UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, INC. 8 Otis Place Scituate, MA 02066 Plaintiff, v. GINA RAIMONDO, *in her official capacity as Secretary*, et al., Defendants. CENTER FOR BIOLOGICAL DIVERSITY, et al., [Provisional] Intervenor-Defendants	Case No. 1:23-cv-00293-JEB **CONSOLIDATED REPLY MEMORANDUM TO DEFENDANTS AND DEFENDANT-INTERVENORS' MEMORANDUMS IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND STAY PURSUANT TO 5 U.S.C. § 705**

Plaintiff Massachusetts Lobstermen's Association, Inc. ("MLA"), by and through its undersigned counsel, pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 7(d)-(e), hereby bring their Consolidated Reply Brief in Response to Defendants Gina Raimondo, Janet Coit, and National Marine Fisheries' (collectively, "NMFS") and Provisional Intervenor Defendants Center for Biological Diversity, Conservation Law Foundation, and Defenders of Wildlife (collectively, "NGOs") Oppositions to MLA's Motion for Temporary Restraining Order, Preliminary Injunction, and Stay Pursuant to 5 U.S.C. § 705 against NMFS.

I. INTRODUCTION

This case, despite the parties' prolific briefing, is straightforward: Did Congress authorize NMFS to issue an emergency rule closing portions of federal waters off Massachusetts ("2023

Wedge Closure"), in the Consolidated Appropriations Act, 2023 ("CAA") when it permitted NMFS to "extend" existing emergency rules in § 101(b)? If no, this Court must issue a preliminary injunction against the 2023 Wedge Closure.

The unambiguous text of the CAA, the only existing legislative history, and NMFS's own representations demonstrate that the 2023 Wedge Closure is an impermissible new emergency rule and thus NMFS violated the Administrative Procedures Act ("APA") by so promulgating. This illegal action has caused irreparable harm that MLA cannot recover from without the preliminary injunction and the balance of harms and public interests unequivocally weigh against agencies, like NMFS, taking such illegal actions. Therefore, this Court must grant MLA's Motion for Temporary Restraining Order, Preliminary Injunction, and Stay Pursuant to 5 U.S.C. § 705 against NMFS.

II. ARGUMENT

Prior to engaging in the substance of NMFS and the NGO's oppositions, it is necessary to reaffirm that, because the D.C. Circuit has not overturned the sliding scale standard for preliminary injunctions, this Court is required to deploy that method. *Archdiocese of Wash. v. Wash. Metro. Area. Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018) ("this court has not yet decided whether *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008) is properly read to suggest a sliding scale approach to weighing the four [preliminary injunction] factors be abandoned.") (cleaned up). Turning to the substance, NMFS argues that it can issue the 2023 Wedge Closure because it is an extension of the 2022 Wedge Closure and thus permissible under CAA § 101(b), while the NGOs assert that NMFS can issue the 2022 Wedge Closure because it can issue whatever regulations it sees fit under CAA §101(a). Both of these interpretations fly in the face of the clear language of CAA § 101 and Congress's expressed intent in passing the CAA.

1. Likelihood of Success on the Merits

a. NMFS' 2023 Wedge Closure Violates the APA and the CAA Because it is not an Extension of an Existing Emergency Rule in Place as of December 29, 2022.

In its opposition, NMFS never once addresses the fact that its own agents called the 2023 Wedge Closure a "similar" closure, and thereby an impermissibly different closure. *In re Sienega*, 18 F.4th 1164, 1169 (9th Cir. 2021) ("Similar does not mean the same."). Instead, NMFS attempts to sidestep this issue entirely by claiming that it can "extend" a rule regardless of when the rule ended. (NMFS Opp. at 26.)[1] To support this, NMFS argues that "Congress chose to exempt any action to 'extend' an emergency rule that is 'in place' rather than 'in effect.' The *emergency itself* was still in place on the date of the CAA's enactment and under the similar language for emergency rules in the MMPA, NMFS is not forbidden from extending an emergency rule even after the rule's effective date has expired."[2] (NMFS Opp. at 26 (emphasis added).) This gives away the game. Congress did not authorize NMFS to extend an emergency rule *if the emergency was still in place*, it authorized it to extend an emergency rule only if *that rule was in place* when the CAA became effective. CAA §101(b). If this Court allows NMFS to rewrite Congress's words, it will have

[1] It should also be noted that NMFS knows how to "extend" an emergency rule and that it did not do so here. On October 29, 2021, NMFS validly extended the Sablefish Primary Fishing Season, which was set to expire on October 31, 2021, with a rule titled "Fisheries Off West Coast States; Emergency Action to Temporarily Extend the Sablefish Primary Fishery Season." 86 FR 59873. This is a true extension of an emergency rule, taken before the emergency rule expired and specifically titled as an extension. This is in clear contrast to the 20223 Wedge Rule, which is not titled as an extension and was taken long after the 2022 Wedge Closure expired. 88 FR 7362.

