UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, INC. 8 Otis Place Scituate, MA 02066 Plaintiff, v. GINA RAIMONDO, *in her official capacity as Secretary*, U.S. Department of Commerce 1401 Constitution Avenue, NW Washington, DC 20230, JANET COIT, *in her official capacity as Assistant Administrator*, NOAA Fisheries 1315 East-West Highway Silver Spring, MD 20910, NATIONAL MARINE FISHERIES SERVICE, 1315 East-West Highway Silver Spring, MD 20910 Defendants.	Case No. 1:24-cv-10332 **MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND STAY PURSUANT TO 5 U.S.C. § 705**

Plaintiff Massachusetts Lobstermen's Association, Inc., by and through its undersigned counsel, pursuant to Rule 65 of the Federal Rules of Civil Procedure, hereby submits its Memorandum in Support of Motion for Temporary Restraining Order, Preliminary Injunction, and Stay Pursuant to 5 U.S.C. § 705 against Defendants Gina Raimondo, Janet Coit, and National Marine Fisheries, as more fully detailed herein.

I. INTRODUCTION

The Massachusetts' lobster industry, a centuries old industry that has served as the lifeblood for the Commonwealth and thousands of families, has been under repeated assault by the National Marine Fisheries Service in a misguided attempt to comply with NMFS's purported obligations under the Marine Mammal Protection Act and the Endangered Species Act regarding the North Atlantic Right Whale. Despite the Massachusetts' lobster industry's cutting-edge efforts to save the North Atlantic Right Whale, NMFS has added increasingly heavy burdens, including closing federal waters to trap and pot fishing. With the Consolidated Appropriations Act, 2023, Congress put a stop to NMFS's oppressive actions, deeming the lobster industry in full compliance with the ESA and MMPA until 2028, and forbidding NMFS from passing new regulations on the lobster industry for MMPA and ESA purposes. However, in flagrant disregard of that clear Congressional mandate, NMFS has now promulgated an illegal final rule closing portions of federal waters where MLA members fish, causing irreparable harm to thousands of fishermen and women. NMFS's promulgation of this illegal final rule is a continuation of its conduct, which the United States Court of Appeals for the District of Columbia in *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582 (D.C. Cir. 2023) held "relied upon worst-case modeling that is "very likely" wrong, based upon assumptions [NMFS] concededly does not believe are accurate" and relies upon legal reasoning which is "egregiously wrong." Like the D.C. Circuit, this Court must put a stop to NMFS and issue a temporary restraining order, halting implementation of this illegal closure, and further issue a preliminary injunction and stay pursuant to 5 U.S.C. § 705 for the same.

II. FACTS

NMFS is charged with promulgating regulations under the Endangered Species Act ("ESA") § 7(a)(2) and the Marine Mammal Protection Act ("MMPA") to protect against the

incidental take of endangered species, including the North Atlantic Right Whale. It is also charged with authorizing fisheries in federal waters under various laws, including the Magnuson-Stevens Act and the Atlantic Coastal Fisheries Cooperative Management Act. *See* 16 U.S.C. §§ 5101-08. One of those fisheries is the American lobster fishery, a bedrock industry of the Commonwealth of Massachusetts. For decades, Massachusetts' lobstermen have worked with NMFS and other invested parties on the "Atlantic Large Whale Take Reduction Team"[1] to help restore the right whale population, primarily by seeking to minimize potential risk that lobster gear may theoretically pose to the health and safety of North Atlantic Right Whales. *See, e.g.*, 62 Fed. Reg. 39,157 (July 22, 1997); 50 C.F.R. §229.32.

From 1991 to 2011, the North Atlantic Right Whale population increased to almost 500 individuals, a nearly five-fold increase from 1935. *See* 72 Fed. Reg. 57,104 (Oct. 5, 2007); 73 Fed. Reg. 51,228 (Sept. 2, 2008). Unfortunately, from 2011 to 2019, the North Atlantic Right Whale population was estimated to have dipped below 400, leading NMFS to declare an unusual mortality event in 2017. For context, NMFS has a goal of a 0.8 "potential biological removal level" ("PBR"), *i.e.*, "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population." 86 Fed. Reg. 51,970 (Sept. 17, 2021); 16 U.S.C. § 1362(20). Thus, NMFS reinitiated the ESA § 7(a)(2) consultation process to develop a new "conservation framework" to reduce the risk of North Atlantic Right Whale entanglement, and to develop a

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[1] NMFS established the Atlantic Large Whale Take Reduction Team pursuant to the Marine Mammal Protection Act. That statute authorizes NMFS to establish risk-reduction measures, subject to certain conditions, via "take reduction plans" with respect to marine mammals like the right whale. *See* 16 U.S.C. § 1387(f). The take reduction planning process seeks to achieve "consensus" among stakeholders, and take reduction plans (and amendments to them) must go through notice and comment. *Id.* § 1387(f)(7).

new Biological Opinion determining how the lobster industry could operate under the ESA and MMPA.

NMFS's new conservation framework (ruled illegal for reliance on faulty science and data as explained below), determined that the American lobster fishery was responsible for 7.57 right whale mortalities or serious injuries each year.[2] It then decided that it would need to implement "gear and operational measures" to reduce the annual rate of mortality or serious injury to 2.69, then 2.61, then 1.04, and finally to 0.136.

In September 2021, NMFS promulgated a final rule implementing the first phase of the conservation framework, which required the American lobster industry to reduce the risk of right whale entanglement substantially. *See* 86 Fed. Reg. 51,970 (Sept. 17, 2021). To meet this goal, NMFS required lobstermen to significantly modify their gear and close fishing grounds during peak fishing seasons. *Id*. at 51,971.

This rule was challenged in *Maine Lobstermen's Association*, *et al. v. NMFS, et al.*, No. 1:21-cv-02509-JEB (D.D.C. 2021), where the District of D.C. ultimately granted summary judgment in NMFS's favor on September 8, 2022. On June 16, 2023, the D.C. Circuit unanimously reversed, ordered the Biological Opinion vacated, the Final Rule remanded, and noting that "[b]y the Service's admission, it relied upon worst-case modeling that is "very likely" wrong, based upon assumptions the Service concededly does not believe are accurate." *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582, 599 (D.C. Cir. 2023). For example, NMFS's illegal conservation framework speculated that the American lobster fishery was responsible for 46 whale deaths per decade, and the *Maine Lobstermen's Association* Court

[2] NMFS categorizes incidental injuries between fisheries and marine mammals as "serious" or "non-serious" injuries. A "serious injury" is "any injury that will likely result in mortality." 50 C.F.R. § 216.3.

noted this was a "staggering departure from the two documented deaths known to have originated in all U.S. fisheries over a period of nine years."

