UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Plaintiffs, v. RAIMONDO, in her official capacity as Secretary of Commerce, *et al.,* Federal Defendants, and THE STATE OF MAINE, *et al.,* Intervenors-Defendants.	)	Case Nos. 1:18-cv-112 (JEB) 1:18-cv-283 (JEB)

INTERVENOR-DEFENDANT MASSACHUSETTS LOBSTERMEN'S ASSOCIATION'S REMEDY RESPONSE BRIEF

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

GOVERNMENT PUBLICATIONS

TREATISES AND SECONDARY SOURCES

OTHER PARTIES' REMEDY BRIEFS

DECLARATIONS

I. INTRODUCTION

Plaintiffs, blinded by their successful summary judgment motion, overreach, asking this Court to impose an arbitrary and unfeasible timeline on the National Marine and Fisheries Services ("NMFS") that it cannot possibly meet, while also dooming the lobster industry without any corresponding benefit to the Right Whale. Federal Defendants similarly propose a timeline that they cannot hope to meet, perhaps believing that presenting a seemingly reasonable timeline will persuade this Court to remand without vacatur. This Court should reject both proposals. Instead, the Massachusetts Lobstermen's Association ("MALA") proposes that this Court should remand without vacatur because this will ensure the preservation of the lobster industry and reflect the seriousness of NMFS's flawed 2021 Biological Opinion. In so doing, it should not set a specific deadline by which NMFS must promulgate its new Biological Opinion but should instead require six-month status updates from which the Court can compel faster performance where warranted. This will provide NMFS the breathing room it needs to create a valid Biological Opinion, Plaintiffs the assurance they need to keep NMFS accountable, and the lobster industry the time it needs to prepare for the biggest disruption to its practices since the invention of the steamship.

II. FACTS

Sufficient ink has been spilled reciting the procedural history of this case, the status of the Right Whale, and the efforts by NMFS to comply with the Endangered Species Act ("ESA"). Therefore, MALA will limit this fact section to the minimum amount necessary.

The ESA and Marine Mammal Protection Act ("MMPA") require the NMFS to issue a Biological Opinion containing an incidental take statement ("ITS") when it determines that an action and incidental take of an endangered species will not jeopardize the species' survival. 50 C.F.R. § 402.14(a), ESA § 7(a)(2). The ITS must detail (1) the impact of such taking on the species;

(2) those reasonable and prudent measures ("RPMs") that are necessary or appropriate to minimize that impact; (3) in the case of marine mammals, measures necessary to ensure compliance with the MMPA's Section 101(a)(5), 16 U.S.C. § 1371(a)(5), requirements; (4) terms and conditions that will allow the action agency to implement the RPMs and measures necessary for compliance with the MMPA; and (5) procedures to be used to handle or dispose of any individuals of a species actually taken. 50 C.F.R. § 402.14(i)(1)(i)-(v).

NMFS issued its 2021 Biological Opinion ("2021 BiOp") in response to this Court's prior grant of summary judgment to Plaintiffs. (Dkt. # 90 (First Summary Judgment Order).) The 2021 BiOp contained a zero-take ITS which did not allow for any incidental take and required immediate consultation in the event that a Right Whale was taken. However, this Court granted Plaintiffs' Motion for Summary Judgment, invalidating the 2021 BiOp and 2021 Final Rule. (Dkt. # 218 - *Summary Judgment Order*.) The basis for that decision was that the 2021 BiOp's projections failed to show that the incidental taking from commercial fisheries would not have a negligible impact, and thus the issuance of a zero-take ITS was invalid. (*Id.* at 20-22, 30.) Notably, this Court acknowledged the Maine Lobstermen's Association's argument that the American lobster industry was not objectively evaluated, but declined to address this contention, noting "potential fixes are an issue for another day." (*Id.* at 23.) This Court also based its ruling on the fact that the NMFS's time period was too extensive and failed to meet the six-month requirement of the MMPA. (*Id.* at 41.)

However, the Court did not reject NMFS's determination that, through 2030, the American lobster fishery would not likely jeopardize the Right Whale's continued existence. Further, while granting summary judgment, this Court recognized "what a weighty blow" immediately closing the American lobster fishery would inflict. (Dkt. # 219 - Mem. Op. at 42.) As such, the Court

ordered additional briefing on potential remedies before making a determination on remedy. (*Id.*; *MLA v. NMFS*, Case No. 1:18-CV-00112-JEB, Court's July 8, 2022 Order at 1.)

While Massachusetts has not released official numbers, approximately 1000 commercial lobster permits were issued by the Massachusetts Department of Marine Fisheries, while NMFS has issued 1,601 permits for federal zone 1 (which surrounds Massachusetts' waters) as of 2017. NOAA, *American Lobster - Permitting Information* (April 12, 2022), https://www.fisheries.noaa.gov/permit/american-lobster-permitting-information#:~:text=30%20days-,About,a%20valid%20federal%20operator's%20permit. In 2021, the ex-vessel value of lobster landed in Massachusetts was approximately $120 million. *See* Massachusetts Division of Marine Fisheries, *Massachusetts Seafood Value Reaches an All-Time High in 2021* (Jan. 1, 2022), https://www.mass.gov/news/massachusetts-seafood-value-reaches-an-all-time-high-in-2021. As recently as 2016, Maine and Massachusetts accounted for 94% of the total national landings of American lobster. NOAA, *New England, Mid-Atlantic States Lead Nation in Volume and Value of Several Key Fisheries* (Nov. 1, 2017), https://www.fisheries.noaa.gov/feature-story/new-england-mid-atlantic-states-lead-nation-volume-and-value-several-key-fisheries.

