mortality rate to total mortality rate to conclude an estimated 5.86% of sturgeon mortality is attributed to bycatch annually.⁶³ The rate of bycatch mortality may vary depending on the size of the catch in which the bycatch occurs, which is noted by the scientific community. To develop best practices essential to increasing survival rates, researchers have called for a more detailed study of how the total catch size impacts handling practices⁶⁴ Studies like these can be implemented by the state of New Jersey development of an HCP and procurement of the incidental take permit required by the ESA.

Even with these studies, ascertaining the true extent of bycatch mortality is difficult and likely to be underestimated based on latent mortality impacts experienced by the

⁵⁸ *Strahan v. Sec’y, Mass. Exec. Off. of Energy & Env’t Affs.*, 458 F.Supp.3d 76, 87 (D. Mass. 2020) (finding that even where a whale is caught and released without a serious physical injury the catch itself can cause harm to the whale through the stress associated with the capture).

⁵⁹ *Id.* See also *Wildearth Guardians v. U.S. Fish & Wildlife Serv.*, 342 F.Supp.3d 1047, 1064-65 (stating that the word “injury” as used within the ESA may encompass the “pain or stress” that results from trapping an animal, even when the animal is released and there is “no physical indication of harm”).

⁶⁰ 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) (stating that to “remain stable or grow, populations of Atlantic sturgeon can sustain only very low anthropogenic sources of mortality (<4% per year”).

⁶¹ 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* 921-22 (2016).

⁶² *Id.* at 922 (note that these levels represent total mortality, however, not mortality from bycatch alone).

⁶³ *Id.* (“Assuming that the estimated average weekly mortality in fall and winter of 0.12% is comprised entirely of natural mortality, and applying this weekly mortality to a full year, yields annual natural mortality of 5.88%. The difference between annual total mortality, 11.73%, and annual natural mortality results in estimated annual fishing mortality of 5.86%, attributable to incidental catches.”)

⁶⁴ Dunton et al., *supra* note 29 at 28.

sturgeon: “[t]he mortality rate for Atlantic Sturgeon captured in commercial trawling is unknown; however, direct observations of deceased juvenile Atlantic Sturgeon are frequently made on beaches close to the Rockaway aggregation region during the spring and fall and adjacent to coastal areas that experience high-frequency bottom trawling.”⁶⁵ While “94% of otter trawl captures observed by the [NEFOP] are released alive, the delayed effects of stress and injuries may occur for weeks after the initial capture.”⁶⁶ Thus, this 94% survival rate of sturgeon subjected to bycatch is likely significantly inflated, and does not represent the true survival rate of the Atlantic sturgeon.

Finally, the true rates of take as the result of incidental bycatch are only estimated based on current and past experiences of observable occurrences. NMFS itself recognizes that the frequency of lethal bycatch incidences of Atlantic Sturgeon is set to increase with the impacts from climate change. “Sturgeon bycatch in hot water is more likely to result in death due to the combination of the stress caused by the warmer temperatures and the stress of being accidentally captured.”⁶⁷ As a result, not only are current estimates of lethal incidences of incidental bycatch likely undercounted based on the delayed effects of stress and injuries to the Atlantic Sturgeon that do not always immediately manifest upon release, they are further undercounting the likely future mortality rates as climate change impacts continue to worsen.

New Jersey Is a Liable Third Party Due to Its Regulatory Authority

In addition to parties that directly cause a take to occur, the ESA also attaches liability to third parties that have indirectly brought about a take.⁶⁸ This includes governmental third parties that have caused a take pursuant to their regulatory authority.⁶⁹ A governmental third party causes a take pursuant to its regulatory authority when it uses its authority to make lawful an act which results in a taking: “a regulatory entity that ‘exerts control’ over an activity in a way that the ‘regulatory entity purports to make lawful an activity that allegedly violates the ESA,’ has engaged in a taking under the ESA.”⁷⁰ ‘Exerting control’ by a governmental third party can include instances where it

⁶⁵ *Id.* (citing Keith J. Dunton, Population dynamics of juvenile Atlantic Sturgeon, *Acipenser oxyrinchus oxyrinchus*, within the northwest Atlantic Ocean (2014) (Ph.D. dissertation, Stony Brook University) (on file with author Keith J. Dunton); Personal communication with T. Lomschumbo, Gateway National Recreation Area (on file with author Keith J. Dunton)).