[2] Strangely, NMFS attempts to convince this Court that, while CAA § 101(a) was passed in light of the litigation against NMFS's Biological Opinion, CAA § 101(b) somehow only relates to the MMPA and thus is removed from this context. (NMFS Opp. at 18, n. 6.) Obviously, the context surrounding CAA § 101(a) and (b) is identical as they were passed at the same time.

aggrandized to itself power that Congress never intended or expressed. *Landstar Exp. Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 500 (D.C. Cir. 2009) ("But the agency cannot rewrite a statute just to serve a perceived statutory "spirit.").

Indeed, this Court must ask itself, how far is NMFS going to take this "emergency in place" reasoning? For example, could NMFS have "extended" the rule in 2027 if it had not issued an "extension" of the 2022 Wedge Rule previously? If yes, then "extension" has no meaning and there is no reason NMFS would ever need issue a new rule, it could just indefinitely "extend" emergency rules passed decades before. If NMFS could not have extended the rule in 2027 if that was the first extension since the 2022 Wedge Closure, then where is the dividing line? Is it enough that NMFS supposedly "extended" the 2022 Wedge Closure eight months later with the 2023 Wedge Closure? There is nothing in the MMPA or the CAA that suggests such a temporal balancing test. Instead, this Court should bind NMFS to its position in *Starbound, LLC v. Gutierrez*, where NMFS clearly adopted the position that a closure in effect from May 14 - November 13, 2007, ended as of November 13, 2007. *See* No. C07-0910-JCC, 2008 WL 1752219, at *4 (W.D. Wash. Apr. 15, 2008). More pertinent, this Court cannot be distracted with considering whether an emergency existed permitting NMFS to issue the 2023 Wedge Closure, it must look only to whether the 2022 Wedge Closure, which ended on May 1, 2022, was "in place" on December 29, 2022. The 2022 Wedge Closure ended on May 1, 2022, and thus there was no emergency rule in place for NMFS to "extend."

NMFS tries a few other tricks to suggest it can "extend" the expired 2022 Wedge Closure through the 2023 closure. None succeed. CAA § 101(b) specifically allows NMFS to extend an emergency rule in place at the time of enactment. NMFS attempts to suggest that there is a difference between "in place" and "in effect". (NMFS Opp. at 26.) It cites no case law or statutory

language to support the idea that "in place" means anything different than "in effect." In fact, this Court has declined to view a difference between these two terms, noting in *Mahoney v. United States Capitol Police Bd.* that "it would make little sense to evaluate the restrictions that were in place on August 31 instead of those currently in effect." 566 F. Supp. 3d 22, 26–27 (D. D.C. 2022) (Boasberg, J.); *Dist. Hosp. Partners, L.P. v. Sebelius,* 932 F. Supp. 2d 194 (D. D.C. 2013) (reviewing a statute requiring no changes to regulations "in place" as of 1987 by determining if regulations were in effect as of that date). And NMFS position quickly breaks down with two simple questions: could a litigant have violated the 2022 Wedge Closure after May 1, 2022? Could a litigant challenge the 2022 Wedge Closure after May 1, 2022? The obvious answer to both questions is no. If a regulation cannot be violated, and cannot be challenged, the only rational conclusion is that the regulation is no longer in effect, and thus is no longer in place.

NMFS next asserts that, in *HollyFrontier*, the Supreme Court found that the term "extend" in a statute "need not entail continuity." (NMFS Opp. at 26 (citing *HollyFrontier Cheyenne Refining v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2177-78, 2183 (2021)).) The *HollyFrontier* court specifically provided that "[w]e do not mean to suggest that every use of the word 'extension' must be read the same way. On occasion, for example, Congress requires 'extensions' to be 'consecutive' or 'successive.' . . . contextual clues in a given statute may yield a similar conclusion." 141 S. Ct. at 2179. Here, the use of the word "existing" in CAA § 101(b) strongly suggests a continuity requirement, which NMFS has failed to meet. *See Smith v. Vodges*, 92 U.S. 183, 185 (1875) ("No debt now exists which existed prior to 1868; and there is none now existing which can be said in any sense to stand in renewal or continuity of any such prior debt.").

Unable to find support within the CAA, NMFS turns to the MMPA to assert that it can "extend" emergency rules after their effective time has expired. (NMFS Opp. at 26.) But the language of the MMPA itself undermines NMFS's assertions. The MMPA provides that emergency regulations "shall *remain in effect* for [(a)] not more than 180 days or [(b)] until the end of the applicable commercial fishing season, *whichever is earlier*." MMPA § 1387(g)(3)(B). Thus, under the clear language of the MMPA, the 2022 Wedge Closure was not in effect after the end of the 2022 commercial fishing season (assuming it could extend past May 1, 2022). If the 2022 Wedge Closure was not in effect as of December 29, 2022, it by definition cannot be in place as of that date, and thus cannot be the "emergency rule" which is being "extended" here under CAA § 101(b). *Mahoney*, 566 F. Supp. 3d at 26–27.

