UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, INC. 8 Otis Place Scituate, MA 02066 Plaintiff, v. GINA RAIMONDO, *in her official capacity as Secretary*, 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. 1-23-cv-00293 **MOTION AND POINTS AND AUTHORITIES 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 moves 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 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 and unselfish 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 compliance with the ESA and MMPA until December 31, 2028, and forbidding NMFS from passing new regulations on the lobster and Jonah crab industry for MMPA and ESA purposes. However, in flagrant disregard of that clear Congressional mandate, NMFS has now issued a new emergency rule, closing portions of federal waters, where MLA members fish, and causing irreparable harm to thousands of fishermen and women. Respectfully, this Court must 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 Atlantic Coastal Fisheries Cooperative Management Act. *See* 16 U.S.C. §§5101-08; *Maine Lobstermen Association, et al., v. NMFS, et al.,* No. 22-5238(L), 22-5244, 22-5245, 22-5246 Appendix ("*Maine Lobstermen Association* Appendix") at A599, 604. 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 North Atlantic 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. *Maine Lobstermen Association* Appendix at A680-81. 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 new Biological Opinion determining how the lobster

[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).

industry could operate under the ESA and MMPA. *Maine Lobstermen Association* Appendix at A447, A1071.

NMFS new conservation framework (which is being strenuously contested in *Maine Lobstermen's Association et al., v. NMFS, et al.*, No. 22-5238(L), 22-5244, 22-5245, 22-5246 (D.C. Circuit 2022) for reliance on faulty science and data), determined that the American lobster fishery was responsible for 7.57 right whale mortalities or serious injuries each year (even though the last confirmed North Atlantic Right Whale entanglement occurred in 2015 and that did not cause a serious injury).[2] *Maine Lobstermen Association* Appendix at A824. 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. *Maine Lobstermen Association* Appendix A1071, 1076-77.

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. *See* 86 Fed. Reg. 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 Court ultimately granted summary judgment in NMFS's favor on September 15, 2022. That decision is currently being appealed to the D.C. Circuit Court of Appeals. Conversation groups filed a separate lawsuit to challenge the

[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.

biological opinion and final rule, claiming that NMFS did not sufficiently protect the North Atlantic 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 its November 17, 2022 Remedy Order. *See Ctr. for Biological Diversity v. Raimondo*, No. 18-112 (JEB), 2022 WL 2643535 (D.D.C. July 8, 2022).

After the Remedy Order, and while the *Maine Lobstermen Association* appeal was pending, on December 29, 2022, 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 Consolidated Appropriations Act of 2023, H.R. 2617, ("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 §110(a). However, the CAA provided that § 110(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 and Congress prohibited 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 at 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 at 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

addressed 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 yesterday, 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: Massachusetts Restricted Area Wedge", the 2023 Wedge restricts the ***identical*** areas as the 2022 Wedge:

---

[3] Plaintiff MLA is challenging the underlying science behind the DST in *Maine Lobstermen Association, et al. v NMFS, et al.*, USCA Case # 22-5238 (D.C. Circuit 2022). Interestingly and playing fast and loose with the truth, NMFS recently represented to the D.C. Circuit that the appeal should be considered moot as it would not be issuing any regulations arising from the 2021 Biological Opinion and Final Rule it developed, yet is now issuing emergency rules based on the same science underpinning the Biological Opinion and Final Rule.

[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 have hundreds of traps deployed and only a single vessel of forty (40) feet or less in length which requires multiple trips to fit hundreds of traps. This is an impossible task and NMFS knows that.

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′

FR 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). *Id.* at 12. 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 14. 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. Indeed, substantial portions of the explanatory materials for the 2023 Wedge Closure were identical to the 2022 Wedge Closure materials, such as:[5]

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

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 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	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)). 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

incidentally take the species or stock; and, if relevant, Alaska Native organizations or Indian tribal organizations.	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 is 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; (Declaration of Beth Casoni ("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*." (Casoni Decl., Ex. B at 9.) (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." (Casoni Decl., Ex. B at 9.) 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." (*Id*. at Ex. A). In other words, NMFS's own representative and employee acknowledged that the 2023 Wedge Closure is a new, albeit similar, rule to the 2022 Wedge Closure.

