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## Policy Preference: An Unreasonable Means to Advance Moot Claims Under the Endangered Species Act

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# POLICY PREFERENCE: AN UNREASONABLE MEANS TO ADVANCE MOOT CLAIMS UNDER THE ENDANGERED SPECIES ACT

MOLLY MCGRATH\*

**Abstract:** Citizen plaintiffs play a vital role in the enforcement of the Endangered Species Act (“ESA”). In *Strahan v. Roughead*, the United States District Court for the District of Massachusetts opened the possibility for expansion of a citizen’s ability to impose its own policy preference upon federal agencies working to comply with their statutory requirements under the ESA. Although the District Court properly denied the defendant’s motion to dismiss on the basis of mootness, it erred in its rationale. A plaintiff’s claim under the ESA may survive a mootness challenge, even after the violating agency has reinitiated consultation with its overseeing agency, if the potential for relief on alternative grounds remains. Valid alternate bases for relief include award of an injunction when a compliance plan does not encompass the full range of an agency’s activities, or when an agency fails to demonstrate compliance with an existing plan. A citizen’s mere suggestion that an agency’s compliance plan adopt alternate protective measures, however, should not extend the life of an otherwise moot claim.

## INTRODUCTION

In 1999, a researcher spotted a North Atlantic right whale in the Norwegian bay of LoppHAVET.<sup>1</sup> He contacted his colleagues to report this unusual appearance.<sup>2</sup> In the 1600s, LoppHAVET served as a major breeding ground for right whales, but none had been spotted in the remote sanctuary in several centuries.<sup>3</sup> An individual whale’s ability to follow the migratory route of its long-deceased ancestors suggests that the right whale possesses either a significant institutional memory or evolutionary instinct to seek out new breeding grounds at great distance.<sup>4</sup>

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

<sup>1</sup> See SCOTT D. KLAUS & ROSALIND M. ROLLAND, *The Urban Whale Syndrome*, in THE URBAN WHALE: NORTH AMERICAN RIGHT WHALES AT A CRISIS 488–90 (Scott D. Klaus & Rosalind M. Rolland eds., 2007) (noting that the majority of right whales now live most of their lives within 160 kilometers of the densely populated North American Atlantic coast).

<sup>2</sup> See *id.* at 488.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 489; see Jennifer McWeeny, *Sounding Depth with the North Atlantic Right Whale and Merleau Ponty: An Exercise in Comparative Phenomenology*, J. FOR CRITICAL ANIMAL STUD., Jan. 2011, at 144, 155 (discussing maternal teaching, memory, and instinct as possible explanations for right whales’ ability to scout prey aggregations from thousands of kilometers away).

Due to their slow speed and tendency to travel long distances right whales remain vulnerable to ship strikes.<sup>5</sup> Right whales first received protection from intentional hunting under the multilateral 1931 Convention for the Regulation of Whaling.<sup>6</sup> In the United States, Congress designated right whales as an endangered species through the Endangered Species Act of 1973 (“ESA”).<sup>7</sup> With this federal protection, the right whale population increased from 295 in 1992 to nearly five hundred in 2010.<sup>8</sup> Yet, right whales remain vulnerable—a 2016 study reported a nearly forty percent decline in birth rate since 2010.<sup>9</sup> As a result, environmentalists have rallied around these fascinating creatures in an effort to prevent impending extinction.<sup>10</sup> In New England, conservation biologist Max Strahan serves as one of the right whales’ fiercest advocates.<sup>11</sup>

Litigation is Strahan’s primary weapon in his crusade against right whale extinction.<sup>12</sup> He often invokes the ESA’s citizen suit provision to initiate lawsuits against government entities whose actions contribute to species decline and habitat destruction.<sup>13</sup> The ESA’s citizen suit provision is a means for concerned actors to ensure that a government agency complies with procedural requirements when the agency acts in a way that risks harm

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<sup>5</sup> NOAA Files *Environmental Impact Statement on Ship Strike Reduction Measures*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 28, 2008), [http://www.noaanews.noaa.gov/stories2008/20080825\\_shipstrike.html](http://www.noaanews.noaa.gov/stories2008/20080825_shipstrike.html) [<https://perma.cc/AQ7D-Q2VL>] (recognizing that right whales’ slow speed and migratory patterns through shipping lanes along the United States’ eastern coast serve as major contributory factors to declining population).