Having exhausted its efforts to interpret the text of the CAA itself, NMFS falls back onto an extratextual argument that, because the 2022 Wedge Closure was allegedly the only emergency rule issued against the lobster industry in the previous decade, it must have been what Congress was referring to when it used the words "emergency rule that is in place." (Opp. at 27.) It is mistaken and, even if it was not, its contention is irrelevant. First, as NMFS itself admits, CAA §101(b) uses "plain language," thus it is not ambiguous and NMFS cannot turn to canons of construction, extra-textual reasoning, or nonexistent legislative history to aid in its erroneous interpretation. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."). And the CAA is not rendered ambiguous merely because MLA, NMFS, and the NGOs interpret it differently. *United States v. Reffitt*, 602 F. Supp. 3d 85,

102 (D. D.C. 2022). CAA § 101(b) uses the phrase "emergency rule in place" as of December 29, 2022. That language is clear and requires no canons to interpret.

Even if CAA §101(b) was ambiguous, this Court should not travel down the false path of surplusage because the canon against surplusage would not assist NMFS here. NMFS's invocation of the canon against surplusage ignores an obvious point. It could have issued any number of emergency regulations between the time Congress passed the CAA and President Biden signed it. Any one of those emergency regulations would have been valid and could have been validly extended under the CAA. Thus, CAA § 101(b)'s reference to emergency regulations is not inherently ambiguous and the canon against surplusage need not be deployed. *Lamie v. U.S. Tr.*, 540 U.S. 526, 536, (2004) ("Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute.")

Indeed, it cannot be ignored that NMFS's requested use of the canon against surplusage requires this Court to look at Congress's alleged intent, which is not evidenced by any legislative history to support NMFS position.[3] *Id.* ("We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history."). Fatally for NMFS, the only legislative history that does exist directly contradicts NMFS's contentions, as The Honorable Senator Angus King specifically stated that the purpose of §101(a)-(b) is to "pause the economic death sentence"

[3] NMFS also submits a declaration from Massachusetts Department of Marine Fisheries Director Daniel McKiernan, where he explains that his hearsay conversations with Maine Department of Marine Resources Commissioner Patrick Keliher led him to believe that CAA § 101(b) "allowed NOAA Fisheries the latitude to close the Wedge on an annual seasonal basis." [Dkt. # 22-11, ¶11.] With respect, interpretation of a federal statute by a state official based on that official's hearsay conversation with a different state's official provides as much value to this Court's interpretation of the CAA as the Vice Presidency did to John Nance Garner. Daniel J., *The Vice Presidents That History Forgot*, SMITHSONIAN (July 1, 2012). (attributing to Garner the quote that the Vice-Presidency was "not worth a bucket of warm spit.").

caused by this Court's prior rulings and NMFS's regulations against the lobster industry. 168 Cong. Rec. S9591, S9607–08 (daily ed. Dec. 20, 2022) (attached hereto as Exhibit A). It would be quite the ineffective stay of a death penalty if NMFS was allowed to endlessly turn on the electric chair for three months, yet this is exactly what NMFS asserts Congress intended to allow it to do. Its interpretation flies in the face of the clear language of the CAA and Congressional intent and thus must be rejected by this Court.

There is no indication that Congress was contemplating a specific emergency rule when it drafted CAA § 101(b). Thus, NMFS's assertion that Congress must have meant an emergency rule it never referenced is an unnecessarily limited construction of the CAA and NMFS's own powers. *See United States v. Sandlin*, 575 F. Supp. 3d 16, 28 (D. D.C. 2021) ("[T]he canon against surplusage merely favors that interpretation which *avoids* surplusage,' not the construction substituting one instance of superfluous language for another.") (citing *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013)).

Ultimately, NMFS cannot get around the fact that if Congress meant to allow NMFS to implement new Wedge Area closures, it could have said so. *Brendsel v. Off. of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 65 (D.D.C. 2004) ("Where Congress knows how to say something but chooses not to, its silence is controlling."). But Congress did not. This Court must interpret the actual language in front of it, not the nonexistent language that supposedly captures Congress's intent. *Landstar Exp. Am., Inc.*, 569 F.3d at 500. Congress could even revise the CAA to say so after this Court's ruling. *Id.* ("If the Commission is correct . . . the Commission no doubt will convince Congress to update the statutory scheme to that effect."). The language Congress actually used allows NMFS only to extend existing emergency rules in place as of enactment, no emergency rule existed as of December 29, 2022, and thus NMFS's 2023 Wedge Closure illegally violates

the CAA and the APA. *Great Lakes Comnet, Inc. v. Fed. Commc'ns Comm'n*, 823 F.3d 998, 1003 (D.C. Cir. 2016) ("Here, where the text and history of the regulation make its meaning clear, the canon against surplusage cannot dictate a different interpretation.").

b. NMFS's 2023 Wedge Closure is Not Authorized Under CAA § 101(a) and thus Violates the Administrative Procedure Act.

Unsurprisingly, the NGOs take a much bolder stance than NMFS, asserting that this Court need not look to CAA § 101(b) to uphold the 2023 Wedge Closure, but rather that CAA § 101(a) does not limit NMFS in any way, and NMFS can issue whatever regulations it wishes. In the NGOs view, the CAA was actually a "hall pass" to NMFS, giving it more time to promulgate rules, completely ignoring the context of the industry obliterating regulations NMFS was about to impose on the lobster industry. (NMFS Opp. at 24.) The NGOs' interpretation finds no support in the clear language of CAA § 101(a), is unsupported by the MMPA, and flies in the face of the legislative history that does exist. 168 Cong. Rec. S9591, S9607–08 (daily ed. Dec. 20, 2022).