Conversation groups filed a separate lawsuit to challenge the Biological Opinion and Final Rule, claiming that NMFS did not sufficiently protect the right whale. The same district court judge that rejected the challenge in *Maine Lobstermen's Association* sided with the conservation groups in that separate suit and ordered NMFS to promulgate a new rule by December 2024 in a November 17, 2022 Remedy Order. *See Ctr. for Biological Diversity v. Raimondo*, 610 F.Supp.3d 252 (D.D.C. 2022); *see also Ctr. For Biological Diversity v. Raimondo*, No. 18-112 (JEB), 2022 WL 17039193 (D.D.C. Nov. 17, 2022). That order has now been vacated and the case dismissed as moot.

After the Remedy Order, and while the *Maine Lobstermen Association* appeal was pending, the Consolidated Appropriations Act, 2023, H.R. 2617 ("CAA") was signed into law by President Joseph R. Biden. (*Bill Signed: H.R. 2617*, THE WHITE HOUSE, Dec. 29, 2022, https://www.whitehouse.gov/briefing-room/legislation/2022/12/29/bill-signed-h-r-2617/.) The CAA included a mandate that the 2021 Atlantic Large Whale Take Reduction Plan ("ALWTRP") amendments "shall be deemed sufficient to ensure that the continued Federal and State authorizations of the American lobster and Jonah crab fisheries are in full compliance" with the Endangered Species Act and Marine Mammal Protection Act until December 31, 2028. H.R. 2617—1632 § 101(a). However, the CAA provided that § 101(a) "shall not apply to an existing emergency rule, or any action taken to extend or make final an emergency that is in place on the date of enactment of this Act, affecting lobster and Jonah crab." *Id.* § 101(b). Therefore, the CAA limited NMFS from issuing any new regulations except for extending or finalizing emergency rules in place as of December 29, 2023. *Id.*

Prior to the passage of the CAA, on March 1, 2022, NFMS issued an "Emergency Closure for Lobster and Jonah Crab Trap/Pot Fishery Area Between Massachusetts Restricted Area and Massachusetts Restricted Area North for April 2022" ("2022 Wedge Closure") for federal waters in the following coordinates:

MRA Wedge Area Coordinates		
Point	Lat	Long
MRAW1	42°39.77′	70°30′
MRAW2	42°12′	70°38.69′
MRAW3	42°12′	70°30′
MRAW4	42°30′	70°30′
MRAW1	42°39.77′	70°30′

87 FR 11590,11596. To support the 2022 Wedge Closure, NMFS relied on data reflecting whale sightings on April 19, 2021, and April 28, 2021. 87 FR 11590. In explaining its closure, NMFS stated that:

> This emergency closure is being put in place to protect right whales exiting Cape Cod Bay from becoming entangled in the dense aggregations of gear that were observed in this area in April 2021. Implementing an emergency restriction to fishing with buoy lines in this area will address a critical gap in protection where there is a particularly high chance of entanglement that was not addressed in recent modifications to the Atlantic Large Whale Take Reduction Plan, while long term measures are being developed.

See (https://www.fisheries.noaa.gov/bulletin/emergency-closure-lobster-and-jonah-crab-trap-pot-fishery-area-between-massachusetts).

NMFS stated that it was executing the 2022 Wedge Closure pursuant to its authority under the Marine Mammal Protection Act § 118(g) and that "[i]mplementing an emergency restriction to fishing with buoy lines in this area will address a critical gap in an area with a particularly high chance of entanglement in 2022 that was not address in recent modifications to the ALWTRP while long-term measures are being developed." (*See* https://www.fisheries.noaa.gov/action/emergency-closure-lobster-and-jonah-crab-trap-pot-fishery-area-between-massachusetts); 50 C.F.R. § 229. In determining that the 2022 Wedge Closure was necessary, NMFS relied on the Decision Support Tool ("DST"), a statistical model NMFS developed as part of the ALTWRP, which suggested that a high enough volume of North Atlantic Right Whales would be in the Massachusetts Restricted Area ("MRA") and Massachusetts Restricted Area North ("MRA North") that buoys could cause entanglements.[3] 87 FR 11590, 11594-95. The 2022 Wedge Closure lasted from April 1, 2022, to April 30, 2022. *Id.* at 11590. The waters reopened on May 1, 2022, and remained open until February 1, 2024.

With less than fourteen (14) hours' notice,[4] and after the passage of the CAA forbidding NMFS from issuing new rules, NMFS announced on January 31, 2023, that it would be initiating a new closure to begin on February 1, 2023, and ending on April 30, 2023 ("2023 Wedge Closure"). Officially titled the "Emergency Restricted Area for the Trap/Pot Fishery:

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[3] This is the same "science" that the D.C. Circuit rightly noted was, by NMFS's own admission, "very likely wrong" and "based upon assumptions the Service concededly does not believe are accurate." *Maine Lobstermen's Ass'n*, 70 F.4th at 599.

[4] In addition to being illegal, providing fourteen hours' notice also made it impossible for MLA members with gear in the 2023 Wedge to comply with the 2023 Wedge Closure and remove their gear from the 2023 Wedge as many had hundreds of traps deployed and only a single vessel of forty (40) feet or less in length which required multiple trips to fit hundreds of traps. This was an impossible task and NMFS knew that.

Massachusetts Restricted Area Wedge", the 2023 Wedge restricted the ***identical*** areas as the 2022 Wedge:

MRA Wedge Area Coordinates		
Point	Lat	Long
MRAW1	42°39.77′	70°30′
MRAW2	42°12′	70°38.69′
MRAW3	42°12′	70°30′
MRAW4	42°30′	70°30′
MRAW1	42°39.77′	70°30′

88 FR 7362; Docket No. FR-230130-0030.

NMFS claimed it was able to promulgate the 2023 Wedge Closure under MMPA § 118(g), and used the same whale sighting data from April 19, 2021, and April 28, 2021, to support its need for closure (although it said the data was "qualitative" rather than "quantitative" this time). (Complaint Exhibit 1 – Declaration of Beth Casoni ("Casoni Decl."), Ex. B at 13.) Further, NMFS once again relied on the DST to support the closure, although it claimed it was using an "updated version" from the 2021 model, without explaining what new data it was relying on to make it "updated." *Id.* at 15.