The Massachusetts lobster industry has been at the cutting edge of harm-reduction techniques regarding the Right Whale. For example, Massachusetts was the first state to require "year-round use of sinking groundline in all state waters", outlawing floating lines that "can entangle larges whales and other marine life." Massachusetts Division of Marine Fisheries, *Massachusetts Lobster Fishing The Right Way* at 2, https://www.mass.gov/doc/massachusetts-lobster-fishing-the-right-way/download. Further, Massachusetts-licensed lobstermen are already required to use "weak rope", i.e., rope that has a higher tendency to break upon contact with a whale. Massachusetts

Division of Marine Fisheries, *New Protected Species Regulations Finalized for Fixed Gear Fisheries and Industry Outreach on Required Gear Modifications* (February 19, 2021), https://www.mass.gov/doc/21921-new-protected-species-regulations-finalized-for-fixed-gear-fisheries-and-industry/download.Additionally, Massachusetts shuts its fisheries from February 1st to April 30th (and usually extended through May 15th) every year to protect the Right Whale during its calving season. *Id*.

Despite the progressive and aggressive efforts taken by the Massachusetts lobster industry to protect Right Whales, it has not deployed ropeless traps. This is not for lack of interest, but rather because such technology is not yet financially or practically viable. As an example of how financially infeasible ropeless fishing is, a single ropeless trawl with accompanying mandatory communication unit, costs approximately $8,500. *See* (Ex. A - Declaration of Thomas Harshaw, Attach. 1 – Email Exchange with Rob Morris of Edge Tech; Attach. 2. -EdgeTech, *5112 Ropeless Fishing System*.) In Massachusetts state waters, each trawl must have at least two traps, but this can rise to up to thirty-five traps depending on the fishery zone. NOAA, *Minimum Traps/Trawls For Northeast Lobster/Jonah Crap Trap/Pot Fisheries* (October 21, 2021), https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-mammal-protection/minimum-traps-trawl-northeast-lobster-jonah-crab-trap-pot-fisheries. Further, as recently as 2018, ropeless systems were experiencing a 16-30% fail rate. *See* Dr. J. Terhune, *An evaluation of at-sea field trials of a ropeless lobster fishing method in LFA 34*, COLDWATER LOBSTER ASSOCIATION (November 27, 2018), https://www.coldwaterlobster.ca/wp-content/uploads/2020/03/An-Evaluation-of-At-Sea-Field-Trials-for-Ropeless-Fishing-Gear.pdf. Even NMFS concedes that ropeless traps will "not likely be widely available and adopted before 2030." (Federal Defendants' Remedy Brief at 30.)

Finally, and most crucially as this Court determines whether to strike "a weighty blow" against the lobstering industry, there has not been a single documented incident in Massachusetts or adjacent federal waters of a Right Whale being caught in vertical buoy rope ("VBR") or being struck by a fishing vessel since 2016. *See* NOAA, *North Atlantic Right Whale Updates*, (August 31, 2022), https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-updates#sundog-(#3823):-a-newly-entangled-right-whale. That Right Whale was released from the rope and has gone on to birth a calf. *Id*.

III. ARGUMENT

The only appropriate and viable remedy this Court should implement is to remand the 2021 BiOp without vacatur, setting no concrete deadline but requiring NMFS to provide six-month status updates detailing their progress and estimate completion date.[1]

A. This Court Is Empowered to Order Remand Without Vacatur.

Remand without vacatur is a remedy whereby the court keeps in place a flawed agency regulation but returns said flawed regulation to the agency to correct its shortcomings. *See Bennett v. Spear*, 520 U.S. 154, 174–79 (1997) (administrative law principles govern remedies under the APA). The D.C. Circuit was originally skeptical as to whether the APA permitted vacatur without remand. S*ee* Ronald M. Levin, *Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 381 (2003) (tracing the history of the remand without vacatur relief in the D.C. Circuit). It has fully embraced that remedy now. *Bauer v. DeVos*, 332 F. Supp. 3d 181, 184–85 (D.D.C. 2018) ("That rule, however, is not absolute, and a remand without vacatur may be appropriate if there is at least a serious possibility that the agency will be able to

[1] MALA joins Plaintiffs and Federal Defendants in requesting that the Final Rule not be vacated.

substantiate its decision given an opportunity to do so, and when vacating would be disruptive.") (quoting *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999)).

Plaintiffs repeatedly cite to Ninth Circuit precedent to support their unreasonable position that this court should remand and vacate, with a six month stay. (Pls.' Remedy Br. at 11-12, 14, 16, 21, 23-24.) It is unsurprising Plaintiffs would run to the Ninth Circuit to support their position, as "courts within [the Ninth Circuit] *rarely* remand without vacatur." *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1239 (N.D. Cal. 2015) (emphasis added). However, this extreme position is not the position of the D.C. Circuit by which this Court is bound. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, C.J., concurring) ("Remand without vacatur is common in this circuit, especially after our decision in *Allied–Signal, Inc. . . .*"); *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019) (noting that vacatur is the *default* remedy). Nor is it the position of the United States Supreme Court, despite Plaintiffs' misleading cite to *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020). (Pls.' Remedy Br. at 11.) Plaintiffs misleadingly suggest that Supreme Court precedent compels vacatur when there is a violation of the APA, but the language Plaintiffs pluck from that opinion is found at the beginning, prior to any analysis, and does not stand for a uniform rule but rather reflects the action taken by the Supreme Court in that specific case. 140 S. Ct. at 1901.