The NGOs and NMFS assert that MLA interprets the CAA to mean that NMFS "precludes the agency from issuing *any* rules" to protect the Right Whale. (NMFS Opp. at 1 (emphasis added); NGO Opp. at 22.) This is not so. As noted by the NGOs, NMFS can and indeed must issue new regulations regarding new innovative gear; MLA does not dispute this. (NGO Opp. at 23 (citing CAA § 101(a)).) Rather, MLA's contention is that the CAA precludes NMFS from issuing any new regulations against the lobster industry to bring the lobster industry into compliance with the MMPA and ESA because the CAA specifically provided that the lobster industry is "in full compliance" with the MMPA and ESA as it relates to protecting the Right Whale through 2028. CAA §101(a). Even the NGOs agree this is what CAA § 101(a) provides. (NGO Opp. at 23 ("All section 101(a) says is that Congress purports to deem the existing MMPA regulations governing

the lobster fishery sufficient to comply with the ESA and MMPA through the end of 2028.").) If the lobster industry is "in full compliance" with the MMPA and ESA, then NMFS cannot issue regulations to bring the lobster industry into fuller compliance.

The NGOs maintain that this natural conclusion amounts to an implicit repeal of the MMPA itself. (NGO's Opp. at 26-27.) This hyperbolic contention is simply not true. The CAA is not a repeal of the MMPA by implication, it is a Congressional mandate that the lobster industry is "in full compliance" with the MMPA and therefore, NMFS can issue no more regulations to bring the lobster industry into fuller compliance with the MMPA. This result sprouts not from a repeal of the MMPA, but from the language of the MMPA itself. Specifically, MMPA § 1387(b)(2) provides that "[f]isheries which maintain insignificant serious injury and mortality levels approaching a zero rate shall not be required to further reduce their mortality and serious injury rates." *Id.* In other words, fisheries which are "in full compliance" with the MMPA cannot be further regulated to reduce mortality and serious injury rates. In fact, the NGOs themselves inadvertently accept this to be the case. *See* (NGO's Opp. at 25 ("MMPA section 118 itself provides a model of how Congress uses "shalls" to command and "shall nots" to prohibit regulatory action.").); *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186, 1191 (D.C. Cir. 1985) ("Shall, the Supreme Court has stated, is the language of command absent a clearly expressed legislative intention to the contrary, courts ordinarily regard such statutory language as conclusive."). By using "shall not," the MMPA precludes further regulations of industries that are "in full compliance" with the MMPA. Yet this is exactly what NMFS has attempted to do.

Here, CAA § 101(a) specifically provides that the lobster industry is "in full compliance" with the MMPA. Thus, under MMPA § 1387(b)(2) the lobster industry cannot be further regulated, except for CAA § 101(b)'s carve out for existing emergency rules in place as of December 29,

2022. Thus, CAA § 101(a) does not stop NMFS from promulgating regulations under the MMPA or ESA, it simply stops NMFS from placing additional regulations on the lobster industry specifically prior to 2028. This is fully in line with Congress's goals as expressed in the MMPA and the CAA, which is to protect marine mammals but also to prevent the "economic death sentence" that NMFS's regulations were going to impose on the lobster industry. 168 Cong. Rec. S9591, S9607–08 (daily ed. Dec. 20, 2022). NMFS's illegal regulations therefore violate CAA §101(a).

The context of the CAA's passage provides a necessary gloss as well. Prior the CAA, NMFS was free to pass whatever APA-compliant regulations it deemed necessary to bring the lobster industry into compliance with the MMPA. Congress then mandated, through the CAA, that the lobster was in fact "in full compliance," with Senator Angus King specifically referencing this Court's earlier decisions in *Maine Lobstermen's Association, et al. v. Raimondo*, 1:18-cv-00112-JEB, as the reason for doing so. CAA §101(a); 168 Cong. Rec. S9591, S9607–08 (daily ed. Dec. 20, 2022) ("In November, a Federal court here in Washington issued a ruling . . . that effectively shuts down the entire Maine lobster fishery in 2 years . . . . Now, a solution to this crisis is in the bill that we will be voting on tomorrow."). The NGOs would have this Court believe that the CAA, despite specifically bringing the lobster industry "in[to] full compliance" in response to this Court's order, was actually a signal from Congress that NMFS could continue doing what it was already doing, *i.e.*, passing whatever regulations it believed necessary to bring the lobster industry into compliance with the MMPA. Such a construction is absurd, renders the CAA meaningless, and cannot stand.