Indeed, despite saying the DST was a different model, NMFS admitted that it used "distribution data from 2010 through September 2020," which was true for the 2021 DST as

well. *Id.*; *see also* 86 FR 51970. Substantial portions of the explanatory materials for the 2023 Wedge Closure were identical to the 2022 Wedge Closure materials, such as:[5]

87 FR 11590	FR Docket No. FR-230130-0030
The Atlantic Large Whale Take Reduction Plan (Plan) was originally developed pursuant to section 118 of the MMPA (16 U.S.C. 1387) to reduce mortality and serious injury of three stocks of large whales (fin, humpback, and North Atlantic right) incidental to Category I and II fisheries. Under the MMPA, a strategic stock of marine mammals is defined as a stock: (1) For which the level of direct human-caused mortality exceeds the Potential Biological Removal (PBR) level; (2) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act (ESA) of 1973 within the foreseeable future; or (3) which is listed as a threatened or endangered species under the ESA or is	The Atlantic Large Whale take Reduction Plan (*"Plan" or ALWTRP*) was originally developed pursuant to section 118 of the MMPA (16 U.S.C. 1387) to reduce mortality and serious injury of three stocks of large whales (fin, humpback, and North Atlantic right) incidental to certain Category I and II fisheries. Under the MMPA, a strategic stock of marine mammals is defined as a stock: (1) For which the level of direct human-caused mortality exceeds the *PBR* level; (2) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the *ESA* within the foreseeable future; or (3) which is listed as a threatened or endangered species under the ESA or is designated as depleted under the MMPA (16 U.S.C. 1362(19)).

[5] All changes between 87 FR 11590 and FR Docket No. FR-230130-0030 emphasized in the latter.

designated as depleted under the MMPA (16 U.S.C. 1362(19)). When incidental mortality or serious injury of marine mammals from commercial fishing exceeds a stock's PBR level, the MMPA directs NMFS to convene a take reduction team made up of stakeholders, including: representatives of Federal agencies; each coastal state which has fisheries which interact with the species or stock; appropriate Regional Fishery Management Councils; interstate fisheries commissions, academic and scientific organizations; environmental groups; all commercial and recreational fisheries groups and gear types which incidentally take the species or stock; and, if relevant, Alaska Native organizations or Indian tribal organizations.	When incidental mortality or serious injury of marine mammals from commercial fishing exceeds a stock's PBR level, the MMPA directs NMFS to convene a take reduction team of stakeholders *that includes the following*: *R*epresentatives of Federal agencies; each coastal state that has fisheries *interacting* with the species or stock; appropriate Regional Fishery Management Councils; interstate fisheries commissions; academic and scientific organizations; environmental groups; all commercial and recreational fisheries groups *using* gear types that incidentally take the species or stock; and, if relevant, Alaska Native organizations or Indian tribal organizations.

No doubt anticipating a challenge to its unlawful rulemaking, NMFS preemptively attempted to explain why it was allowed to issue the 2023 Wedge Closure despite the CAA explicitly banning it from issuing new rules. In effect, NMFS argued that the 2022 Wedge Closure, despite ending on May 1, 2022, never actually ended because the emergency situation

for the North Atlantic Right Whale never ended, and thus the 2023 Wedge Closure was just an "extension" of the 2022 Wedge Closure.

To wit, NMFS asserted first that MMPA § 118(g)'s emergency rulemaking provision "allow[s] for an extension of existing emergency rules when conditions warrant, and the statutory language does not require an extension to follow immediately upon the expiration of the *original* emergency action." FR Docket No. FR-230130-0030 at pdf pg. 9; (Casoni Decl., Ex. B at 9.) It then stated that "the 2022 30-day emergency rule [2022 Wedge Closure] was not in effect longer than 270 days (the statute's temporal limit), *but the same conditions exist this year to warrant an extension*." (*Id*. (emphasis added).) NMFS sought shelter in MMPA § 118(g) because it believes that this allows it to use CAA §101(b)'s emergency rule exception.

Without citing to any legislative history or other grounds of support, NMFS determined that CAA § 101(b) "can only refer to the 2022 MRA Wedge Rule, because that is the only emergency rulemaking implemented under the MMPA, ESA, and other relevant statutes, affecting lobster and Jonah crab, to occur in the past decade." (*Id.*) NMFS doubled down on this assertion, further extrapolating that "the exception at § 101(b) is a specific reference to the 2022 emergency rule closing the MRA Wedge." (*Id.*) There is no reference to the 2022 emergency rule closing the MRA Wedge anywhere in the CAA, let alone § 101. Notwithstanding, NMFS connected the non-existent dots to conclude that "the continued existence of the emergency, *as opposed to the operability of the emergency rule*, is what matters for an extension of an emergency rule" (*Id.*) (emphasis added). In other words, NMFS has concluded that, so long as an emergency exists, it can continue to issue emergency rules without falling afoul of the CAA.

Notably, despite NMFS asserting that the 2023 Wedge Closure was a continuation of the 2022 Wedge Closure, Marisa Trego, Coordinator of the Atlantic Whale Take Reduction Team

for the NMFS Great Atlantic Region, truthfully stated in a January 31, 2023 email explaining the 2023 Wedge Closure that NMFS "implemented a *similar* emergency rule in April 2022, and are doing so again at the request of the Commonwealth of Massachusetts." (Casoni Decl., Ex. A.) In other words, NMFS' own representative and employee acknowledged that the 2023 Wedge Closure is a new, albeit similar, rule to the 2022 Wedge Closure.

After NMFS announced the emergency rule, MLA immediately sued NMFS in the United States District Court for the District of Columbia, asserting that the 2023 Wedge Closure violated the CAA and was therefore illegal. (*See* Complaint Exhibits 2-6 (Complaint, and Memorandums in Support, Opposition, and Reply to Motion for Preliminary Injunction, Hearing Transcript for Preliminary Injunction Hearing.)) In a hearing on a requested preliminary injunction on February 16, 2023, the Court stated "I think that the plaintiffs may well have a better argument on the merits than the government. It's a close question and one that I probably need to think about more. But in the time that I have had, I think that Mr. Cragg has probably got a better reading of the way -- a better interpretation of the exception." (Complaint Ex. 6 - TRO Hr'g Tr. 30:6-12.)

However, despite determining MLA was likely correct on the law, the Court denied the preliminary injunction based on its reading of D.C. Circuit precedent requiring overwhelming financial harm to meet the irreparable harm standard. Following this, NMFS refused to agree to an expedited briefing schedule and then moved to dismiss as moot the complaint once the 2023 Wedge Closure expired. The Court granted that motion over MLA's strenuous objections grounded primarily in the argument that NMFS had affirmatively stated it was intending to make the illegal 2023 Wedge Closure a final rule and thus the termination of the wedge closure was

not capable of repetition yet evading review. (Complaint Ex. 7 – Order Denying Case For Mootness.)

Following this, on September 18, 2023, NMFS announced it would be "finalizing" the emergency rule. During the notice and comment period, MLA submitted a comment outlining why the Final Wedge Closure Rule would be illegal for, *inter alia*, violating the CAA and because it was based on deficient scientific assumptions and legal reasoning deemed "egregiously wrong" by the D.C. Circuit. *See* (B. Casoni Decl., Ex. E). Despite this, NMFS marched on with its illegal rule, publishing the Final Wedge Closure Rule on February 6, 2024, with an effective date of March 8, 2024.