Prior to the 2023 Wedge Closure, numerous MLA members, including Mr. Eric Meschino, a member of the MLA's Board of Delegates, were fishing and, intended to continue fishing in the areas affected by the 2023 Wedge Closure, but will be prevented from doing so if the 2023 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 2023 Wedge Closure is lifted, Plaintiff's members will be able to fish in the closed areas and obtain a likely profit by doing so. (Declaration of Arthur "Sooky" Sawyer ("Sawyer Decl.") at ¶14-15; Declaration of Eric Meschino ("Meschino Decl.") at ¶12.) On February 1, 2023, the Center for Coastal Studies conducted an aerial study which showed that there were no North Atlantic Right Whales in the Wedge area. (Casoni Decl. ¶¶ 9-10, Ex. D.)

III. STANDARD OF REVIEW

Courts analyze motions for temporary restraining orders using the same standards that apply to preliminary injunctions. *See Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 81 (D.D.C. 2018); *Sterling Commercial Credit–Mich., LLC v. Phx. Indus. I, LLC*, 762 F. Supp. 2d 8, 12 (D.D.C. 2011); *Nguyen v. U.S. Dep't of Homeland Sec*., 460 F. Supp. 3d 27, 33 (D.D.C. 2020). The party seeking a temporary restraining order bears the burden of making a "clear showing that [she] is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (alteration in original). To make such a showing, the party must establish: "(1) that [she] is likely to succeed on the merits, (2) that [she] is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in [her] favor, and (4) that an injunction is in the public interest." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting Winter, 555 U.S. at 20).

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). "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." *Sierra Club v. Jackson*, 833 F.Supp.2d 11, 30 (D.D.C. 2012) (citing *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972,

974 (D.C. Cir. 1985)); see also *Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 524 F.Supp.2d 5, 8 (D.D.C. 2007).

Where, as here, the federal government is the opposing party, the balance of equities and public interest factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). *Gomez v. Trump*, 485 F. Supp. 3d 145, 168 (D.D.C.), *amended in part*, 486 F. Supp. 3d 445 (D.D.C. 2020), and *amended in part sub nom. Gomez v. Biden*, No. 20-CV-01419 (APM), 2021 WL 1037866 (D.D.C. Feb. 19, 2021). Courts in this jurisdiction evaluate the four preliminary injunction factors on a "sliding scale"—if a "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Id.* (citing *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009)).

IV. LEGAL ARGUMENT

This Court should issue a Temporary Restraining Order against NMFS enjoining its 2023 Wedge Closure because the 2023 Wedge Closure unquestionably violates the CAA, has caused, and will continue to cause irreparable harm to Plaintiff's members due to lost fishing income and inability to recover the same, and because it is in the public interest to halt unlawful agency actions.[6]

[6] The 2023 Wedge Closure is a final agency action capable of being challenged because it is the consummation of NMFS's emergency rulemaking decision power as an issued emergency rule, and it has limited the legal rights of lobstermen to fish in certain areas without facing legal consequences. *Nat'l Env't Dev. Assoc.'s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1006 (D.C. Cir. 2014) (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.").

a. Likelihood of Success on the Merits

i. *Standing*

As a preliminary matter, Plaintiff has to establish that it has standing to bring this. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (quoting *Obama v. Klayman*, 800 F.3d 559, 565 (D.C. Cir. 2015) (Williams, J.)); *Brown v. FEC*, 386 F. Supp. 3d 16, 25–26 (D.D.C. 2019) ("[T]he 'merits' on which [a] plaintiff must show a likelihood of success encompass not only substantive theories but also establishment" that the action is justiciable.). To establish standing, Plaintiff must show "(1) [it] has suffered a concrete and particularized injury (2) that is fairly traceable to the challenged action of the defendant and (3) that is likely to be redressed by a favorable decision*." Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 376–77 (D.C. Cir. 2017).