<sup>6</sup> Convention for Regulation of Whaling art. 4, Mar. 31, 1932, 49 Stat. 3079, L.N.T.S. 8080 (referring to right whales as “North Cape whales”); *A History of the International Whaling Commission*, WORLD WILDLIFE FUND, [http://wwf.panda.org/what\\_we\\_do/endangered\\_species/cetaceans/cetaceans/iwc/history/](http://wwf.panda.org/what_we_do/endangered_species/cetaceans/cetaceans/iwc/history/) [<https://perma.cc/EJ3A-X3DQ>].

<sup>7</sup> Endangered Species Act, 16 U.S.C. § 1533(c)(1) (2012); 50 C.F.R. § 17.11 (2016).

<sup>8</sup> *Endangered Right Whale Population Threatened by Entanglements and Dramatically Declining Birth Rate*, SCIENCE DAILY (Sept. 1, 2016), <https://www.sciencedaily.com/releases/2016/09/160901092829.html> [<https://perma.cc/HAY6-5WAB>].

<sup>9</sup> THOMAS A. JEFFERSON ET AL., MARINE MAMMALS OF THE WORLD: A COMPREHENSIVE GUIDE TO THEIR IDENTIFICATION 33 (2d ed. 2015) (discussing contributing factors to right whale population decline, including scars from ship strikes, vessel collisions, habitat destruction, pollution, and disturbance resulting from vessel traffic); *Endangered Right Whale Population Threatened by Entanglements and Dramatically Declining Birth Rate*, *supra* note 8.

<sup>10</sup> See Megan Tady, *Environmentalists Urge Greater Right Whale Protections*, NEW STANDARD (June 6, 2006), <http://newstandardnews.net/content/index.cfm/items/3255> [<https://perma.cc/X7LZ-QN24>].

<sup>11</sup> See Carey Goldberg, *A Boston Firebrand Alienates His Allies Even as He Saves Whales*, N.Y. TIMES (Jan. 23, 1999), [http://www.nytimes.com/1999/01/23/us/a-boston-firebrand-alienates-his-allies-even-as-he-saves-whales.html?\\_r=0](http://www.nytimes.com/1999/01/23/us/a-boston-firebrand-alienates-his-allies-even-as-he-saves-whales.html?_r=0) [<https://perma.cc/V9S8-VNBX>].

<sup>12</sup> See *id.*

<sup>13</sup> *Id.*; see *Strahan v. New Eng. Aquarium*, 25 F. App’x 7, 9 (1st Cir. 2002); *Strahan v. Linnon*, 967 F. Supp. 581, 592 (D. Mass. 1997).

to an endangered species.<sup>14</sup> Recognizing that all agency action occurring in proximity to an endangered species' habitat carries a risk of harm, agencies are permitted a specified level of authorized taking, based on careful consultation with an overseeing agency.<sup>15</sup>

As a check on agency power, private citizens may challenge the adequacy of a subsidiary agency's consultation process, even after a subsidiary agency begins consultation with its overseeing agency.<sup>16</sup> In *Strahan v. Routhead*, Strahan invoked the citizen suit provision to seek an injunction against the United States Navy ("the Navy") for its alleged violation of its duties to engage in formal consultation and to develop and implement said compliance plan.<sup>17</sup> Because of these violations, Strahan argued that the Navy could not adequately ensure the continued existence of the right whale species or protection of the species' habitat.<sup>18</sup> In addition, Strahan sought a permanent injunction to prevent Navy ship operations within one thousand yards of federally protected whales.<sup>19</sup> The United States District Court for the District of Massachusetts found that the Navy failed to demonstrate the adequacy of its compliance process, preserving Strahan's potential for meaningful relief on the merits of the case.<sup>20</sup> Therefore, the District Court rejected the Navy's motion to dismiss on the basis of mootness.<sup>21</sup>

Although Strahan's procedural success serves as a reminder of the important role citizen plaintiffs play in ensuring that government agencies adhere to truly comprehensive compliance plans, *Strahan* establishes a questionable precedent.<sup>22</sup> This Comment argues that, where other circuit courts recognize meaningful relief beyond re-initiation of consultation, the District

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<sup>14</sup> 16 U.S.C. § 1540(g) (2012); see Jonathan Adler, *Stand or Deliver: Citizen Suits, Standing and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 41–42 (2001).