With the Final Wedge Closure Rule, NMFS expanded the area closed to now include:

MRA Wedge Area Coordinates		
Point	Lat	Long
MRAW1	42°52.32′	70°48.98′
MRAW2	42°52.58'	70°43.94′
MRAW3	42°39.77′	70°30′
MRAW4	42°30′	69°45′
MRAW5	42°30′	69°45′
MRAW6	41°56.5′	69°45′
MRAW7	41°21.5′	69°16′
MRAW8	41°15.3′	69°57.9'

MRAW9	41°20.3′	70°00′
MRAW10	41°40.2′	70°00′

NMFS relied on the same legal theory that the CAA must be referring to the 2022 Wedge Closure and that so long as an emergency continued, they could finalize the 2023 Wedge Closure. NMFS also brushed off the District of D.C.'s warning that the 2023 Wedge Closure was illegal, stating "we carefully considered these statements and determined that the present rulemaking complies with all applicable laws". (B. Casoni Decl., Ex. F.) On January 9, 2024, the Center for Coastal Studies conducted an aerial surveillance of the Wedge and sighted no Right Whales. (*Id.*, Ex. G.)

Prior to the permanent Wedge Closure, numerous MLA members, including Mr. Eric Meschino, a member of MLA's Board of Delegates, intended to fish in the areas affected by the permanent Wedge Closure, but will be prevented from doing so if the permanent Wedge Closure illegally remains extant. This will cost MLA members anticipated earnings and degrade their ability to continue to operate as commercial lobster fishermen. If the permanent Wedge Closure is lifted, Plaintiff's members will be able to fish in the closed areas and obtain a likely profit by doing so. (Exhibit 8 - Declaration of Arthur "Sooky" Sawyer ("Sawyer Decl.") at ¶ 15-16; Exhibit 9 - Declaration of Eric Meschino ("Meschino Decl.") at ¶¶ 13-14).)[6]

III. STANDARD OF REVIEW

The decision of whether to grant a preliminary restraining order is within the discretion of the Court. *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92 (1st Cir. 2020) ("In the precincts

[6] To be clear, Exhibit 8 and 9 were not part of the Complaint and are new exhibits for this memorandum. However, Plaintiff has continued the numbering from the Complaint for ease of reference and to avoid confusion for this Court.

patrolled by the abuse of discretion standard, appellate review is respectful to the district court's weighing of these elements[.]"). This Court utilizes a four-part test in determining whether litigants are entitled to preliminary injunction: (1) the likelihood of success on the merits, (2) the potential for irreparable harm if the injunction is denied, (3) the balance of relevant impositions (i.e., the hardship to the nonmoving party in comparison to the hardship to the movant) and (4) the effect of the court's ruling on public interest. *Bio-Imaging Technologies, Inc. v. Marchant*, 584 F.Supp.2d 322, 326 (D. Mass. 2008).

Plaintiff's likelihood of success on the merits is a critical factor in the court's analysis; that is, without an adequate showing, a preliminary injunction will not be granted. *Id.* (quoting *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993) ("In the ordinary course, plaintiffs who are unable to convince the trial court that they will probably succeed on the merits will not obtain interim injunctive relief.")). In the context of statutory violations by government agencies, this Court has held that the standard for establishing irreparable harm is different and easier to meet for plaintiffs. *Long Term Care Pharmacy Alliance v. Ferguson*, 260 F.Supp.2d 282, 289 (D. Mass. 2003). Where the government is the opposing party, the final two preliminary injunction factors merge such that the Court considers the balance of harms and public interest concurrently. *Massachusetts Fair Housing Center v. U.S. Dep't of Housing & Urban Development*, 496 F.Supp.3d 600, 611 (D. Mass. 2020).

The APA grants a reviewing court the power to stay "the effective date of an agency action or . . . preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. "Motions to stay agency action pursuant to [the provisions of the APA] are reviewed under the same standards used to evaluate requests for interim injunctive relief." *Affinity Healthcare Services, Inc. v. Sebelius*, 720 F.Supp.2d 12, 15 n.4 (D.D.C. 2010); *see also Silva v. Romney*, 473

F.2d 287, 292–93 (1st Cir. 1973) ("Having decided the case on these grounds we need not address appellants' persuasive alternative argument that the district court might have acted [] under . . . 5 U.S.C. § 705 . . . to grant temporary relief."). "The standard for a stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test applied in this Circuit . . . . [C]ourts consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing *WMATA v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977)).

IV. LEGAL ARGUMENT

This case is straightforward: Did Congress authorize NMFS to issue an emergency rule closing portions of federal waters off Massachusetts in the Consolidated Appropriations Act, 2023 ("CAA") when it permitted NMFS to "extend" existing emergency rules in § 101(b)? If no, then NMFS has no legal authority to issue a final rule making the Wedge Closure permanent, and this Court must issue a preliminary injunction against the permanent Wedge Closure.

The unambiguous text of the CAA, the only existing legislative history, and NMFS's own representations demonstrate that the 2023 Wedge Closure was an impermissible new emergency rule and thus NMFS violated the Administrative Procedures Act ("APA") by so promulgating and now attempting to "finalize" it. The illegal 2023 Wedge Closure was an illegal action that caused irreparable harm that MLA had no ability to recover from. The permanent Wedge Closure is no different and the balance of harms and public interests unequivocally weigh against rogue 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.[7]

a. Likelihood of Success on the Merits

i. *Standing*

As a preliminary matter, Plaintiff must establish that it has standing to seek a preliminary injunction. *Osediacz v. City of Cranston*, 414 F.3d 136, 137 (1st Cir. 2005). To establish standing, Plaintiff "must show that (1) it personally has suffered some actual or threatened injury, (2) the injury fairly can be traced to the challenged conduct, and (3) a favorable decision likely will redress [the injury]." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 44 (1st Cir. 2005) (quoting *R.I. Ass'n of Realtors, Inc. v. Whitehouse,* 199 F.3d 26, 30 (1st Cir. 1999)).

Here, that burden is clearly met by the MLA. As demonstrated by the Declaration of Eric Meschino, members of the MLA will suffer a concrete and particularized injury by being unable to fish in waters they expected to fish, the only reason they are not able to fish is because of NMFS's illegal emergency closure, and a ruling that the permanent Wedge Closure is illegal will enable the fishermen to fish again. *Davis v. Grimes*, 9 F.Supp.3d 12, 23 (D. Mass. 2014).[8]

[7] The permanent Wedge Closure is a final agency action capable of being challenged because it is the consummation of NMFS' rulemaking decision power as a finalized emergency rule, and it has limited the legal rights of lobstermen to fish in certain areas without facing legal consequences. *Berkshire Env't Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC*, 851 F.3d 105, 111 (1st Cir. 2017) (citing *Bennett v. Spear,* 520 U.S. 154, 177–78 (1997)) (final agency action marks "the consummation of the agency's decisionmaking process," and "is one by which rights or obligations have been determined, or from which legal consequences will flow.").