Here, that burden is clearly met by the MLA. As demonstrated by the Declaration of Eric Meschino, MLA members will suffer a concrete and particularized injury by being unable to fish in waters they expected to fish in only a day prior, the only reason they were not able to fish is because of NMFS's illegal emergency closure, and a ruling that the 2023 Wedge Closure was illegal will enable the fishermen to fish again. *Id.*[7]

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 "at least one member would have standing to sue in its own right, the interests the association seeks

[7] 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. *Bauer v. DeVos*, 325 F.Supp.3d 74, 101 (D.D.C. 2018); see also 5 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.

to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires that an individual member of the association participate in the law suit." *Nat'l Env't Dev. Assoc.'s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1005 (D.C. Cir. 2014) (citing *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)). 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 2023 Wedge Closure. *Nat'l Env't Dev. Assoc.'s Clean Air Project*, 752 F.3d at 1005 ("Petitioner's members include companies in the oil and gas industry, as well as others in manufacturing sectors that operate facilities regulated under the Act."). 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 2023 Wedge Closure. *AARP v. United States Equal Emp. Opportunity Comm'n*, 226 F. Supp. 3d 7, 19 (D.D.C. 2016) ("Germaneness is satisfied by a 'mere pertinence' between litigation subject and an organization's purpose."). Finally, because MLA seeks only injunctive relief, there is no requirement that a single one of its members participate in the lawsuit. *Id.* at 20 ("AARP seeks only injunctive relief in this suit; thus, the Court is satisfied that neither the claims asserted nor the relief requested here requires the participation of one of AARP's individual members.").

ii. *Substance of the Argument*

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." *Foster v. Mabus*, 895 F.Supp.2d 135, 146 (D.D.C. 2012); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995).

However, it is also well established that agency action that "stands on a faulty legal premise and [lacks] adequate rationale" is arbitrary and capricious. *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985); *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 Wedge 2023 Closure must fail.

For NMFS's 2023 Wedge Closure to be valid, NMFS's interpretation of CAA § 101 must be well founded and capable of withstanding judicial review. It is clearly unable to do so. When interpreting a statute, this Court's interpretation "depends upon reading the whole statutory text, considering the purpose and context of the statute, 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 month old, to the undersigned's knowledge § 101 has not yet been reviewed by any court, making the proper interpretation of CAA § 101 a matter of first impression. Thus, this Court must look only to the text and 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); *City of Clarksville v. FERC*, 888 F.3d 477, 482 (D.C. Cir. 2018) ("In addressing a question of statutory interpretation, we begin with the text."). It then provides a narrow exception for "existing emergency rules" or "extensions" of the same that existed at the time of CAA's passage. CAA § 101(b). Thus, NMFS may only issue a new regulation if it is an extension of an emergency rule that existed as of December 29, 2023. *Janko v. Gates*, 741 F.3d 136, 139–40 (D.C. Cir. 2014) ("Indeed, "[t]he 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.'"). None did. NMFS deploys an impressive display of mental gymnastics to avoid this reality, but it ultimately falls into the black pit.[8] *See Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 332 (D.C. Cir. 2020) ("[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 *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

NMFS endeavors to assert that the 2023 Wedge Closure is merely an extension of the 2022 Wedge Closure. However, this is immediately undercut by its own representations, via Ms. Trego, that the 2023 Wedge Closure is "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."); *United States v. Bezmalinovic*, No. S3 96 CR. 97 MGC, 1996 WL 737037, at *2

[8] 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. *Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F. Supp. 3d 160, 170 (D.D.C. 2019) (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)).

(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)); *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.'"). 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, has admitted that the 2023 Wedge Closure is a different closure than the 2022 Wedge Closure, and thus the 2023 Wedge Closure violates the CAA.