Further, unlike the Ninth Circuit precedents relied on extensively by Plaintiffs, the D.C. Circuit is intimately familiar with the workings of federal agencies and, while it does not routinely grant remand without vacatur, it does grant remand without vacatur more readily. *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1184 (D.C. Cir. 1994); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047–49 (D.C. Cir. 2002) (remanding a rule on ownership of television stations, but vacating

a rule on ownership of cable stations, because defects in the latter rule appeared less curable); *La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003); *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198–99 (D.C. Cir. 2009). Thus, this Court is empowered to remand without vacatur.

B. This Court Should Remand Without Vacatur.

This Court is empowered to grant remand without vacatur, and the facts of this matter compel it do so. The standard for whether remand without vacatur should be granted was established in *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) ("An inadequately supported rule, however, need not necessarily be vacated") (citing *International Union, UMW v. FMSHA,* 920 F.2d 960, 966–67 (D.C. Cir.1990). Under the *Allied-Signal Inc.* test, the decision to vacate "depends on [1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed." *Id*. at 151. Additionally, "[t]here is no rule requiring either the proponent or opponent of vacatur to prevail on both factors." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F.Supp.3d 240, 270 (D.D.C. 2015).

Here, despite MALA's stringent critiques of the NMFS' 2021 BiOp, the fact remains that the Court's ruling in its Summary Judgment Order demonstrated that the NMFS's Biological Opinion's deficiencies were not serious. Further, the disruptive impact on the lobster industry would be catastrophic. Thus, remand without vacatur is the appropriate remedy here. *Am. Pub.*

Gas Ass'n v. United States Dep't of Energy, 22 F.4th 1018, 1030 (D.C. Cir. 2022) ("The pragmatic benefits of remand without vacatur, properly deployed, are undeniable.").

1. NMFS Error was Not Serious.

NMFS failure in its 2021 BiOp is limited to a finding that its ITS was insufficient; all other grounds brought by Plaintiffs in this action and by plaintiffs in *Maine Lobstermen's Association v. NMFS*, Case No. 1:21-cv-02509, were rejected by this Court. (Dkt. #219 - Mem. Op. at 13; *MLA v. NMFS*, Case No. 1:21-cv-02509-JEB Dkt. # 76.) Thus, although a failure, NMFS insufficient ITS was not a *serious* failure as understood by courts for this analysis. This factor therefore weighs in favor of remand without vacatur.

The question for vacatur is not the importance of the issue, but the extent of the error. *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 103 (D.D.C. 2017). Thus, courts focus on the procedural failure, not the substantive failure. *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 985 F.3d 1032, 1051–52 (D.C. Cir. 2021) (noting the inquiry begins "[w]hen an agency bypasses a fundamental procedural step[.]"), *cert. denied sub nom. Dakota Access, LLC v. Standing Rock Sioux Tribe*, 142 S. Ct. 1187 (2022); *Shands Jacksonville Med. Ctr., Inc.*, 959 F.3d 1113, 1118 (D.C. Cir. 2020) ("[t]he Hospitals do not dispute that on remand the Secretary cured the Rule's procedural deficiencies . . . .").

When analyzing the extent of error, courts assess whether there is a "significant possibility that the agency may find an adequate explanation for its actions on remand*." Standing Rock Sioux Tribe*, 985 F.3d at 1051 (quoting *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008)). While the *Standing Rock Sioux Tribe* court suggested a "significant possibility" test, the D.C. Circuit has previously suggested a lesser standard of whether "agency *may be able to* readily cure a defect in its explanation of a decision, the first factor in *Allied-Signal*

counsels remand without vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (emphasis added) (citing *La. Fed. Land Bank Ass'n v. Farm Credit Admin.,* 336 F.3d 1075, 1085 (D.C. Cir.2003)); *see also Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 949–50 (D.C. Cir. 2004) ("First, the 1989 rationale pointed to by EPA is sufficient to persuade us that the Agency *may be able to* explain the subcategorization decision it made in 2000") (emphasis added and citation omitted); *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 451 (D.C. Cir. 2017) ("Here, the SEC *may be able to* approve the Plan once again, after conducting a proper analysis on remand.") (emphasis added). Under either standard, remand without vacatur is warranted.