[8] Additionally, the Administrative Procedure Act waives sovereign immunity in the case of final agency actions by allowing parties to seek judicial review of the action. *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). So long as the applicable statute does not preclude judicial review or permit action committed to agency discretion, an injured party may seek judicial review. *Bernardo ex rel. M & K Eng'g, Inc. v. Johnson*, 814 F.3d 481, 491 (1st Cir. 2016); *see also* 5

MLA has standing to sue on behalf of its members, like Mr. Meschino and the plethora of other members affected. An association has standing to bring suit on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Council Of Ins. Agents & Brokers v. Juarbe-Jimenez*, 443 F.3d 103, 108 (1st Cir. 2006) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Here, any one of MLA's members would have standing as they are fishermen who fish in the closed Wedge and are being prohibited from doing so by the permanent Wedge Closure. *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 (1st Cir. 2000).

The MLA exists to protect the lobstermen and advocate for the continued existence of the lobster industry (and operates based on dues from lobstermen, dues which are sourced from the selling of lobster and which could be reduced if the lobster season is reduced); challenging NMFS's regulation of the lobster industry is directly germane to its purpose and thus it has standing to challenge the permanent Wedge Closure. *Conservation L. Found., Inc. v. Jackson,* 964 F.Supp.2d 152, 160 (D. Mass. 2013) ("The interests of plaintiffs' members in preserving their ability to use and enjoy the embayments is germane to CLF and BBC's missions, as those organizations focus their work on protecting and preserving water quality, including that of the embayments."). Finally, because MLA seeks only injunctive relief, there is no requirement that a single one of its members participate in the lawsuit. *Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 326 (D. Mass. 2013) (quoting *Pharm. Care Mgmt. Ass'n v. Rowe,* 429 F.3d 294,

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U.S.C. § 701(a). Here, neither the MMPA, the ESA, nor the CAA preclude judicial review and thus this Court may consider the Motion.

307 (1st Cir. 2005) ("Because Plaintiff is not requesting monetary damages for its members, there is normally 'no need ... for the members to participate as parties.'")).

ii. *The Consolidated Appropriations Act, 2023 Precludes Issuing the Permanent Wedge Closure.*

Turning to the substance of Plaintiff's arguments, under the APA, a court has the power to hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(B). "The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. To make this determination, a reviewing court requires the agency to make a minimum requirement of demonstrating a "rational connection between the facts found and the choice made." *Penobscot Air Servs., Ltd. v. F.A.A.*, 164 F.3d 713, 719 (1st Cir. 1999) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))). However, it is also well established that agency action that is based on "mistakes of law" is arbitrary and capricious. *Good Samaritan Med. Ctr. v. Nat'l Lab. Rels. Bd.*, 858 F.3d 617, 629 (1st Cir. 2017); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[A]n order may not stand if the agency has misconceived the law."). And it is here where NMFS's permanent Wedge Closure must fail.

For NMFS's permanent Wedge Closure to be valid, NMFS's interpretation of CAA § 101 must be well founded and capable of withstanding judicial review. It is unable to do so. When interpreting a statute, this Court's interpretation "depends upon reading the whole statutory text, considering the [statute's] purpose and context …, and consulting any precedents or authorities that inform the analysis." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) (citing *Dolan v. Postal Service,* 546 U.S. 481, 486 (2006)). Because the CAA is barely a year old, CAA § 101 has not yet been reviewed by any court except for a preliminary analysis by the District of D.C. in MLA's previous challenge, making the proper interpretation of CAA § 101 effectively a matter of first impression. Thus, this Court must look only to the text and, only if it finds the text ambiguous, the purpose and context of the statute.

Beginning, as all statutory interpretation must, with the text, CAA § 101 specifically prohibits NMFS from promulgating new regulations regulating the lobster and Jonah crab industry until 2028. CAA § 101(a); *United States v. Brown*, 500 F.3d 48, 59 (1st Cir. 2007) ("When interpreting a statute, we begin with its text.") (citing *Richardson v. United States*, 526 U.S. 813, 818 (1999)). It then provides a narrow exception for "existing emergency rules" or "extensions" of the same that were "in place" at the time of CAA's passage. CAA § 101(b). Thus, NMFS may only issue a new regulation if it is an extension or finalization of an emergency rule that was "in place" as of December 29, 2023. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)) ("The preeminent canon of statutory interpretation requires us to "presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"); *Neang Chea Taing v. Napolitano*, 567 F.3d 19, 27 (1st Cir. 2009) (using "in place" to mean regulations

actually in effect); *Collins v. Yellen*, 141 S. Ct. 1761, 1774, 210 L. Ed. 2d 432 (2021) (same). None were.

NMFS deploys an impressive display of mental gymnastics to avoid this reality, but it ultimately falls into the block pit.[9] *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

NMFS endeavors to assert that the 2023 Wedge Closure was merely an extension of the 2022 Wedge Closure, and thus it can issue the permanent Wedge Closure as a finalization of the original 2022 Wedge Closure. However, this is immediately undercut by its own representations, via Ms. Trego, that the 2023 Wedge Closure was "similar" to the 2022 Wedge Closure. (Casoni Decl. Exhibit A.) "Similar" is not the "same." *In re Sienega*, 18 F.4th 1164, 1169 (9th Cir. 2021) ("Similar does not mean the same."); *Hearts With Haiti, Inc. v. Kendrick*, No. 2:13-CV-00039-JAW, 2015 WL 3649592, at *8 (D. Me. June 9, 2015) ("Finally, 'similar' does not mean 'the same.'");*United States v. Bezmalinovic*, No. S3 96 CR. 97 MGC, 1996 WL 737037, at *2 (S.D.N.Y. Dec. 26, 1996) ("It is true that 'similar' does not mean 'the same.'") (citing *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980)). CAA § 101(b) does not contain an exception for "similar" emergency rules, only for extensions of the exact same emergency rule. NMFS, by its own words, admitted that the 2023

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[9] Because CAA §101(b) directly addresses the issues as to whether NFMS can promulgate a new emergency rule, Congress's directive controls and there is no need to engage in a *Chevron* analysis. *Lovgren v. Locke*, 701 F.3d 5, 21 (1st Cir. 2012).

Wedge Closure was a different closure than the 2022 Wedge Closure, and thus the 2023 Wedge Closure violated the CAA. Therefore, the 2023 Wedge Closure cannot be made into a final rule.