Further, NMFS asks this Court to accept that the 2023 Wedge Closure is 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 January 31, 2023. But this clear temporal break strongly suggests that it is 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's 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.[9] *See, e.g., Starbound, LLC v. Gutierrez*, No. C07-0910-

[9] 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.

JCC, 2008 WL 1752219, at *4 (W.D. Wash. Apr. 15, 2008) (acknowledging NMFS's concession that an emergency rule's effect only lasts as long as specified in the rule itself.)

Indeed, NMFS expressly assumes the position 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.").) 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." 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-three years, meaning that the alleged "emergency" has been ongoing for over five decades. (https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#:~:text=North%20Atlantic%20right%20whales%20have,years%20has%20been%20below%20average.) 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" the 2022 Wedge Closure for 269 days each year, effectively shutting down the lobster industry. Thus, despite Congress's 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. 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, 140 S. Ct. 1731, 1749 (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 2023 Wedge Closure to fail.

Knowing that it cannot stand on the actual wording of CAA § 101(b), NMFS hypothesizes that Congress must have meant the 2022 Wedge Closure when referring to "emergency rule".[10] (Casoni Decl. Exhibit B at 9.) Of course, 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. Hays v. Leavitt*, 583 F. Supp. 2d 62, 72 (D.D.C. 2008), *aff'd sub nom. Hays v. Sebelius*, 589 F.3d 1279 (D.C. Cir. 2009) ("However, the legislative history does provide support for Hays' construction of the statutory text."). Even if it had, NMFS's construction ignores the reality that, if Congress meant to extend 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 United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 17, 21 (D.D.C. 1993) ("a judge

[10] 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.

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. CAA § 101(b) makes mention only of emergency rules existing as of December 29, 2023, it makes no mention of the 2022 Wedge Closure and it is arbitrary and capricious for NMFS to rewrite CAA § 101(b) to fit what it assumes Congress must have meant.

Ultimately, the 2023 Wedge Closure reflects 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 is explained using frequently verbatim language as the 2022 Wedge Closure, that it relies 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.

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 (9) months prior. NMFS's issuance of the 2023 Wedge Closure, and the underlying misinterpretation of law that support it, is arbitrary and capricious and Plaintiff has a substantial likelihood of success on the merits in so showing. Accordingly, this prong is met, and the Court should issue a TRO, preliminary injunction, and stay pursuant to the APA.

b. Irreparable Harm

To establish irreparable harm, Plaintiff must show that the "injury must be both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (cleaned up). It is well-established in this district that, where the only claims available to a party are APA claims, i.e., that no money damages can be recovered against the government even if plaintiff prevail, the injuries are "by definition, irreparable." *Alphapointe v. Dep't of Veterans Affs.*, 416 F. Supp. 3d 1, 9 (D. D.C. 2019) (citing *Feinerman v. Bernardi*, 558 F. Supp. 2d 36 (D.D.C. 2008)) and *Nalco Company v. Environmental Protection Agency*. 786 F. Supp. 2d 177 (D.D.C. 2011)). Here, Plaintiff only has APA claims available to them, and thus they will suffer irreparable harms if this Court does not grant injunctive relief.

If this were not enough, Plaintiff will also suffer substantial and debilitating financial harm. Harm that is "merely economic" is not generally considered irreparable, *see Wisc. Gas Co. v. F.E.R.C.,* 758 F.2d 669, 674 (1985), but "unrecoverable financial loss can constitute irreparable injury under some circumstances." *Coalition for Common Sense in Gov't Procurement v. United States,* 576 F.Supp.2d 162, 169 n. 3 (D.D.C.2008) (citing cases); *see also Brendsel v. Office of Fed. Hous. Enter. Oversight,* 339 F.Supp.2d 52, 66 (D.D.C.2004). Here, NMFS's actions stand to inflict individual MLA members with massive harm. Losing three months of fishing is enough to put many lobstermen out of business and with each lobsterman put out of business, the chances that those individuals will pay dues to MLA substantially decreases. (Sawyer Decl. at ¶ 13; Meschino Decl. at ¶ 11.); *Alphapointe v. Dep't of Veterans Affs.*, 416 F. Supp. 3d 1, 8 (D.D.C. 2019) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 298 (D.C. Cir. 2006)

("Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business.")). This is substantially more impactful than financial harm found not irreparable. *See* e.*g.*, *Sandoz, Inc. v. Food and Drug Admin.*, 439 F.Supp.2d 26, 32 (D. D.C. 2006) (loss of less than 1 percent of total sales not irreparable harm); *Apotex, Inc. v. Food and Drug Admin.*, 2006 WL 1030151, at *16–17 (D.D.C.2006) (loss of 1.4 percent of company's annual revenue not irreparable harm); *Bristol–Myers Squibb Co. v. Shalala*, 923 F.Supp. 212, 220–21 (D.D.C.1996) ("[A] loss of less than 1 percent of total sales is not irreparable harm."). Further, the lobster season is limited; every day the 2023 Wedge Closure remains in place is another day that lobstermen will not be able to recover at a later date. *Alphapointe*, 416 F. Supp. 3d at 9 ("Plaintiffs do not say that they would be unable to make up these revenue losses through other contracts."). Prior to the 2022 Wedge Closure and 2023 Wedge Closure, 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), Closure of the 2023 Wedge Area, even as admitted by NMFS (in an albeit inappropriate and flawed analysis), is clearly causing and will continue to cause financial harm. Thus, Plaintiff's (unrecoverable) financial losses are so significant as to give rise to irreparable harm.

c. Harm to Others and Public Interest

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 2023 Wedge Closure is clearly an unlawful agency action, the public interest is served in granting the temporary restraining order.

The 2023 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.[11] 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*, 2009 U.S. Dist. LEXIS 131058 at *14, 2009 WL 8162144 (D. Mont., Sept. 8, 2009) ("[T]o consider any taking of a listed species as irreparable harm would produce an irrational result" because the ESA allows for incidental take permits.)); *Animal Welfare Inst. v. Martin,* 588 F.Supp.2d 70, 105–06 (D. Me. 2008) (refusing to grant a preliminary injunction barring the use of leghold traps where plaintiffs had demonstrated

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

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 comply with the ESA and MMPA, essentially ordaining that they do not present a threat to the North Atlantic Right Whale until 2028. CAA § 101(a).[12] 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's 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).

V. CONCLUSION

NMFS has flagrantly and wantonly violated the APA and the CAA by promulgating 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. This final agency action, which will and already has devastated the Massachusetts' lobster industry, cannot be allowed to stand. This Court must put an immediate stop to this rogue agency. Therefore, MLA respectfully request this Court grant their 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.

[12] While not necessarily germane to the public interest analysis, it cannot be ignored that NMFS gave the thousands of Massachusetts lobstermen a single day to remove their buoy ropes from the Wedge area. A temporary restraining order would help alleviate the massively disruptive impact of NMFS's blindsiding emergency rule.

Plaintiff Massachusetts Lobstermen's Association, Inc.

By its attorneys,

ECKLAND & BLANDO LLP

Dated: February 2, 2023

/S/SAMUEL P. BLATCHLEY
Samuel P. Blatchley, Esq. (#MA0039)
22 Boston Wharf Road, 7th Floor
Boston, MA 02210
(612)-236-0170
sblatchley@ecklandblando.com

Daniel J. Cragg, Esq. (#MN0016)
Robert T. Dube Jr., Esq.*
10 South Fifth St., Suite 800
Minneapolis, MN 55402
(612) 236-0160
dcragg@ecklandblando.com
rdube@ecklandblando.com

*Admission to District of D.C. pending

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2023, 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. (#MA0039)