<sup>15</sup> 16 U.S.C. § 1536(o)(2) (classifying takings made in compliance with written statements—prepared by an overseeing agency after consultation—as not prohibited); see also *id.* § 1532(19) (defining "take" as an act or attempt to engage in an act meant "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species).

<sup>16</sup> See *id.* § 1532. Such challenges may result in the re-initiation of consultation between the subsidiary agency and the overseeing agency. See *id.* Before proceeding with an action expected to impact an endangered species or its critical habitat, the Endangered Species Act ("ESA") requires all federal agencies to engage in consultation with their overseeing agency to assess the potential impact of the action and to develop reasonable alternatives to minimize impact of the action upon the listed endangered species. *Id.* In the context of the ESA, overseeing agencies are specifically tasked guiding the action of other federal entities in stewardship of biological life. See NAT'L MARINE FISHERIES SERV., NAT'L OCEANIC & ATMOSPHERIC ADMIN., STEWARDSHIP OF LIVING MARINE RESOURCES 1 (2016), <http://www.legislative.noaa.gov/policybriefs/NMFS-FY17.pdf> [https://perma.cc/2F6P-8HR8].

<sup>17</sup> See 910 F. Supp. 2d 358, 367 (D. Mass. 2012).

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 381.

<sup>21</sup> See *id.* at 382.

<sup>22</sup> See *id.*; Adler, *supra* note 14, at 42.

Court's decision in *Strahan* suggests that citizens' policy suggestions may extend the life of an otherwise moot claim.<sup>23</sup>

### I. FACTS AND PROCEDURAL HISTORY

On May 30, 2008, plaintiff Max Strahan filed a complaint *pro se* against the Navy in the United States District Court for the District of Massachusetts.<sup>24</sup> Strahan alleged that naval operations along the Atlantic Coast, including ship strikes, equipment noise, and bomb discharges, routinely caused harm to whales protected by the ESA.<sup>25</sup> In three separate complaints, Strahan argued that the Navy violated §§ 7 and 9 of the ESA through unlawful takings of federally protected whales and by refusing to re-enter into formal consultation with the National Marine Fisheries Service ("NMFS") to address the impact of its operations.<sup>26</sup> The Navy filed a motion to dismiss for lack of subject matter jurisdiction based on mootness, arguing that it completed formal consultation with the NMFS to address the impact of its proposed actions.<sup>27</sup> The consultation produced an incidental take statement, which the Navy contended shielded the agency from liability for alleged violations of the ESA's consultation requirement.<sup>28</sup> The Navy argued, therefore, that Strahan lacked any potential for meaningful relief, rendering his claim moot.<sup>29</sup> After a brief discovery process, the Navy filed a renewed motion to dismiss, and Strahan opposed the motion.<sup>30</sup>

To support its motion to dismiss, the Navy filed thirteen exhibits, comprised of biological opinions and incidental take statements produced in conjunction with the NMFS.<sup>31</sup> In analyzing these exhibits, the District Court

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<sup>23</sup> See *Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006); *Nw. Env'tl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1241–45 (9th Cir. 1988); *Strahan*, 910 F. Supp. 2d at 380–81; *Or. Nat'l Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 994–95 (D. Or. 2010); *infra* notes 66–88 and accompanying text.

<sup>24</sup> See *Strahan*, 910 F. Supp. 2d at 362, 367.

<sup>25</sup> *Id.* at 367.

<sup>26</sup> 16 U.S.C. §§ 1536, 1538 (2012); *Strahan*, 910 F. Supp. 2d at 367.