NMFS's failure was procedural. It did not fail to issue an ITS (as it had in 2014), NMFS merely failed to issue a valid ITS under the ESA.[2] *Cf. Daimler Trucks North America LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013) ("[T]he court typically vacates rules when an agency 'entirely fail[s]' to provide notice and comment . . . ." (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991))). The ITS NMFS issued represented a good faith effort to correct its initial failure to issue an ITS with the requirements of the ESA and MMPA. Realizing that it was unlikely that there would be no takes, NMFS issued an ITS it believed would be compliant with ESA and MMPA: a zero-take ITS that would be immediately reconsidered if a take occurred. This Court determined that such an ITS was not valid and that NMFS would have to issue an ITS permitting

[2] Federal Defendants explain in detail the nature of the ITS and its relation to the 2021 BiOp in their Remedy Brief and why vacating the 2021 BiOp would be detrimental to the Right Whale. *See* (Fed. Defs.' Remedy Br. at 21–25); *see also Ctr. for Biological Diversity vEPA*, 861 F.3d 174, 188 (D.C. Cir. 2017) ("Court has previously remanded without vacatur, however, if vacating 'would at least temporarily defeat . . . the enhanced protection of the environmental values covered by [the EPA rule at issue].'") (quoting *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam)). MALA refers this Court to that explanation rather than repeating the assertions here.

a non-jeopardizing amount of takes or issue no ITS at all. (*See generally,* Dkt. # 219 - Mem. Op.) There is no reason to believe, and indeed Plaintiffs do not even allege, that NMFS will be unable to correct its flawed ITS on remand. *Oglala Sioux Tribe v. United States Nuclear Regul. Comm'n*, 896 F.3d 520, 538 (D.C. Cir. 2018) (declining to vacate either a flawed environmental impact study or an associated mining license because the court had "not been given any reason to expect that the agency [would] be unable to correct those deficiencies" on remand). Indeed, all parties seem in agreement that a new, valid ITS will be issued on remand. Even though MALA finds NMFS's proposal deeply flawed, as explained below, there can be no doubt that NMFS "may be able to" correct its error, or that there is a "significant possibility" that NMFS will correct its error. Thus, NMFS's error was not serious under the *Allied-Signal* procedural analysis and Plaintiffs' assertion to the contrary fails.

2. The Disruptive Consequences of Vacatur Would be Catastrophic to the Lobster Industry.

If this Court remands with vacatur, even with a stay, it will continue to force the industry into a whirlpool of conflicting expectations and uncertainty, where the very ability to make a livelihood could be stripped away at a moment's notice for hundreds of lobstermen. *Mozilla Corp. v. FCC*, 940 F.3d 1, 86 (D.C. Cir. 2019) ("Regulation of broadband Internet has been the subject of protracted litigation . . . . We decline to yet again flick the on-off switch of common-carrier regulation under these circumstances."). Further, this Court will be doing so despite the lobster industry's good faith reliance on the 2021 BiOp and the corresponding ITS, the failures of which the lobster industry bears no responsibility. *Oglala Sioux Tribe*, 896 F.3d at 538 (declining to vacate operating license when licensee had reasonably relied on agency ruling and faced grave economic harm if license were vacated).

With barely concealed disdain, Plaintiffs attempt to downplay the catastrophic effects vacatur would have on the hundreds of Massachusetts lobstermen, claiming that MALA will attempt to "overstate the [economic] consequences by asserting that vacatur will shut down the entire lobster fishery in both state and federal waters." (Pls.' Remedy Br. at 19–20.) Plaintiffs go on to contend that this argument should fail because "the court did not rule" on the state waters argument raised by Plaintiffs and, thus vacatur "would not directly affect the lobster fishery in state waters as permitted under state fisheries law."

Plaintiffs expect this Court to ignore their core objective, which--by their own admission--is to target fisheries "in both state and federal waters." *See* (Pls.' Remedy Br. at 22 ("these new measures not only help protect right whales but also other imperiled whale species at risk of entanglement in lobster gear in both *state* and federal waters . . .").) Further, the remedy Plaintiffs seek contradicts their own purported mission to protect the Right Whale by restricting the lobstering boats that were once spread between state and federal waters to the confines of the Massachusetts' state fisheries. Regardless, the economic consequences of closing the federal fisheries cannot be "overstated." The vacatur of the 2021 BiOp would almost certainly preclude NMFS from issuing federal permits in fixed gear fisheries, closing off massive swathes of federal waters. Closing the federal waters to lobstering will result in the loss of [INSERT PERCENTAGE OF FISHING THAT OCCURS IN FEDERAL WATERS] and thousands of jobs.

Further, Plaintiffs' dismissive attitude cannot overcome the heavy importance the courts place on the disruptive consequences prong once the first *Allied-Signal* factor is established. *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) ("[T]he second *Allied-Signal* factor is weighty only insofar as the agency may be able to rehabilitate its rationale."); *see also Rodway v. United States Dep't of Agric.*, 482 F.2d 722 (D.C. Cir. 1973) (remanding without vacatur where

agency completely failed to conduct notice and comment proceedings."). When the Court can issue a remedy that does not subject hundreds to "a logistical nightmare", it should do so. *Susquehanna Int'l Grp., LLP*, 866 F.3d at 451 (remanding without vacatur to prevent a situation where "the parties may [] awaken from that nightmare just as the [agency] decides to rewind the unwinding."); *see also Sugar Cane Growers Co-op. of Florida v. Veneman,* 289 F.3d 89, 97 (D.C.Cir.2002) (vacatur would be "an invitation to chaos" because "[t]he egg has been scrambled and there is no apparent way to restore the status quo ante"). This is the case here.