⁶⁶ *Id.* (citing Michael W. Davis, *Key principles for understanding fish bycatch discard mortality*, 59 CAN. J. FISHERIES & AQUATIC SCI. 1834–43 (2002); Matt K. Broadhurst et al., *Estimating collateral mortality from towed fishing gear*, 7 FISH & FISHERIES 180–218 (2006)).

⁶⁷ Office of Protected Resources, *Atlantic Sturgeon and Climate Change: Warming Water Impacts Spawning and Development*, NOAA FISHERIES (Oct. 26, 2023) <https://www.fisheries.noaa.gov/feature-story/atlantic-sturgeon-and-climate-change-warming-water-impacts-spawning-and-development#:~:text=Sturgeon%20bycatch%20in%20hot%20water,temperatures%20in%20rivers%20and%20bays> (last visited June 27, 2024).

⁶⁸ *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997).

⁶⁹ *Id.*; see also *Defs. of Wildlife v. Env’t Prot. Agency*, 882 F.2d 1294, 1301 (8th Cir. 1989).

⁷⁰ *Wishtoyo Found. v. Hattoy*, 2007 U.S. Dist. LEXIS 42951, at *7 (C.D. Cal. 2007) (citing *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1251 (11th Cir. 1998)).

directly licenses the activity that causes a take,⁷¹ or where an actor engages in an activity pursuant to the governmental third party's laws and regulations that causes a take.⁷² A governmental third party may also be liable under the ESA when it causes a take through inaction or failure to regulate.⁷³

Even when an actor has the ability to engage in an activity pursuant to governmental authority without causing a take, the governmental third party may still be considered the cause of a take if one does occur, as the liability of the governmental third party under the ESA "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."⁷⁴ A governmental third party may not be the proximate cause of a resulting incidental take, and therefore not be liable, only if there is an "independent intervening actor" that causes the take by disregarding the governmental authorization and regulations.⁷⁵

New Jersey's official regulations for all commercially harvested marine fish are codified at Title 7, Chapter 25, Subchapter 18 of the New Jersey Administrative Code. Of the thirteen fisheries identified to have resulted in incidental bycatch, and thus, a take, of Atlantic sturgeon, two require direct permitting from the State of New Jersey in order to engage in the activities resulting in take,⁷⁶ one requires the possession of a valid Federal commercial permit,⁷⁷ and three are subject to special regulations imposed by the State.⁷⁸ Additionally, the recreational fishing of Striped Bass is covered in a different section. The remaining six fisheries either do not appear in the regulations, or are only subject to recreational fishing regulations.

New Jersey is exerting control (*i.e.*, permitting, regulating, and failing to regulate commercial fisheries) over the activity (*i.e.*, commercial fisheries operating in state waters) in a way that purportedly makes lawful the activity which violates Section 9 of the ESA (*i.e.*, authorizing incidental takings through capture without having a Section 10 permit to incidentally take a protected species). New Jersey itself has violated the Act as the proximate cause of the unpermitted incidental takes of Atlantic sturgeon occurring due to

⁷¹ See *e.g.*, Strahan, 127 F.3d at 163-64; Animal Prot. Inst. v. Holsten, 541 F.Supp.2d 1073, 1079-80 (D. Minn. 2008).

⁷² See *e.g.*, Flathead-Lolo-Bitterroot Citizen Task Force v. Montana, 98 F.4th 1180, 1192-93 (9th Cir. 2024); Defs. of Wildlife, 882 F.2d at 1301.