<sup>27</sup> 16 U.S.C. § 1538; *Strahan*, 910 F. Supp. 2d at 363; 50 C.F.R. § 402.14(h)–(i) (2016).

<sup>28</sup> See 16 U.S.C. § 1538; *Strahan*, 910 F. Supp. 2d at 363, 367; 50 C.F.R. § 402.14(i) (defining "incidental take statement" as a binding opinion issued by an overseeing agency, specifying the allowable amount of incidental taking of a species and defining prudent measures to reduce impact upon species).

<sup>29</sup> See *Strahan*, 910 F. Supp. 2d at 363.

<sup>30</sup> *Id.* at 367.

<sup>31</sup> *Id.* at 369. A biological opinion is an assessment conducted by the overseeing agency, examining the effects of the subsidiary agency's actions upon endangered species and their critical habitat. 50 C.F.R. § 402.14(h). An incidental take statement is a compliance plan developed by the overseeing agency, outlining precautions the subsidiary must undergo to protect endangered species, and identifying a maximum number of the listed endangered species that may be legally harmed or taken as the result of the subsidiary agency's activities without violating the ESA. *Id.* § 402.14(i).

concluded that it was unclear whether the biological opinions and incidental take statements addressed the full scope of the Navy's activities along the coast.<sup>32</sup> In addition, the District Court concluded that the Navy failed to provide evidence to demonstrate compliance with existing incidental take statements.<sup>33</sup>

The District Court denied the Navy's renewed motion to dismiss and instructed the parties to complete discovery on the issue of mootness.<sup>34</sup> Subsequently, the District Court dismissed the case on August 23, 2013, in part because Strahan failed to comply with a separate court order.<sup>35</sup>

## II. LEGAL BACKGROUND

A claim is moot if the court is unable to provide any meaningful relief to the plaintiff.<sup>36</sup> In asserting a mootness claim, the moving party bears a heavy burden in demonstrating lack of meaningful relief.<sup>37</sup> If an event that extinguishes the possibility of the court providing meaningful relief to satisfy the plaintiff's claims occurs after the filing of the complaint, the court must dismiss the claim for lack of subject matter jurisdiction on the basis of mootness.<sup>38</sup>

Further, under the Federal Rules of Civil Procedure ("FRCP"), a defendant may seek a motion to dismiss for lack of subject matter jurisdiction on the basis of mootness.<sup>39</sup> In considering such motions, the United States Court of Appeals for the First Circuit has held that if facts underlying the jurisdictional question closely intertwine with the merits of the plaintiff's claim, the defendant must demonstrate that these facts are no longer in dispute.<sup>40</sup>

In *Torres-Negron v. J & N Records*, the First Circuit recognized that, if the facts that the court must analyze to resolve a jurisdictional question are the same facts it must analyze in deciding the merits of a plaintiff's cause of

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<sup>32</sup> See *Strahan*, 910 F. Supp. 2d at 376–77.

<sup>33</sup> *Id.* at 376.

<sup>34</sup> *Id.* at 382.

<sup>35</sup> See *Strahan v. Roughead*, No. 08-CV-10919-MLW, 2014 WL 2594082, at \*1 (D. Mass. June 9, 2014) (upholding Navy's motion to dismiss due to Strahan's failure to submit discovery report as required by 2013 court order).

<sup>36</sup> See *Calderon v. Moore*, 518 U.S. 149, 150 (1996); *Gulf of Me. Fishermen's All. v. Daley*, 292 F.3d 84, 87–88 (1st Cir. 2002).

<sup>37</sup> See *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

<sup>38</sup> See *Church of Sci. v. United States*, 506 U.S. 9, 12 (1992); *Gulf of Me. Fishermen's All.*, 292 F.3d at 88 (holding that the promulgation of new regulations following the initiation of an action to enjoin enforcement of previously promulgated regulations mooted the plaintiff's claims).

<sup>39</sup> FED. R. CIV. P. 12(b)(1); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362–63 (1st Cir. 2001).