Plaintiffs also assert that the disruptive consequences prong is less salient where "the harm from vacatur would be economic, not environmental." (Pls.' Remedy Br. at 17–18.) Yet Plaintiffs cite only two cases for this broad overstatement: *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007) and *Pub. Emps. For Envtl. Responsibility v. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1 (D.D.C. 2016). *See* (Pls.' Remedy Br. at 18.) *Nat. Res. Def. Council* does not address how or whether economic concerns weigh against environmental concerns in any way. *Pub. Emps. For Envtl. Responsibility* posits that economic concerns might not be as relevant as environmental concerns, but it bases this contention on a single Northern District of California case which itself was only uncertain as to the weight between environmental and economic concerns. 189 F. Supp. 3d at 3 (citing *Ctr. for Food Safety v. Vilsack*, 734 F.Supp.2d 948, 953 (N.D. Cal. 2010)). Further, no District of D.C. Case has relied on *Pub. Emps. For Envtl. Responsibility* for the alleged environmental over economic considerations, strongly suggesting this strand of law is illegitimate. This Court would be wading into treacherous waters if it followed Plaintiffs' reasoning. Instead, it should weigh the disruptive economic consequences on their own merits.

Having already recognized "the importance of lobster fishing to the economies of several states along the Atlantic seaboard", this Court should not deliver the "weighty blow" of vacatur.

The two prongs of the *Allied-Signal* test clearly weigh towards remand without vacatur here. This Court must follow the direction of the *Allied-Signal* court, avoid the chaos and logistical nightmare that would come from vacatur, and remand to NMFS.

C. Plaintiffs' Proposed Remedy of Remand with Vacatur Stayed for Sixth Months Is Untenable.

Plaintiffs urge this Court to adopt an untenable and unreasonable position that this Court should remand with vacatur, staying vacatur within six-months. (Pls.' Remedy Br. at 2.) This timeline is far too expedited to possibly afford the NMFS the time it needs to promulgate a compliant Biological Opinion that complies with this Court's direction and the other requirements of the Administrative Procedures Act ("APA"). Further, while appearing reasonable, it guarantees the obliteration of the lobster industry. Viable alternatives exist that ensure the NMFS can meet its obligations, the lobster industry and its thousands of jobs and reliant families is preserved, and the goals of the ESA and MMPA can be met.

A six-month stay would not actually provide NMFS six months to create a new Biological Opinion. Rather, because of the APA's notice and comments obligations, NMFS would be required to produce a new Biological Opinion almost immediately. Under the APA, once an agency has drafted a proposed rule, it must generally present that rule to the public for a comment period. *Mendoza v. Perez*, 754 F.3d 1002, 1020-21 (D.C. Cir. 2014). But notice-and-comment is not just for show. Rather, "[t]o meet the rulemaking requirements of section 553 of the APA, an agency must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019) (quoting *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)) (internal quotations omitted). In other words, a proposed rule (or Biological Opinion) must "adequately

frame the subjects for discussion" for notice to be sufficient, lest the public be denied an opportunity to meaningfully comment; a half-baked, rushed rule deprives the public of that right to meaningful commentary. *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996). Indeed, failure to provide adequate grounds for notice and comment is sufficient reason for a regulation to be remanded or vacated for invalidity. *See Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013); *Northern Mariana Islands v. United States*, 686 F.Supp.2d 7, 15 (D.D.C. 2009).

While the APA does not provide a minimum notice and comment time period, the United States Supreme Court has suggested that, at an absolute minimum, there must be a thirty-day notice and comment period. *Azar v. Allina Health Services*, 139 S.Ct. 1804, 1809 (2019) (referring to the "APA minimum of 30 days" when discussing the Medicare statutory requirement of a 60-day comment period). Some courts even consider ninety days to be the minimum to satisfy the APA. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011). Further, a more complex rule, such as the one here, requires a longer comment period. *See Conn. Light & Power Co. v. Nuclear Regul. Comm'n*, 673 F.2d 525, 534 (D.C. Cir. 1982). Once those comments are received, the government must then review and respond accordingly, requiring even further time to be expended. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

Thus, to comply with its APA obligations, NMFS will have to publish its proposed Biological Opinion at least thirty days, but more reasonably at least sixty days, prior to implementation to properly notice and review comments.[3] *Azar*, 139 S.Ct. at 1809; *Conn. Light & Power Co.*, 673 F.2d at 534. Under Plaintiffs' proposed remedy, this means NMFS would have

[3] Federal Defendants also concede that "NMFS should allow for public comment on the proposed rule under NEPA and the Administrative Procedure Act" but do not clarify how long they anticipate this period taking. (Fed. Defs.' Remedy Br. at 15.)

only ***four months*** to consult the AWLTR, review new scientific information, consult with its Canadian counterparts, and take all other necessary steps ensure a viable, new Biological Opinion is issued. *Azar*, 139 S.Ct. at 1809; *Perez*, 575 U.S. at 96. Indeed, according to Plaintiffs, NMFS cannot "justify its decisions based on the existing record," and yet must "substantially amend the regulation governing the operation of the lobstering fisher." (Pls.' Remedy Br. at 12.) But NMFS is supposed to create an entirely new record and accomplish this substantial amendment in four months?[4] This is clearly untenable and will spawn endless requests for extensions of the stay of vacatur that will drag the parties back before this Court, wasting this Court's resources and injecting continued uncertainty into the lobstering industry. *See Anacostia Riverkeeper, Inc. v. Pruitt*, No. CV 09-0098 (JDB), 2017 WL 6209176, at *1 (D.D.C. Sept. 15, 2017) (granting an additional three year stay of vacatur following seven years of stay of vacatur); 53 Duke L.J. at 302–03 ("the court . . . may well want to avoid the burden of having to entertain a series of requests for extension of such stay.").