⁷³ See *e.g.*, Am. Bird Conservancy v. Harvey, 232 F.Supp.3d 292, 309-10 (E.D.N.Y. 2017); United States v. Town of Plymouth, 6 F.Supp.2d 81, 90-91 (D. Mass. 1998).

⁷⁴ Holsten, 541 F.Supp.2d at 1079.

⁷⁵ Strahan, 127 F.3d at 164; Holsten, 541 F.Supp.2d at 1079; see also Loggerhead Turtle v. Cnty. Council, 92 F.Supp.2d 1296, 1307 (M.D. Fla. 2000) (holding that County was not liable for sea turtle takings because they occurred as a result of actors who were not following the County ordinance).

⁷⁶ See N.J. Admin. Code § 7:25-18.12(c)(2), (i)(1) (requiring a valid New Jersey state permit for the commercial fishing of Tautog and Summer Flounder respectively).

⁷⁷ See N.J. Admin. Code § 7:25-8.12(b) (requiring a valid Federal commercial permit for commercial fishing of Bluefish).

⁷⁸ See N.J. Admin. Code § 7:25-8.12 (a), (j), & (k) (imposing regulations upon the commercial fisheries for Weakfish, Winter Flounder, and Scup respectively).

Atlantic sturgeon bycatch.

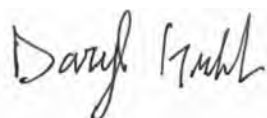
Further exacerbating the flagrant violations of the Endangered Species Act highlighted in this letter is the fact that they are willful and deliberate. An ASMFC Review of the Interstate Fishery Management Plan for Atlantic Sturgeon, completed in 2019, outlines the status of ESA Section 10(a)(1)(B) incidental take permits for Atlantic sturgeon by state.⁷⁹ New Jersey is listed as “developing” its incidental take permit, with the status rationale listed as: “Applying for a renewal of the previous ITP. Will submit a final draft of Section 10 Plan once successfully calculate bycatch estimates.”⁸⁰ In the same review completed in 2022, and New Jersey’s status for its Incidental Take Permit is still listed as “developing” and has been updated to indicate that a renewal application for its previous ITP, NMFS Permit No. 21858, has been submitted and GARFO is working on finalizing details.⁸¹

However, no Incidental Take Permit application is listed on the NOAA website and no previously-issued permit appears either.⁸² In contrast a number of states demonstrate how progress is achievable within the same timeframe: North Carolina, Georgia, South Carolina, and Virginia have submitted incidental take permit applications for Atlantic sturgeon bycatch. Of those, North Carolina and Georgia’s permits have been granted,⁸³ while South Carolina and Virginia’s permits are pending.⁸⁴

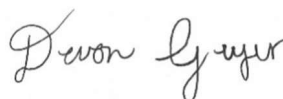
CONCLUSION

If the parties involved do not cure the violations of law described above immediately, upon the expiration of 60 days, the Delaware Riverkeeper, Maya van Rossum, and Delaware Riverkeeper Network, the Hudson Riverkeeper, Tracy Brown, and Riverkeeper, Inc., intend to file suit against you pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). If you would like to discuss the significant violations described herein and seek a mutually acceptable solution to them, please contact the undersigned.

Sincerely,



Daryl D. Grable
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⁷⁹ ATL. STATES MARINE FISHERIES COMM’N, REVIEW OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR ATLANTIC STURGEON 15 (2019).

⁸⁰ *Id.*

⁸¹ ATL. STURGEON PLAN REVIEW TEAM, 2018-2022 REVIEW OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION FISHERY MANAGEMENT PLAN FOR ATLANTIC STURGEON 18 (2022).

⁸² NOAA Fisheries, *Incidental Take Permits*, ENDANGERED SPECIES CONSERVATION, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/incidental-take-permits> (last visited July 1, 2024).

⁸³ *Id.*; ATL. STURGEON PLAN REVIEW TEAM, *supra* note 81 at 18.

⁸⁴ *Id.*

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