Further, NMFS asks this Court to accept that the 2023 Wedge Closure was merely an extension of the 2022 Wedge Closure, despite the 2022 Wedge Closure definitively ending on May 1, 2022, and federal waters being open subsequently until the 2023 Wedge Closure. But this clear temporal break means that the 2023 Wedge Closure was not the same "emergency rule." NMFS tries to obfuscate this fact by claiming that the 2022 Wedge Closure "30-day emergency rule" was "not in effect longer than 270 days" but that "the same conditions exist this year to warrant an extension." (Casoni Decl. Exhibit B at 9.) Apparently, in NMFS' view, an emergency rule with a definitive expiration point can lie dormant for almost a year, hibernating like a regulatory grizzly bear, before suddenly springing back to life at the snap of the agency's fingers. This is not, and cannot be, how emergency regulations work. Once the expressly promulgated timeline of the emergency order expires, so too must the emergency rule.[10] This is not merely legal argument, this is the exact position NMFS has already taken. *See, e.g., Starbound, LLC v. Gutierrez*, No. C07-0910-JCC, 2008 WL 1752219, at *4 (W.D. Wash. Apr. 15, 2008) (wherein NMFS affirmatively represented that an emergency rule's effect only lasts as long as specified in the rule itself); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("When an agency changes its existing position . . . the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy.").

[10] To the extent there was an existing emergency rule, it was only for the time period of April 1, 2022, to April 30, 2022. Thus, this supposed "extension" is also a temporal expansion of the now expired 2022 Wedge Closure. Any "extension" of the rule could only cover the same corresponding time period, *i.e.*, April 1, 2023, to April 30, 2023. Any changes to that time frame would be a new rule and thus would violate the CAA's mandate, making the rule arbitrary and capricious.

It should also be noted that NMFS knows how to "extend" an emergency rule but it did not do so with the 2023 Wedge Closure. 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 2023 Wedge Rule, which was not titled as an extension and was taken long after the 2022 Wedge Closure expired. 88 FR 7362. NMFS has no explanation as to why its changed procedure in "extending" an emergency rule is somehow acceptable. *Encino Motorcars, LLC*, 579 U.S. at 221.

Instead, NMFS asserts that so long as the "emergency" which prompted the emergency rule continues to exist, then so too does the emergency rule. (Casoni Decl. Exhibit B at 9 ("the continued existence of the emergency, *as opposed to the operability of the emergency rule*, is what matters for an extension of an emergency rule.") (emphasis added).)In so doing, NMFS has rewritten CAA § 101(b) to the following:

> "shall not apply to an existing emergency ~~rule~~, or any action taken to extend or make final an emergency rule that is in place on the date of enactment of this Act, affecting lobster and Jonah crab."

But NMFS is not permitted to rewrite a plainly written statute to suit its whims. *Bostock v. Clayton Cnty., Georgia*, 207 L. Ed. 2d 218 (2020) ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.") (citing *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254 (1992); *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Doing so is arbitrary and capricious and grounds for the permanent Wedge Closure to fail. If this

Court allows NMFS to rewrite Congress's words, it will have aggrandized to itself power that Congress never intended or expressed.

And it is no surprise that NMFS would prefer that CAA § 101(b) had been written as such, given that the North Atlantic Right Whale has been an endangered species for fifty-four years, meaning that the alleged "emergency" has been ongoing for over five decades.[11] If an extension of an emergency rule is predicated on the continued existence of the emergency, then NMFS will be empowered to "extend" its 2022 Wedge Closure through to 2028; indeed, nothing is stopping it from "extending" any emergency rule for 269 days each year, effectively shutting down the lobster industry. If this is acceptable, 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.[12] 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

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[11] (https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#:~:text=North%20Atlantic%20right%20whales%20have,years%20has%20been%20below%20average.)

[12] This would directly contradict the Marine Mammal Protection Act, which 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 the 2023 Wedge Closure claimed to be extending under CAA § 101(b).

balancing test. Instead, 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.").

Despite Congress' clear mandate that NMFS stop regulating the lobster and Jonah crab industry for MMPA purposes until 2028, NMFS has effectively read the statute as allowing it to emergency regulate the lobster industry to its heart's content, because it happened to issue a long-expired emergency rule in April 2022.

Knowing that it cannot stand on the actual wording of CAA § 101(b), and that its rewording on "emergency rule" to mean "emergency", NMFS next hypothesizes that Congress must have meant the 2022 Wedge Closure when referring to "emergency rule".[13] (Casoni Decl. Exhibit B at 9.) Of course, the text does not say this and NMFS cites no legislative history to support this position. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593, n. 10 (1980) ("But neither the language of the statute nor its legislative history supports either of these proposed readings of § [the statute]); *Cf. Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 823 (1983) ("Moreover, the legislative history supports the Rate Commission's approach.").

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[13] This ignores the actual context in which CAA §101 was passed. CAA § 101 was passed at a time when NMFS was seeking to promulgate regulations in accordance with the 2021 Biological Opinion it had produced, with those regulations seeking to reduce the alleged contribution of the lobster and Jonah crab pot fisheries to North Atlantic Right Whale mortalities from allegedly 7.57 to 2.69, then 2.61, then 1.04, and finally to 0.136. This prompted a flurry of litigation that warned that such regulations would obliterate the lobster industry. It is within that cauldron of concerns that Congress passed CAA § 101, declaring the lobster industry to be in compliance with the ESA and MMPA until 2028, to provide time to evaluate the use of existing gear technologies, for scientific research, and for the development of new technologies. CAA § 101(a)(1). Thus, the clear purpose of CAA § 101 was to limit NMFS's ability to promulgate new regulations against the lobster industry under the MMPA and ESA. And this purpose is supported by the actual language of CAA § 101.

This is unsurprising, as the only legislative history for CAA § 101 goes *directly against* NMFS's invented unspoken intent. 168 Cong. Rec. S9591, S9607–08 (daily ed. Dec. 20, 2022) (The Honorable Senator Angus King specifically stating that the purpose of §101(a)-(b) is to "pause the economic death sentence" caused by the District of D.C.'s prior rulings and NMFS's regulations against the lobster industry);[14] *Hernandez-Echevarria v. Walgreens de Puerto Rico, Inc.*, 121 F.Supp.3d 296, 306 (D.P.R. 2015) ("Second, the legislative history directly contradicts Defendant's position.").

Even if Congress did secretly mean to include the 2022 Wedge Closure, NMFS's construction ignores the reality that, if Congress meant the 2022 Wedge Closure when it wrote "emergency rule," it could have written so. But "Congress didn't choose those other words." *Murphy v. Smith*, 138 S. Ct. 784, 787–88 (2018). "And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Id.; see also F.B.I. v. Abramson*, 456 U.S. 615, 635 (1982) (O'Connor, J. dissenting) ("In approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation."). As the United States Supreme Court cannot rewrite statutes passed by Congress, neither can NMFS or this Court. CAA § 101(b) makes mention only of emergency rules existing as of December 29, 2023, it makes no mention of the 2022 Wedge Closure. It is arbitrary and capricious for NMFS to rewrite CAA § 101(b) to fit what it assumes Congress must have meant.