<sup>40</sup> See *Torres-Negron v. J & N Records*, 504 F.3d 151, 163 (1st Cir. 2007).

action, the plaintiff's case may not be dismissed if those facts remain in dispute.<sup>41</sup> In contrast, where the facts that are determinative of the jurisdictional question are not intertwined with the merits of the plaintiff's claim, a court in the First Circuit may engage in fact-finding to decide whether it may hear the case.<sup>42</sup> Further, the First Circuit has held that factual allegations made by plaintiffs in a motion to dismiss under § 12(b)(1) of the FRCP should be credited as true in the absence of countervailing evidence presented by the defendant.<sup>43</sup>

In his suit against the Navy, *pro se* plaintiff Max Strahan sought injunctive and declaratory relief under §§ 7 and 9 of the Endangered Species Act ("ESA").<sup>44</sup> The ESA is a federal statute that allows the Secretary of the Interior to promulgate regulations protecting endangered or threatened species and to designate their natural habitat.<sup>45</sup> To prevent proposed agency actions from injuring or endangering species or damaging their habitats, the ESA requires federal agencies to engage in a formal consultation process with their overseeing agency.<sup>46</sup> The purpose of this formal consultation is to determine whether the proposed action might harm an endangered species, and whether the subsidiary agency can avoid or minimize the harm of its proposed actions.<sup>47</sup> The consultation process requires the overseeing agency to complete a biological opinion—cataloguing the potential impact of an agency action upon a species—and to create an incidental take statement—listing a specified amount of allowed harm and outlining protective measures.<sup>48</sup>

Section 9 of the ESA prevents agencies from unlawful takings of endangered species.<sup>49</sup> When contemplating an action likely to result in the incidental taking of an endangered species, a subsidiary agency may shield itself from liability under § 9 by initiating consultation with its overseeing

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<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See* Merlonghi v. United States, 620 F.3d 50, 53 (1st Cir. 2010); Aguilar v. U.S. Immigration & Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 8 (1st Cir. 2007).

<sup>44</sup> Strahan v. Roughead, 910 F. Supp. 2d 358, 368 (D. Mass. 2012).

<sup>45</sup> 16 U.S.C. § 1531 (2012). Damage of a listed species' natural habitat may constitute an unlawful taking because degradation can injure wildlife by disrupting behavioral patterns necessary to survival. *See* Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1106 (9th Cir. 2012). In developing a compliance plan, an overseeing agency examines the potential impact of agency action upon the natural habitat. 50 C.F.R. § 17.3 (2016).

<sup>46</sup> 16 U.S.C. § 1536; 50 C.F.R. § 402.14(i)–(h).

<sup>47</sup> 50 C.F.R. § 402.14(h)–(i).

<sup>48</sup> *Id.*

<sup>49</sup> 16 U.S.C. § 1538. The ESA defines "take" as an act or attempt to engage in an act meant "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species. *Id.* § 1532(19).

agency, pursuant to § 7 of the ESA.<sup>50</sup> In the event that initial informal consultation with the overseeing agency fails to fully address the possible harm resulting from a proposed action, the subsidiary agency must engage in a formal consultation process, in which the overseeing agency produces a biological opinion addressing the likelihood of harm and possible alternative policies that would comply with the ESA.<sup>51</sup> If the overseeing agency decides that the subsidiary agency's proposed action complies with the ESA, the overseeing agency issues an incidental take statement, specifying the amount of authorized taking, thus shielding the subordinate agency from liability.<sup>52</sup>

Prior to the First Circuit's decision in *Strahan v. Roughead*, other circuit courts established that a concerned citizen or organization's action alleging § 9 liability could survive a mootness challenge on several grounds.<sup>53</sup> For example, the United States Court of Appeals for the Ninth Circuit has held that agency action taken after development of a compliance plan still might constitute an unlawful taking of an endangered species, offering two primary justifications.<sup>54</sup> First, agency action might constitute an unlawful taking where the offending agency fails to show its existing plan addresses the full extent of its activities.<sup>55</sup> Second, agency action may constitute an

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<sup>50</sup> *Id.* § 1536(b)(4); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1239 (9th Cir. 2001).