Further, nothing in the CAA repeals the MMPA by implication and MLA is not asserting that it does. Rather the language of CAA §101(a) represents Congress's determination that the

lobster industry is "in full compliance" with the MMPA until 2028 and, as a fishery "in full compliance" with the MMPA, the lobster industry cannot be further regulated by NMFS to bring it into even deeper "full compliance" with the MMPA unless the exception under CAA § 101(b) is met which, as explained above, it is not.[4] Thus, the NGOs assertion that the CAA is actually a further broad grant of power to NMFS to regulate the lobster industry is clearly erroneous and the 2023 Wedge Closure is an illegal regulation under the CAA, MMPA, and APA. Accordingly, MLA has demonstrated a strong likelihood of success on the merits and this Court should grant the requested preliminary injunction.

2. Irreparable Harm

This Circuit has a long-standing rule, repeatedly upheld by this Court, that when a party cannot recover financial damages but can only receive injunctive and declaratory relief, there is irreparable harm. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (holding mere assertion of Establishment Clause violation is enough for irreparable harm because it cannot be deterred by award of damages); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D. D.C. 2015) (Boasberg, J.) ("Members of the proposed class do not seek monetary compensation for their injuries. Instead, they seek injunctive and declaratory relief invalidating and setting aside the improper deterrence policy. Unlike economic harm, the harm from detention pursuant to an unlawful policy cannot be remediated after the fact."); *Whitman-Walker Clinic, Inc.*

[4] NMFS and the NGOs note that MLA's preliminary injunction argues for a likelihood of the success on the merits based only on Count I of its Complaint and therefore it has waived arguments as to Counts II or III. (NMFS Opp. at 27, n. 7 (citing *California v. Trump*, No. 19-cv-960 (RDM), 2020 WL 1643858, at *16 (D. D.C. Apr. 2, 2020.)); NMFS Opp. at 2.) While MLA certainly believes those claims to be meritorious and that it will succeed on the merits, it did not believe those claims would entitle it to a preliminary injunction and thus did not raise them in its supporting brief. If this Court finds that such claims would entitle it to injunctive relief, it respectfully requests the Court consider them.

v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 59 (D. D.C. 2020) (Boasberg, J.) (finding irreparable harm where "injuries are unrecoverable because the present suit arises under the APA, which does not allow for recovery of monetary damages."); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D. D.C. 2018) (Boasberg, J.) ("The injuries at stake, furthermore, are "beyond remediation." Members of the proposed class do not seek monetary compensation for their injuries. Instead, they seek injunctive and declaratory relief . . .").

MLA is not seeking monetary damages here. Indeed, it cannot seek monetary damages. *See Fishermen's Finest Inc. v. United States*, --- F.4th ---, 2023 WL 1807477 (Fed. Cir. 2023) (holding that fishermen licensed by the federal government to fish in federal waters have no Fifth Amendment property interest in their licenses and permits, nor any compensable property interest in using vessel to harvest and process fish in management areas.). Even if this was not a claim solely under the APA, there is no possibility of recovering financial damages from the federal government at any point because NMFS has not waived sovereign immunity and because MLA's members have no Fifth Amendment property interest from which to recover from NMFS's taking. *Fishermen's Finest Inc. v. United States*, --- F.4th ---, 2023 WL 1807477; *Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.*, 680 F. Supp. 2d 62, 77 n. 19 (D. D.C. 2010), *aff'd sub nom. Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891 (D.C. Cir. 2010) ("Where a plaintiff cannot recover damages from an agency because the agency has sovereign immunity, "any loss of income suffered by [the] plaintiff is irreparable *per se.*") (emphasis in original) (quoting *Feinerman v. Bernardi,* 558 F.Supp.2d 36, 51 (D. D.C. 2008); *see also Clarke v. Office of Fed. Housing Enter. Oversight,* 355 F.Supp.2d 56, 65 (D. D.C. 2004) (Leon, J.) (noting that "courts have recognized that economic loss may constitute 'irreparable harm' where a plaintiff's

alleged damages are unrecoverable"). The only possible recovery would be injunctive or declaratory relief, and thus MLA has suffered irreparable harm. *R.I.L-R*, 80 F. Supp. 3d at 191.

NMFS cites a raft of cases in attempt to obscure this clear rule, but these cases fall flat. First, NMFS cites *Monsanto Co. v. Geertson Seed Farms* for the proposition that the inability to obtain money damages does not mean the harm is irreparable, but *Monsanto Co.* never states that. Instead, it provides only that injunctions are not a presumptive remedy to APA challenges to the regulation issued under the NEPA. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, (2010). Second, in *Air Transp. Ass'n of Am.*, this Court specifically said economic loss does not constitute irreparable harm in and of itself because "economic injuries are generally in fact reparable with monetary damages in the ordinary course of litigation." *Air Transp. Ass'n of Am. v. ExportImport Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D. D.C. 2012) (Boasberg, J.). This distinguishment is crucial because, as explained, MLA and its members cannot possibly recover monetary damages in this case; it can only obtain injunctive and declaratory relief. *Sottera, Inc.*, 627 F.3d 891. In fact, this Court specifically rejected NMFS's assertion that MLA must demonstrate substantial economic loss "where economic loss will be unrecoverable, such as in a case against a Government defendant where sovereign immunity will bar recovery, economic loss can be irreparable even if it would not wipe the business out." *Whitman-Walker Clinic, Inc.*, 485 F. Supp. 3d at 58 (citing *Everglades Harvesting & Hauling, Inc. v. Scalia*, 427 F. Supp. 3d 101, 115 (D. D.C. 2019); see also *D.C. v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 37 n. 25 (D. D.C. 2020) ("existential harm requirement" inapplicable to unrecoverable economic harm) (citing *Open Communities All.*, 286 F. Supp. 3d at 178); *Texas Children's Hospital v. Burwell*, 76 F. Supp. 3d 224, 242–44 (D. D.C. 2014)). Thus, the cases cited by NMFS on the economic loss doctrine are not applicable because MLA cannot recover.