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[14] 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.

Plaintiff suspects that NMFS will 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." It is mistaken and, even if it was not, its contention is irrelevant. First, as NMFS itself admitted before the District of D.C., 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 and NMFS might interpret it differently. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997). 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.

Further, this Court cannot ignore an obvious point. NMFS 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, or any other canon of construction, 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."). The CAA is clear: NMFS cannot further regulate the lobster industry until 2028.

Ultimately, the 2023 Wedge Closure reflected that NMFS was planning to issue a closure pursuant to the MMPA prior to the passage of the CAA § 101(b), and, finding that it was no longer permitted to do, simply ignored the new language in favor of language it wanted to see. That NMFS was planning a closure regardless of CAA § 101(b) is evidenced by the fact that the 2023 Wedge Closure was explained using verbatim language as the 2022 Wedge Closure, that it relied on the same underlying data as the 2022 Wedge Closure (NMFS's protestations that the DST is different notwithstanding), and that it closes the exact same geographic coordinates. Its permanent Wedge Closure now does the same.

This Court cannot permit NMFS to ignore Congress's clear mandate by allowing it to interpret language enabling it to extend an existing emergency order to mean NMFS can issue any emergency order so long as the North Atlantic Right Whale remains endangered, and to mean that a new emergency order is actually an extension of an emergency action that ended nine months prior, and thus can be "finalized." NMFS's issuance of the permanent Wedge Closure, founded on the illegal 2023 Wedge Closure, and the underlying misinterpretation of law that supported it, is arbitrary and capricious and Plaintiff has a substantial likelihood of success on the merits in so showing. Accordingly, MLA is highly likely to obtain declaratory judgment that the permanent Wedge Closure is illegal and the Court should issue a temporary restraining order, preliminary injunction, and stay pursuant to the APA.

iii. The Permanent Wedge Closure is dependent upon scientific assumptions ruled illegal in Maine Lobstermen Association v. Raimon*do, 70 F.4th 582 (D.C. Circuit 2023).*

The permanent Wedge Closure Rule cannot possibly be legal under *Maine Lobstermen Association v. Raimondo*, 70 F.4th 582 (D.C. Circuit 2023). In *Maine Lobstermen Association*, the D.C. Circuit determined that NMFS was not allowed to use worst case scenario data

presumptions, that the ESA does not permit a presumption in favor of endangered species, but rather requires outcomes reasonably certain to occur. The D.C. Circuit was especially harsh against NMFS' arguments that because the ESA does not say how to handle uncertain data, it could use worst case scenarios. It said NMFS "legal reasoning was not just wrong; it was egregiously wrong." *Id.* at 598. In other words, the D.C. Circuit completely rejected NMFS's argument against worst case scenarios that forms the underlying basis of the ALTWRP and the DST that justify the permanent Wedge Closure Rule.

In breaking down this argument, the D.C. Circuit noted that NFMS was "inconsistent", *i.e.*, lying, about the facts. *Id.* at 597. First, it noted that NMFS had said repeatedly that nothing required it to use worst case scenarios, and then it suddenly decided that it had to use worst case scenarios. *Id*. Second, it noted NMFS relied on one line of legislative history, not the actual text of the statute, and that was entirely unacceptable. *Id.* at 598. Third, it noted that the cases cited by NMFS did not actually support what NMFS claimed it did. *Id*. For these reasons, it found that NMFS acted arbitrary and capriciously such as to make the 2021 Biological Opinion illegal. *See generally, id*.

The D.C. Circuit, rejecting the idea it had to defer to a rogue agency like NMFS, noted that its first duty was to interpret the law, and it could not uphold an agency action contrary to law. *Id.* at 596–97. Nothing in the ESA requires worst case scenarios, the D.C. Circuit determined, and thus, even though NMFS tried to claim that the court had to defer on scientific questions (and that it did not really use worst case scenarios because the result would be the same), NMFS was wrong. *Id*. The Court also noted that NMFS completely failed to consider the severe economic damage that could befall the lobster industry, not consider the other worst-case scenario that none of the new technology it wants to mandate would actually help. *Id*. at 596.

Finally, the D.C. Circuit determined that NMFS's error was not harmless because the use of worst-case scenarios tainted the entire Biological Opinion. It especially noted how absurd it was for NMFS to allocate entanglements 50/50, when substantially more entanglements occurred in Canada and the Canadian data was outdated. *Id*. at 601.

Despite the clear and complete rebuke by the D.C. Circuit, NMFS is proceeding with this permanent Wedge Closure Rule as if nothing has changed. But the D.C. Circuit has removed any doubt as to the validity of the science underlying NMFS's illegal actions and, as NMFS is relying on the same science here, its permanent Wedge Closure Rule is illegal, arbitrary, and capricious.

b. Irreparable Harm

The permanent Wedge Closure will not only limit Plaintiff's members' ability to fish and generate income, thus reducing Plaintiff's income generated by dues, it also is an entirely unrecoverable harm because financial harm cannot be recovered for an APA violation. *Ryan v. U.S. Immigration and Customs Enforcement,* 382 F.Supp.3d 142, 146 (D. Mass. 2019) (motion for preliminary injunction granted in light of plaintiffs being likely to succeed on the merits of their APA claim). However, this Court need not reach the financial harm suffered by Plaintiff and its members because it is well-established in this District that statutory violations by government agencies mandate issuance of a preliminary injunction, as such violations inherently offend the public interest and are per se irreparable. *Long Term Care Pharmacy Alliance v. Ferguson*, 260 F.Supp.2d 282, 289 (D. Mass. 2003).

Indeed, the typical need to demonstrate irreparable harm is not a prerequisite when a plaintiff attempts to enforce a statute. *Id.* (citing *United States v. D'Annolfo*, 474 F.Supp. 220, 222 (D. Mass. 1979)); *see also United States v. D'Annolfo*, 474 F.Supp. 220, 222 (D. Mass.

1979) (holding when a party acts to enforce a statute, the standard of public interest measures the propriety and need for injunctive relief); *Doe 1-6 v. Mills*, 16 F.4th 20, 37 (1st Cir. 2021) ("[B]ecause the appellants have not shown a constitutional or statutory violation, they have not shown that enforcement of the rule against them would cause them any legally cognizable harm."); *Newell Co. v. Connolly*, 624 F.Supp. 126, 129 (D. Mass. 1985) (ruling existence of statutory remedies, in light of violation of a statute, constituted imminent irreparable harm); *Hyde Park Partners v. Connolly*, 676 F.Supp. 391 (D. Mass. 1987) (risk of incurring civil and criminal liability, in the context of the Anti-Takeover Act, constitutes a threat of immediate and irreparable harm); *Goldstein v. Batista Contracting LLC*, No. 22-10807-PBS, 2023 WL 3113275 (D. Mass. Apr. 27, 2023) (violations of the Employee Retirement Income Security Act and Labor Management Relations Act amounted to "a significant risk of irreparable harm" in the absence of an injunction); *Monahan v. Winn*, 276 F.Supp.2d 196, 212 (D. Mass. 2003) (violation of APA procedural prerequisites makes a rule promulgation invalid, thereby upholding preliminary injunction).