<sup>51</sup> 16 U.S.C. § 1536(b)(4) (2012); *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1239.

<sup>52</sup> *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1239; 50 C.F.R. § 402.14(b)(1).

<sup>53</sup> *See Ctr. for Biological Diversity*, 698 F.3d at 1108; *Or. Nat'l Res. Council v. Allen*, 476 F.3d 1031, 1034–35, 1040 (9th Cir. 2007); *Ariz. Cattle Growers Ass'n*, 273 F.3d at 1239; *In re Operation of Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1160 (D. Minn. 2004). If an agency operates outside the bounds of the safe harbor established in its incidental take statement, it does so “at its own peril . . . for any person who knowingly takes an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.” *Bennett v. Spear*, 520 U.S. 154, 170 (1997). A citizen plaintiff may challenge the validity of an agency's creation of an incidental take statement or a biological opinion as arbitrary and capricious under the Administrative Procedure Act. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012).

<sup>54</sup> *See Forest Guardians v. Johanns*, 450 F.3d 455, 462–63 (9th Cir. 2006) (rejecting mootness challenge where potential for declaratory relief remained due to agency's unwillingness to comply with existing compliance plan); *Or. Nat. Res. Council*, 476 F.3d at 1036–37 (rejecting validity of an incidental take statement that failed to quantify allowed takings of northern spotted owls); *Or. Wild v. Connor*, No. 6:09–CV–00185–AA, 2012 WL 3756327, at \*2–\*3 (D. Or. Aug. 27, 2012) (noting that the subsidiary agency complied with and would be able to comply with an existing incidental taking statement); *Or. Nat. Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 994–995 (D. Or. 2010) (holding that the subsidiary agency could not demonstrate compliance with its incidental taking statement).

<sup>55</sup> *Or. Nat. Res. Council*, 476 F.3d at 1036–37 (rejecting validity of existing incidental take statement as arbitrary and capricious for failure to encompass full range of activities through its failure to quantify allowed takings).



unlawful taking where an agency fails to provide evidence of compliance with an existing plan.<sup>56</sup>

Even after re-initiation of consultation, additional forms of meaningful relief may defeat a mootness challenge.<sup>57</sup> In *Oregon Natural Desert Association v. Tidwell*, the defendant subsidiary agency began re-initiation of consultation after the plaintiff filed his claim.<sup>58</sup> The agency argued that, because re-initiation was the only means of the relief that a court could provide to the plaintiff, the plaintiff's claim was moot.<sup>59</sup> Noting the defendant agency's failure to comply with previous grazing authorizations and consultation plans, the court identified a potential injunction against the defendant agency as a meaningful form of relief still available to the plaintiff, enabling the suit to survive a mootness challenge.<sup>60</sup> In *Strahan v. Linnon*, the United States District Court for the District of Massachusetts mooted the plaintiff's claim because no meaningful relief remained, finding that the challenged consultation plan fully considered the agency's activities and that the agency had not violated this existing plan.<sup>61</sup>

In determining whether a plaintiff's opportunity for meaningful relief exists when inter-agency consultation is ongoing, the Ninth Circuit has held that an entity's failure to follow existing plans opens the possibility for court-provided relief beyond re-initiation of consultation.<sup>62</sup> For example, in *Oregon Natural Desert Association*, the United States District Court for the District of Oregon held that the challenged agency's repeated violations of existing grazing plans made the likelihood that a court could offer meaningful relief so great that the plaintiff's claim could not be properly mooted, as previous damage could carry over into subsequent seasons.<sup>63</sup> In *Northwest Environmental Defense Center v. Gordon*, the Ninth Circuit found that the plaintiff still had the opportunity for meaningful relief in the form of a declaratory judgment against the federal agency, even though the federal agency removed the opportunity for injunctive relief by reinitiating the consultation process.<sup>64</sup> In *Forest Guardians v. Johanns*, where the defendant

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<sup>56</sup> *Id.*; *Or. Nat. Res. Council* 476 F.3d at 1034–35; see *Or. Wild.*, 2012 WL 3756327, at \*2–\*3 (noting that the subsidiary agency complied with and would be able to comply with an existing incidental taking statement); *Or. Nat. Desert Ass'n*, 716 F. Supp. 2d at 994–995 (holding that the subsidiary agency could not demonstrate compliance with its incidental taking statement).