Even if this Court does require MLA to establish economic harm, it can and has clearly done so. As a preliminary matter, NMFS and the NGOs attempts to elevate MLA's burden to a summary judgment-adjacent evidentiary hearing must be rejected; MLA is entitled to "rely on evidence that is less complete than in a trial on the merits" so long as the evidence is "credible." *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 281 (D. D.C. 2005) (citing *Natural Res. Def. Council v. Pena,* 147 F.3d 1012, 1022–23 (D.C. Cir. 1998)). This Court has recognized that "obstacles that 'unquestionably make it more difficult for an organization to accomplish its primary mission ... provide injury for purposes both of standing and irreparable harm.'" *Whitman-Walker Clinic, Inc.*, 485 F. Supp. 3d at 56 (citing *Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 56 (D. D.C. 2020) (Boasberg, J.); *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016)) (emphasis in original, alterations omitted). MLA has explained how the 2023 Wedge Closure will result in its members losing money, which will result in less individuals being able to pay dues, and thus make it more difficult for MLA to advocate on behalf of lobstermen for regulations and laws that support the lobster industry. *Id.* Indeed, it is sufficient that MLA will have to educate its members on how to comply with the 2023 Wedge Closure, an expenditure it would otherwise not have to make. *Id.* (citing *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 912–13 (D.C. Cir. 2015) ("It is well established that even resources "expend[ed] ... to educate [an organization's] members and others" qualifies as injury where "doing so subjects the organization to 'operational costs beyond those normally expended.'")). Further, upon information and belief there have already been lobstermen who have received tickets from the Coast Guard for allegedly violating the 2023 Wedge Closure. *Damus*, 313 F. Supp. 3d at 342 ("Plaintiffs have satisfied this [irreparable harm] inquiry here. As discussed above, the evidence they present suggests that

asylum-seekers are being denied parole without the protections of the ICE Directive."). These lobstermen will not be able to recover the improper assessed damages levied against them.

NMFS and the NGOs also suggest this Court set aside MLA and its members' declarations as insufficient. NMFS specifically critiques MLA for not explaining whether its members could simply relocate to other federal or state waters, (NMFS Opp. at 23), apparently forgetting that it told this Court that shifting "lobstering from federal to state waters," would "concentrate[e] vertical lines there and "substantially offsetting gains in risk reduction from shutting federal fisheries." See *Center for Biological Diversity, et al. v. Raimondo, et al.*, 18-cv-112, Dkt. # 228 at 27. Regardless, this comment ignores the fact that lobstermen *are not permitted to travel into the Wedge Area* and thus cannot retrieve their traps to move them to state waters, especially with the less than fourteen (14) hours' notice that NMFS gave lobstermen to uproot their livelihoods.[5]

Even more egregious, NMFS asserts that "declarants fail to address the fact that the lobsters not caught in the MRA Wedge during the 2023 emergency closure remain available for harvest starting May after the closure ends." (NMFS Opp. at 23-24.) This "let them eat cake" attitude assumes that a business can be forbidden from engaging in profit making activities for four months with no repercussions. The federal government may care little for basic economics, but the small business lobstermen who live by their ability to land lobster in the Wedge do. Losing access to the Wedge for four months and being forbidden from even traveling in the area to recover the lobster traps in those areas, is devastating to MLA's members and certainly constitutes irreparable harm. And, let this Court not forget that NMFS itself calculated in its woefully inadequate financial

[5] If the lobstermen did violate the 2023 Wedge Closure by retrieving their traps and attempting to move them into different waters, NMFS would simply assert that the economic harm "arises out of their own decision to cancel or change their plans and therefore, it is indirect, self-inflicted, and not irreparable harm." *Safari Club Int'l v. Jewell*, 47 F. Supp. 3d 29, 36 (D. D.C. 2014).

impact statement that "[i]t is estimated to impact between 26-31 vessels in a given month and the total costs including gear transportation costs and lost revenue range from $338,804-$608,346." 88 FR 7362, 7368. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 82 (D. D.C. 2013), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014), *reh'g en banc granted, opinion vacated*, 35 ITRD 2763 (D.C. Cir. 2014), and *judgment reinstated*, 760 F.3d 18 (D.C. Cir. 2014) ("Regardless of whether Plaintiffs have sufficiently shown irreparable harm either in the form of a First Amendment violation or due to severe economic losses, there is no doubt that the Final Rule imposes significant compliance costs on some companies in the meat production industry . . . . Consequently, the Court concludes that the balance of harms swings slightly in favor of Plaintiffs."). There is little question that, for some lobstermen, the 2023 Wedge Closure will be enough to put them out of business.