Here, NMFS's violation of the CAA, and therefore the APA, is enough in itself to find irreparable harm and warrant a preliminary injunction, as the permanent Wedge Closure offends the public interest and was promulgated in direct contravention of Congress' expressly written directives. *Massachusetts Fair Housing Center v. U.S. Dep't of Housing and Urban Development*, 496 F.Supp.3d 600, 610 (D. Mass. 2020) (plaintiffs granted preliminary injunction after relying in part on the argument that the agency's Rule was "arbitrary and capricious").

c. <u>Harm to Others and Public Interest</u>

On the public interest side of the ledger, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of United States v. Newby*,

838 F.3d 1, 12 (D.C. Cir. 2016). "To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* (cleaned up); *see also E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020) ("[T]he public interest is served by compliance with the APA." (cleaned up)). Because the permanent Wedge Closure is clearly an unlawful agency action predicated on an earlier unlawful agency action, the public interest is served in granting the temporary restraining order.

Further, the lobster industry contributes millions of dollars to the Massachusetts' economy; the collapse of the industry not only harms Plaintiffs' members, it would destroy numerous other communities that rely on the lobster industry. *See Dunkin' Donuts Franchised Restaurants LLC v. Wometco Donas Inc.*, 53 F.Supp.3d 221, 232 (D. Mass. 2014) (public interest weighed in plaintiffs' favor, as preliminary injunction would likely result in the closure of many Dunkin' Donuts franchises in Puerto Rico); *Hearst Stations Inc. v. Aereo, Inc.*, 977 F.Supp.2d 32, 41 (D. Mass. 2013) (public interest factor cut both ways, and therefore did not weigh heavily in the court's analysis); *22 Franklin LLC v. Boston Water and Sewer Commission*, 549 F.Supp.3d 194, 198 (D. Mass. 2021) (court ruled there was a strong public interest in the maintenance of public health through functioning water, thereby granting a preliminary injunction); *Arborjet, Inc. v. Rainbow Treecare Scientific Advancements, Inc.*, 63 F.Supp.3d 149, 159 (D. Mass. 2014) (public interest weighed slightly in plaintiff's favor, as it is in the public interest to enforce contractual obligations); *Pesce v. Coppinger*, 355 F.Supp.3d 35, 49 (D. Mass. 2018) (public interest weighed in plaintiff's favor, as plaintiff facing impending incarceration should receive medically necessary treatment).

The permanent Wedge Closure unquestionably harms the fishermen who intended to fish in the closed waters, but it is not clear who, if anyone, would be harmed by staying the closure. No doubt NMFS will assert that the North Atlantic Right Whale will be harmed (an assertion undercut by the fact that there has been no documented North Atlantic Right Whale mortality or serious injury due to entanglement in any North Atlantic waters in almost two decades), and that such harm will be deleterious to the public interest.[15] But it is not sufficient for NMFS to identify potential harm to an animal, especially where that harm is entirely speculative and indeed likely to be nonexistent as evidenced by the Center for Coastal Studies' aerial study showed that there were no North Atlantic Right Whales in the Wedge area. *Pac. Coast Fed'n of Fishermen's Associations v. Ross*, No. 120CV00431DADSAB, 2020 WL 1699980, at *5 (E.D. Cal. Apr. 7, 2020) ("No court has held that as a matter of law, the taking of a single animal or egg, no matter the circumstance, constitutes irreparable harm.") (citing *Animal Welfare Inst. v. Martin*, 588 F.Supp.2d 70, 109 (D. Me. 2008)); *Alabama v. U.S. Army Corps of Engineers*, 441 F.Supp.2d 1123, 1135–36 (N.D. Al. 2006) (collecting opinions); *Defenders of Wildlife v. Salazar*, 812 F.Supp.2d 1205, 1209 (D. Mont. 2009) ("[T]o consider any taking of a listed species as irreparable harm would produce an irrational result. The ESA permits incidental takings of a listed species.")); *Animal Welfare Inst.,* 588 F.Supp.2d at 105–06 (refusing to grant a preliminary injunction barring the use of leghold traps where plaintiffs had demonstrated that the traps "take" ESA protected lynx but had not demonstrated that these takes amounted to irreparable harm); (Casoni Decl. ¶¶ 9-10, Ex. D).

This is especially true where Congress has put its thumb on the scale to say that the lobster and Jonah crab pot fishery industry are in compliance with the ESA and MMPA,

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[15] It is not apparent how NMFS could possibly argue that it, as a federal agency, will be harmed by a temporary restraining order.

essentially ordaining that they do not present a threat to the North Atlantic Right Whale until 2028. CAA § 101(a). The CAA obviates any public interest weight that may be assigned to NMFS's efforts to protect the North Atlantic Right Whale, especially in light of Congress' amendments to the ESA which require NMFS to consider the economic impacts of its actions. *See* Endangered Species Act Amendments, Pub. L. No. 95-632, 92 Stat. 3751 (1978); Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1982).

And, let this Court not forget that the D.C. Circuit has specifically ruled that the scientific assumptions relied on by NMFS to justify its lobster-killing regulations were invalid and had to be discarded. *Maine Lobstermen's Ass'n*, 70 F.4th at 599.

Thus, the public interest weighs against NMFS's rogue agency actions, and no party or individual is harmed by forcing NMFS to comply with the law.

V. <u>CONCLUSION</u>

NMFS has flagrantly and wantonly violated the APA and the CAA by allegedly "finalizing" a new emergency rule closing federal waters around Massachusetts, despite the CAA specifically forbidding it from issuing new regulations intended to bring the lobster and Jonah crab pot industries into compliance with the ESA and MMPA and despite a court already warning it that such an action was likely illegal. This Court must put an immediate stop to this rogue agency's illegal permanent Wedge Closure Rule. This final agency action, which will and already has devastated the Massachusetts' lobster industry, cannot be allowed to stand. Therefore, MLA respectfully request this Court grant its Motion for Temporary Restraining Order, Preliminary Injunction and Stay Pursuant to 5 U.S.C. § 705, incorporating Plaintiff's Proposed Order filed in conjunction with this present Motion, and grant such other relief which is just and equitable.

Plaintiff Massachusetts Lobstermen's Association, Inc.

By its attorneys,

ECKLAND & BLANDO LLP

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**Pro hac vice* application pending

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2024, 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 Blatchley, Esq.