Plaintiffs assert NMFS should have ordered closures to lobster fishing as protective measure, should have expanded the restricted fishing area,[5] should have required the use of one

[4] Plaintiffs also allege that PBR has changed drastically since the 2017 model supporting the 2018 Final Rule, and that "the best available data", i.e., a single report, as of 2021 showed that the risk reduction was insufficient. (Pls.' Remedy Br. at 4–5 (citing NMFS, 2019 Stock Assessment Report: North Atlantic Right Whale (Apr. 2020)).) If the 2017 study was already outdated as of 2018, MALA assumes Plaintiffs find the 2020 paper to be outdated as well, requiring NMFS to publish a new, updated paper.

[5] Plaintiffs are apparently unaware that Massachusetts already closes its fisheries from February 1st to May 15th, the time period in which Right Whales are present in Massachusetts waters. Massachusetts Division of Marine Fisheries, *New Protected Species Regulations Finalized for Fixed Gear Fisheries and Industry Outreach on Required Gear Modifications* (February 19, 2021), https://www.mass.gov/doc/21921-new-protected-species-regulations-finalized-for-fixed-gear-fisheries-and-industry/download.

buoy line, should have issued "an emergency rule under section 118(g) of the MMPA". (Pls.' Remedy Br. at 2, 18.) Ironically, after outlining specific steps the NMFS must take, Plaintiffs claim that "this Court will not be commanding the agency *how* to act, only that it must act by a date certain." (Pl.s' Remedy Br. at 23.) Clearly, Plaintiffs are asking this Court to command NMFS how to act. To possibly determine whether Plaintiff's impositions are feasible or even useful for achieving ESA's goals, NMFS will be required to conduct additional studies and consultation. This cannot be completed within four months.

Contrary to Plaintiffs' assertions, a de facto four-month timeline does not "limit disruptive consequences while providing NMFS time" to comply with this Court's direction. (Pls.' Remedy Br. at 3.) Instead, it guarantees that NMFS will fail, and will destroy the lobster industry. This Court must reject this unrealistic proposal.[6]

D. The Federal Defendants' Proposed Remand without Vacatur and a Two-Year Timeline is Insufficient.

The Federal Defendants, attempting to appear reasonable before this Court, have proposed a more extensive timeline than that suggested by Plaintiffs, but one that still falls woefully short of any realistic scenario. NMFS now claims that it can achieve in twenty-six (26) months what it

[6] If this Court does decide to remand with vacatur, MALA urges this Court to stay vacatur until the resolution of the appeal in *Maine Lobstermen's Association v. NMFS, et al*, 1:21-cv-02509, or until December 31, 2030, whichever is later. *Nat. Res. Def. Council, Inc. v. EPA*, 301 F.Supp.3d 133, 145 (D.D.C. 2018) (staying vacatur of rule governing pollution level in Anacostia River until agency promulgated replacement rule). This is prudent because a successful appeal in *MLA v. NMFS* will require NMFS to further edit and modify its Biological Opinion to comply with the APA, ESA, and MMPA.

failed to accomplish in fifty-three (53) months: an ESA and MMPA compliant ITS and Biological Opinion. (Fed. Defs.' Remedy Br. at 17.) It cannot.

1. The Timeline Federal Defendants Propose Cannot Feasibly Be Accomplished by December 2024.

By Federal Defendants' own admission, achieving PBR will require "another herculean effort by the agency and the TRT." (Fed. Defs.' Remedy Br. at 14.) A herculean effort cannot be achieved in two years; even if every step proposed by NMFS occurs exactly as envisioned (which would be a miraculous revolution in government efficiency), the proposed timeline is simply too short.

First, NMFS claims that it will be able to update the Right Whale population model by early 2023. (Fed. Defs.' Remedy Br. at 11.) However, the Right Whale calving season begins in mid-November and runs through mid-April, and thus any accurate determination of the Right Whale population, which is crucial for PBR calculations, cannot be completed until at least mid-2023. *See North Atlantic Right Whale Calving Season 2022*, NOAA (Oct. 4, 2022) https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2022. This will delay NMFS timeline by at least two to three months. Further, NMFS represents that it will seek peer review on the right whale population model but does not provide this Court any guidance as to how long this process will take. (Fed. Defs.' Remedy Br. at 15.) This likely will further delay NMFS' proposed timeline.

NMFS also claims it will "seek input on the proposed rule from the Atlantic States Marine Fisheries Commission and Fishery Management Councils". (Fed. Defs.' Remedy Br. at 11.) Yet, once again, NMFS does not provide a timeline of how long these consultations will take, nor what steps will be taken on any feedback it receives from that group. It is likely that NMFS' timeline is

only feasible if the ASMFC and the FMCs rubberstamp its proposals. If the ASMFC and the FMCs push back or have changes to NMFS's proposals, as they almost certainly will, it will once again delay the timeline, further showing the infeasibility of the 26-month timeline.

NMFS further asserts that it will "refine and seek peer review on the Decision Support Tool" but provides no estimation of how long this will take, what kind of peer review will be necessary, or how much time would be needed to incorporate any changes from the peer review process. Once again, this vague proposition can only lead to the conclusion that more time will be needed.