MLA has asserted, through declarations, that its members will suffer financial harm that will limit their ability to pay dues to MLA, directly impacting MLA's ability to perform its function of representing the lobster industry. Its members have said that they would be fishing in the Wedge Area if not for the Wedge Closure and that they will suffer economic harm because of the closure, harm that is imminent and definite, even if the exact amount is currently incalculable as they do not know exactly how many lobster they will fail to catch because of the four month ban. These assertions, while entirely unnecessary to this Court's evaluation of irreparable harm because MLA only seeks injunctive and declaratory relief and can seek no other type of relief, are more than enough to show irreparable economic harm.[6]

[6] Even if they were not, because this Court is required to use the sliding-scale method, if it finds that MLA does not prevail on this prong, the weight of the other three prongs require it to rule in MLA's favor. *Archdiocese of Wash. v. Wash. Metro. Area. Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018).

3. Balance of Harms and Public Interest

NMFS and the NGOs argument ultimately is that Congress considered saving the Right Whale so important that NMFS is entitled to break the law to take whatever steps it deems necessary to effectuate this goal, even if there is no evidence supporting that its action will do so, and this it is indeed in the public's interest for it to do so. In fact, NMFS and the NGOs hope that this Court will confuse the parties and assume that the weighing of harms and public interest is the lobster industry vs. the Right Whale, but it is not. This is a dispute between a rogue agency taking illegal actions and the working men and women that will be devastated if it is allowed to do so.[7]

Regardless of the impact of the 2023 Wedge Closure on the Right Whale, that impact must play no role in this Court's balancing of the harms that NMFS may face that this Court has to balance. This Court has been clear, that "the Government cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *R.I.L-R*, 80 F. Supp. 3d at 191 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)). Further, "the public interest is served when administrative agencies comply with their obligations under the APA." *Id.* (citing *N. Mariana Islands v. United States,* 686 F.Supp.2d 7, 21 (D. D.C. 2009); *Klayman v. Obama,* 957 F. Supp. 2d 1, 43 (D. D.C. 2013)). Thus, if this Court finds that NMFS has violated the CAA, its analysis on the balance of harms and public interest factors is finished. *Id.* Enjoining the 2023 Wedge Closure would not harm NMFS and would serve the public interest.

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[7] The NGOs sneer at the working-class men and women who rely on fishing lobster for their living, claiming that the damages the lobstermen would face are not enough to constitute irreparable harm, and certainly are not as harmful as their members not seeing a Right Whale during the next presidential inauguration from their million-dollar oceanfront second homes. *See* [Dkt # 16-5 (Declaration of Molly Harding Bartlett) ¶¶ 5-6.] Such elitist mindsets should be treated with as much disdain by this Court as the NGOs have shown to the working men and women represented by MLA.

If this Court ignores its previous precedent, the balance of harm and public interest still weighs in favor of a preliminary injunction. NMFS hand waves around MLA's assertion that "harm to a right whale from an injunction would likely be nonexistent" by asserting that Right Whales were shown to be in the Wedge Area from 2018 to 2022. (NMFS Opp. at 30.) This actually supports MLA's contentions. There was no wedge closure from 2018 to 2021, and no wedge closure in February or March, 2022. Yet not a single whale was entangled during those periods. If no whales were entangled without a wedge closure, how can NMFS possibly justify its 2023 Wedge Closure by asserting that such a closure is necessary to prevent an entanglement? It cannot do so. It does not even attempt to do so.[8] It is not enough for NMFS to assert that enjoining the 2023 Wedge Closure would harm the Right Whale, it has to show that the 2023 Wedge Closure affirmatively helps the Right Whale. *Water Keeper All. v. U.S. Dep't of Def.*, 271 F.3d 21, 34 (1st Cir. 2001) ("In the absence of a more concrete showing of probable deaths during the interim period and of how these deaths may impact the species, the district court's conclusion that Water Keeper has failed to show potential for irreparable harm was not an abuse of discretion."). It failed to do so.

Realizing that it cannot point to actual evidence of harm to the Right Whale, NMFS attempts to shift the burden, asking this Court to just presume that it should win because the 2023 Wedge Closure affects the Right Whale. NMFS argues that "courts in this circuit and many others have found that the balance of interests "weighs *heavily* in favor of protected species." (NMFS

[8] NMFS meekly asserts that it "determined using the best available scientific and commercial data that the MRA Wedge closure is necessary to reduce risk of right whale M/SI from entanglement." (NMFS Opp. 31). Putting aside that this data is from the DST tool it specifically told the D.C. Circuit it would not be using to issue regulations after the passage of the CAA, this assertion fails to overcome the clear showing of harm NMFS must make to prevail on the balance of harms.