<sup>57</sup> *Forest Guardians*, 450 F.3d at 462–63.

<sup>58</sup> See 716 F. Supp. 2d at 994.

<sup>59</sup> See *id.* at 995.

<sup>60</sup> See *id.* The potential injunction would have ensured the defendant agency's compliance with a new consultation plan. See *id.*

<sup>61</sup> 957 F. Supp. 581, 597, 599 (D. Mass. 1997).

<sup>62</sup> See *Forest Guardians*, 450 F.3d at 462–63; *Or. Nat. Desert Ass'n*, 716 F. Supp. 2d at 994.

<sup>63</sup> See 716 F. Supp. 2d at 994.

<sup>64</sup> See 849 F.2d 1241, 1245–46 (9th Cir. 1988). In this case, the federal agency failed to comply with its own fishery management plan. *Id.*

agency expressed an unwillingness to comply with the terms of the newly created compliance plan, the Ninth Circuit recognized the continued opportunity for meaningful relief through a declaratory judgment and refused to dismiss the plaintiff's claims on the basis of mootness.<sup>65</sup>

### III. ANALYSIS

In *Strahan v. Roughead*, the United States District Court for the District of Massachusetts declined to grant the United States Navy's motion to dismiss Strahan's claims on the basis of the mootness.<sup>66</sup> The court ultimately held that a defendant agency's inability to demonstrate the adequacy of its consultation process will allow a plaintiff's claim under § 7 of the Endangered Species Act ("ESA") to survive a mootness challenge, as the potential for meaningful relief remains.<sup>67</sup>

The court concluded that the Navy failed to demonstrate the adequacy of its ongoing consultation with the National Marine Fisheries Services in three ways.<sup>68</sup> First, the court found the Navy's ongoing consultation did not fully address its activities along the Atlantic coast.<sup>69</sup> Because the Navy failed to present evidence to counter that point, the potential inadequacy preserved the plaintiff's potential for meaningful relief.<sup>70</sup> Second, the Navy failed to provide evidence to demonstrate its adherence with its existing compliance plan.<sup>71</sup> Strahan could have received meaningful relief had the Navy completed its obligation to provide affirmative evidence of compliance.<sup>72</sup> Third, the court held that the failure of the Navy's compliance plan to address an alternative policy proposed by Strahan left room for the possibility of meaningful relief, thereby defeating the mootness challenge.<sup>73</sup>

The District Court's third conclusion is especially problematic because it allows plaintiffs to defeat a mootness challenge by proposing an alternative policy previously unconsidered in interagency consultation.<sup>74</sup> In reaching its conclusion, the District Court noted that the subsidiary agency needed to re-initiate its consultation to provide appropriate relief to Strahan in

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<sup>65</sup> See 450 F.3d at 462–63. Here, the defendant agency willingly underwent consultation with its overseeing agency, but the defendant agency refused to comply with the existing plans because it viewed them as "unreasonable." *Id.*

<sup>66</sup> 910 F. Supp. 2d 358, 382 (D. Mass. 2012).

<sup>67</sup> See *id.*

<sup>68</sup> *Id.* at 380.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* Meaningful relief may include the re-initiation of consultation, in which the agency addresses the potential harms outlined in the plaintiff's complaint. See *id.* at 376, 380.

<sup>71</sup> *Id.* at 376–77.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 380–81.