Crucially, the core of NMFS' strategy revolves around forcing the adaptation of a technology within two years that *will not exist for eight years*. NMFS claims that "the only way to make a [negligible impact determination ("NID")] is broad-scale deployment of on-demand (i.e., ropeless) fishing in federal and state waters for all, or nearly all, fixed gear fisheries – not merely the lobster fisheries." (Fed. Defs.' Remedy Br. at 5 (emphasis added).) NMFS then reveals "[t]hat kind of technology is not currently viable for widespread use. It will not likely be widely available and adopted *before 2030*." (*Id.* (emphasis added).) Despite acknowledging that the technology underpinning its future regulatory scheme will not be available for another eight years, NMFS asks this Court to force the entire industry to adopt such non-existent technology within two years. This cannot be achieved. No amount of wishful thinking can change the hard scientific fact that such technology simply does not viably exist and cannot be made so by government fiat. NMFS attempts to elide this reality by claiming that it has "worked aggressively to aid development of this technology, but it needs more time." (Fed. Defs.' Remedy Br. at 12.) This is certainly true. It does need more time. In fact, it needs substantially more than two years. NMFS needs at least as long as the technology itself needs, i.e., eight years, to come into "compliance with numerous

federal and state laws and regulations, and fishery management plans[.]" (*Id.*) Setting a hard deadline on remand will force NMFS to develop a rule that it knows full well cannot actually be implemented.

NMFS claims that it can complete a "four-step process" to deploy remote traps within two years, including technology development and testing, resolving gear conflicts, expanding experimental fishing, and fishery regulatory management plan changes. (Fed. Defs.' Remedy Br. at 13.) While Federal Defendants claim these processes are beginning this year and next, they do not explain how these processes will work in light of the actual state of the technology nor do they detail how these processes will be completed within two years. To be clear, MALA is not objecting to the steady roll out of ropeless fishing as the technology becomes viable. Rather, MALA is making clear to this court that NMFS' timeline simply is not feasible. This becomes even more salient as NMFS must take additional actions beyond what it is already proposing to do.

2. NMFS Must Reconsider Apportionment of M/SI between the United States and Canada.

While this Court ruled that the NMFS's allocation of whale mortalities between Canada and United States was reasonable under the then-existing science, it also admonished that "the Court fully expects that NMFS will continue diligently incorporating the latest information, considering the concerns of all stakeholders, and adapting to changing circumstances in making its future decisions." [*MLA v. NMFS*, Case No. 1:21-cv-02509-JEB, Dkt. # 76.] With remand, the NMFS has the time and ability to conduct a thorough and sufficient evaluation of the correct apportionment that will also bolster the ultimate Biological Opinion and ITS. NMFS has hedged on this front, claiming only that it will "potentially" refine and seek peer review on "risk apportionment between the United States and Canada[.]" (Fed. Defs.' Remedy Br. at 15.) It should

be required to do so. (*Id.* ("If new data continue supporting this trend [of whales migrating north], the agency may in the future need to either update its modeling or say more about why it has not.").)

The data underpinning NMFS' 2021 Biological Opinion is already certainly outdated. Refining and conducting peer review will take time, requiring intergovernmental meetings, communications, and information exchange with NMFS' Canadian counterparts. *See Pub. Emps. for Env't Resp. v. Beaudreau,* 25 F. Supp. 3d 67, 78 (D.D.C. 2014) (noting a years' long process of consultation between the United States government and tribal governments to achieve a viable regulation). NMFS notably excludes this time from its estimated completion date of December 2024. But this will take time. In Canada, preservation of the Right Whale is handled by the Fisheries and Oceans Canada – Maritime Region under the Species at Risk Act. *See* Species At Risk Act (2002) (Ca.); *Recovery Strategy for the North Atlantic Right Whale (Eubalaena glacialis) in Atlantic Canadian Waters* at i (June 2009). The FOCMR has implemented fishing closures, speed limits, and its own incidental take permitting scheme. Species At Risk Act §§ 73(3)(c); 73(8). To do so, it necessarily had to collect similar scientific data as those collected and relied upon by NMFS to issue its Biological Opinion and ITS. Indeed, NOAA's current data already shows that more Right Whales deaths occurred in Canadian waters (21) than U.S. waters (13) from 2012-2021, such that 61% of the deaths occurred in Canada. *2017-2022 North Atlantic Right Whale Unusual Mortality Event*, NOAA (Sept. 27, 2022), https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event. NMFS should be required to consult with FOCMR (or any other applicable entity) on this data to determine a more reliable and statistically justifiable allocation of whale mortalities between Canadian and United States waters.