Opp. at 29 (emphasis in original).) However, the cases they cite are inapposite because they were "brought under the ESA," and thus, because of the "language, history, and structure" of the ESA, the public interest titled in favor of the species. *See Cascadia Wildlands v. Scott Timber Co.*, 715 F. App'x 621, 624 (9th Cir. 2017); *Fla. Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1284–85 (S.D. Fla. 2005), *aff'd sub nom. Fla. Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) ("in cases involving the ESA, the standard is different."). This is not a challenge under the ESA, this is a challenge under the APA and CAA to an action allegedly permitted by the MMPA. Thus, the presumption of heavy favor towards the Right Whale is not applicable here.

The NGOs, as is typical, reach far past NMFS, accusing the lobster industry of killing dozens of whales without any evidence, allegedly because the nefarious working men and women of Massachusetts have convinced the adversarial NMFS not to apply markings to ropes. (NGO Opp. at 31.) Again, without evidence that a single whale has been seriously harmed or killed by the lobster industry in the last two decades, NGOs argue the 2023 Wedge Closure is necessary to stop that very non-observed and unproven harm.[9] The NGOs assert that economic harm cannot "trump" the survival of the Right Whale and that this "is particularly true here, where the right whale desperately needs the protections that the Emergency Rule provides." (Opp. at 29.) Indeed, the NGOs go so far as to assert that NMFS does not have to show any evidence, asserting that "the agency does not have to wait until the whales are swimming" in the Wedge Area to protect them. (NGO Opp. at 30 (citing *Dist. 4 Lodge of the Int'l Ass'n of Machinists and Aerospace Workers Local Lodge 207 v. Raimondo*, 18 F.4th 38, 46 (1st Cir. 2021)).) This evidence free assertion

[9] NMFS thinks it has scored a goal by pointing to Beth Casoni's Declaration in MLA v. NMFS, No. 1:21-cv-2509 (JEB) where Ms. Casoni supported Massachusetts' seasonal closures, but this ignores that Massachusetts is legally allowed to issue such a closure, unlike NMFS, and that the Massachusetts's closure is only viable because the Wedge Area remained open to lobstermen. (NMFS Opp. at 15-16, n. 5.)

(ironic given the NGOs challenges to MLA's evidence regarding economic harm) is nothing more than a "we have to do something" fallacy; it bears no relation to the actual effect of the 2023 Wedge Closure, it is simply an assertion that NMFS should be able to do whatever it wants to save the Right Whale, regardless of whether those actions actually do anything to help the Right Whale. This exact mindset, of strangling the lobster industry because it might help the whales, is what the CAA was passed to prevent and cannot be accepted by this Court. 168 Cong. Rec. S9591, S9607–08 (daily ed. Dec. 20, 2022).

The NGOs also assert that "[w]hen injury to the environment is at stake, the balance of harms will usually favor . . . protect[ion] of the environment." (NGO Opp. at 28 (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)).) Yet, in *Amoco*, the Court specifically found that the balance of harm *did not* weigh in favor of protecting the environment, but rather supported the industry which would suffer economic loss "without chance of recovery had exploration been enjoined." 480 U.S. at 545. This is exactly the situation here. Further, the NGOs claim that "numerous courts have recognized the public's extremely strong interest in protecting the survival and flourishing and flourishing of marine mammals and endangered species." (NGO Opp. at 29 (citing *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1141 (N.D. Cal. 2003);[10] see also *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 983 (D. Haw. 2008)).) But these two decisions (hardly numerous) are not applicable; this language never appears in *Ocean Mammal Inst.*, while *Evans* is an ESA challenge and thus contemplates a challenge in support of endangered species, not a challenge in opposition to an illegal agency action that has no evidence of supporting an endangered species.

[10] This citation leads to a withdrawn opinion, it appears that the actual cite is supposed to be 279 F.Supp.2d 1129.

The consolidated balance of harm and public interest analysis must be short: NMFS is violating the APA and the CAA, it is not harmed by its illegal acts being enjoined, and the public is aided by halting illegal agency action. This Court cannot allow NMFS to continue to flout Congress's clear will because NMFS asserts without evidence that the 2023 Wedge Closure will assist the Right Whale. It must issue a preliminary injunction and stay under 5 U.S.C. § 705.

III. CONCLUSION

Congress passed the CAA specifically to give the lobster industry a reprieve from NMFS's devastating "death sentence" regulations until 2028, with a narrow exception for extending emergency rules in place on December 29, 2022. There were no emergency rules in place as of that date, and thus NMFS's 2023 Wedge Closure is not an extension but rather a new rule, and therefore is an illegal regulatory act under the CAA and the APA. The CAA did not give NMFS a blank check to issue whatever regulations it sees fit, and its decision to illegally issue the 2023 Wedge Closure will cause MLA irreparable harm, while providing no public benefit. Granting a preliminary injunction will not harm NMFS and will benefit the public by enjoining an illegal agency action, and thus this Court should grant MLA's Motion for Temporary Restraining Order, Preliminary Injunction, and Stay Pursuant to 5 U.S.C. § 705 against NMFS.

Plaintiff Massachusetts Lobstermen's Association, Inc.

By its attorneys,

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Dated: February 13, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2023 and prior to 12:00 PM EDT, I electronically filed the within document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Samuel P. Blatchley
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