<sup>74</sup> See *id.*

the form of responses to Strahan's factual allegations about unreported and unaddressed injuries towards right whales.<sup>75</sup> The District Court then concluded that the plaintiff's alternative policy suggestion also preserves potential for meaningful relief.<sup>76</sup> While the District Court rightfully acknowledged that re-initiation might be appropriate to cure unaddressed harms, the court's preservation of a claim based upon agency failure to include a broader alternative policy impedes upon agency discretion.<sup>77</sup>

To support its conclusion that Strahan's proposal of an unaddressed policy alternative creates the potential for meaningful relief, the District Court cited *Oregon Natural Desert Association v. Tidwell* and *Forest Guardians v. Johanns*.<sup>78</sup> In *Oregon Natural Desert Association* and *Forest Guardians*, the potential for meaningful relief through an injunctive action was present because the defendant agencies previously violated existing plans or explicitly expressed their refusal to comply.<sup>79</sup> There, the proposed alternative basis for meaningful relief was an injunctive action to ensure agency adherence to the compliance plans.<sup>80</sup> In *Strahan*, the Navy had not repeatedly violated an approved compliance plan, and the consideration of the plaintiff's alternative policy was unrelated to any purported Navy violation.<sup>81</sup>

The District Court's conclusion allows future plaintiffs to defeat mootness challenges by adding policy alternatives to their claims.<sup>82</sup> Although the Navy may have violated its existing compliance plan, the appropriate form of relief would not be inclusion of an alternative policy—rather, an injunction to ensure that the Navy adhere to a new compliance plan, developed through the re-initiation process, would be more appropriate.<sup>83</sup> Plaintiffs may commence action against agencies for failure to adhere to procedural obligations in developing a compliance plan.<sup>84</sup> Under the Administrative Procedures Act ("APA"), plaintiffs may challenge the means by which an agency came to a decision.<sup>85</sup> In bringing a mootness challenge based upon alternative policy preference, the plaintiff nor the court made reference to the APA.<sup>86</sup> Plaintiffs may challenge an agency action that occurs outside

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<sup>75</sup> *See id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See id.* at 380.

<sup>78</sup> *Id.*; see 450 F.3d 455, 461–63 (9th Cir. 2006); 716 F. Supp. 2d 982, 994 (D. Or. 2010).

<sup>79</sup> *See Forest Guardians*, 450 F.3d at 461–63; *Or. Nat. Desert Ass'n*, 716 F. Supp. 2d at 994.

<sup>80</sup> *See Forest Guardians*, 450 F.3d at 461–63; *Or. Nat. Desert Ass'n*, 716 F. Supp. 2d at 994.

<sup>81</sup> *See Strahan*, 910 F. Supp. 2d. at 376, 380–81.

<sup>82</sup> *See id.*

<sup>83</sup> *See Forest Guardians*, 450 F.3d at 461–63; *Or. Nat. Desert Ass'n*, 716 F. Supp. 2d at 994.

<sup>84</sup> 16 U.S.C. § 1536(b)(4) (2012).

<sup>85</sup> 5 U.S.C. §§ 704, 706 (2012); see *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012). An agency action is deemed unlawful where it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

<sup>86</sup> *See Strahan*, 910 F. Supp. 2d. at 362.

the established limits of an existing compliance plan.<sup>87</sup> To permit a citizen to defeat a mootness challenge through an alternative policy proposal impedes the discretion of an overseeing agency to develop a compliance plan and set the limits of an appropriate taking.<sup>88</sup>

#### CONCLUSION

The United States District Court for the District of Massachusetts correctly denied the Navy's motion to dismiss on the basis of mootness, finding that the Navy failed to both develop a comprehensive plan and demonstrate compliance with this existing plan. Due to the Navy's failure to comply with and to create a comprehensive plan, the District Court recognized the plaintiff's potential for meaningful relief and declined to dismiss the claims. While the Ninth Circuit has allowed an alternative form of relief to extend an otherwise moot claim, the District Court deviated from the Ninth Circuit's approach by allowing a citizen proposal to serve as a valid means to survive a mootness challenge. The purpose of the ESA citizen suit provision is to challenge the adequacy of the agency consultation process, but specific citizen policy preferences are more appropriately articulated in the course of the agency rulemaking process.

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<sup>87</sup> 16 U.S.C. §§ 1536(b)(4), 1538; *see Strahan*, 910 F. Supp. 2d at 380–81.

<sup>88</sup> *See Strahan*, 910 F. Supp. 2d at 380–81.