3. NMFS Must Reconsider Apportionment of M/SI between Vessel Strikes and Fisheries.

In their Remedy Brief, Federal Defendants correctly note that vessel collisions are a "leading cause of right whales' decline and [a] primary factor in ongoing unusual mortality event[.]" (Fed. Defs.' Remedy Br. at 9, n.4.) Yet, despite vessel collisions' crucial role in the Right Whale's decline, NMFS will not commit to reevaluating the "apportionment of M/SI between vessel strikes and fisheries", stating that it will only potentially do so. (Fed. Defs.' Remedy Br. at 11, 15.) NMFS' unwillingness to commit to ensuring it has the most accurate data before it issues a regulation that could cripple the lobster industry simply defies explanation. NMFS has already issued new regulations that will supposedly reduce the M/SI from vessel strikes. *See* Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule, 87 Fed. Reg. 46,921 (Aug. 1, 2022). There is no reason why NMFS should not be required to determine the impact of these new regulations and whether they have an impact on the lobster industry's potential contribution to M/SI and therefore PBR. [*MLA v. NMFS*, Case No. 1:21-cv-02509-JEB Dkt. # 76 ("While this case has reached its terminus, the Court fully expects that NMFS will continue diligently incorporating the latest information, considering the concerns of all stakeholders, and adapting to changing circumstances in making its future decisions.").] This will of course take time, further extending the timeline NMFS will require to issue a valid, compliant ITS and Biological Opinion.[7]

E. This Court Should Remand Until December 21, 2030, with Mandatory Status Updates Every Six Months

[7] NOAA currently divides the United States into six distinct fishing regions: Alaska, New England/Mid-Atlantic, Pacific Islands, Southeast, West Coast, and International. These are further subdivided into seven Lobster Management Areas wherein federal lobster permit holders may fish. Those seven LMAs are further divided into zone to distinguish the requisite number of minimum traps per buoy line. Rather than determine PBR for the entire human actiivty, NMFS should

Plaintiffs and Federal Defendants have not provided feasible proposals to this Court, with Plaintiffs' proposal entirely too aggressive and unrealistic, and Federal Defendants' proposal unreflective of the time they will need to accomplish their mission. MALA proposes a realistic compromise that will provide Plaintiffs the assurance they need that NMFS is expeditiously correcting its ITS, while giving Federal Defendants the breathing room they need to develop a viable Biological Opinion, and saving this Court the burden of repeated requests for extensions.

MALA proposes this Court remand without vacatur, without putting a specific deadline on NMFS to promulgate a new ITS before the natural expiration of its 2021 Biological Opinion by December 31, 2030. This is the most feasible option because it allows NMFS the flexibility it needs to ensure its data collection and consultation are not rushed to meet an arbitrary deadline, but instead are allowed the full amount of time to be done appropriately (and therefore withstand future challenges). However, MALA is not ignorant to the fact that the lack of a firm deadline removes a key incentive for NMFS to complete its work in a timely manner. *Air Transp. Ass'n of Am., Inc. v. United States Dep't of Agric.*, 317 F. Supp. 3d 385, 392 (D.D.C. 2018) ("The Court well appreciates Plaintiffs' concern that the agency, if unchecked, may take years to promulgate a new proposed rule or take other action.").

To ensure that NMFS does not drag its feet, MALA proposes that NMFS be required to provide status updates to this Court every six months (or sooner if the Court believes that necessary). This has been an approach taken by courts who remand without vacatur in this Circuit and ensures that Plaintiffs and MALA can keep NMFS accountable. *See Friends of Animals v. Williams*, No. CV 21-2081 (RC), 2022 WL 3714226, at *10 (D.D.C. Aug. 29, 2022) (requiring a

---

determine PBR on a per-LMA or per-zone basis, so as to better target and fulfill the goals of the ESA and MMPA. This Court should explore that possibility with NMFS and, if viable, recognize that NMFS will need additional time produce a new ITS and Biological Opinion.

status update six-months after remand without vacatur); *Nat. Res. Def. Council, Inc. v. EPA*, 490 F. Supp. 3d 190, 192, 198 (D.D.C. 2020) (mandating "detailed status reports" updates every three months in light of slow progress of regulation updates); *Air Transp. Ass'n of Am., Inc.*, 317 F. Supp. 3d at 3929 (ordering status reports every ninety days to ensure completion of regulatory update); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 137 (D.D.C. 2010) (directing the agency to file "status reports with this Court every 90 days apprising the Court of its progress in developing the revised recover plan" after remanding without vacatur). This is a reasonable proposal that will allow Plaintiffs to seek relief from this Court if NMFS begins to fall behind Plaintiffs' or NMFS' expected timelines, allows the Court to see the progress of NMFS' intended data collection, consultation, and revisions to the ITS and Biological Opinion. If NMFS fails, then this Court could impose sanctions or more specific deadlines to ensure a timely completion.

IV. CONCLUSION

For the foregoing reasons, the Court should remand the 2021 TRP Amendment Rules without vacatur and instruct NMFS to issue a new TRP amendment rule by December 31, 2030, that will achieve PBR within six months of its implementation, with mandatory six-month status reports. The Court should also remand, and not vacate, the lethal take portion of the ITS in the 2021 BiOp to NMFS.

Defendant-Intervenor Massachusetts Lobstermen's Association, Inc. by its attorneys,

Dated: October 7, 2022

ECKLAND & BLANDO LLP

/S/SAMUEL P. BLATCHLEY

Samuel P. Blatchley, Esq. (#MA0039)
22 Boston Wharf Road, 7th Floor
Boston, MA 02210
sblatchley@ecklandblando.com
(617) 217-6936

Daniel J. Cragg, Esq. (#MN0016)
10 South Fifth Street, Suite 800
Minneapolis, MN 55402
dcragg@ecklandblando.com
(612) 236-0160

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, 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

Samuel P. Blatchley (#MA0039)