IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, INC., Plaintiff, v. GINA RAIMONDO, in her official capacity as Secretary of Commerce, *et al*., Federal Defendants.	Civil Action No.: 1:24-cv-10332 (WGY)

CONSERVATION GROUPS' SECOND AMICUS BRIEF IN SUPPORT OF FEDERAL DEFENDANTS

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2021 Rule	2021 Final Rule amending the Atlantic Large Whale Take Reduction Plan 86 Fed. Reg. 51,970 (Sept. 17, 2021)
CAA	Consolidated Appropriations Act, 2023
Conservation Groups	Conservation Law Foundation, Center for Biological Diversity, Defenders of Wildlife, and Whale and Dolphin Conservation
DMF	The Commonwealth Massachusetts Division of Marine Fisheries
ESA	Endangered Species Act
Final Rule	89 Fed. Reg. 8333 (Feb, 7, 2024)
MMPA	Marine Mammal Protection Act
MRA Wedge	Massachusetts Restricted Area Wedge
NMFS	National Marine Fisheries Service
Plan	Atlantic Large Whale Take Reduction Plan

INTRODUCTION

The threshold legal question before the Court is whether it is permissible under the Consolidated Appropriations Act, 2023 (CAA) for the National Marine Fisheries Service (NMFS) to finalize a rule prohibiting trap/pot fishing with static vertical lines in 200 square nautical miles of federal waters (MRA Wedge) off Massachusetts for three months to protect critically endangered North Atlantic right whales. 89 Fed. Reg. 8333 (Feb. 7, 2024) ("Final Rule"). NMFS inadvertently left these waters open in the 2021 Rule amending the Atlantic Large Whale Take Reduction Plan (Plan) under the Marine Mammal Protection Act (MMPA).

The adjoining seasonal closures of state and federal waters created by the 2021 Rule resulted in a situation where dense lobster gear accumulated in the MRA Wedge at precisely the same time that aggregations of right whales are present during February, March, and April. It created such a hotspot of entanglement risk that the Commonwealth (DMF) and others immediately expressed concerns. In early 2022, NMFS promulgated an emergency regulation as the MMPA required it to do (*see* 16 U.S.C. § 1387(g)(1)) to close the MRA Wedge in April, with plans to seasonally close[1] the area annually thereafter for February through April.

In December 2022, and before NMFS had initiated notice and comment rulemaking to seasonally close the MRA Wedge annually, Congress passed the CAA. At the behest of the Maine delegation,[2] the CAA included a rider, § 101(a),[3] that "deemed" the 2021 Rule "sufficient" for federal and state lobster fishery authorizations to comply with the Endangered

[1] To avoid confusion, Conservation Groups use the terms "closure" or "closing" as used in the Final Rule. The Final Rule prohibits the use of static (i.e., persistent) vertical buoy lines but does not close the MRA Wedge to lobster fishing without vertical buoy lines. Conservation Groups fully support fishing with on-demand gear in this and all other Plan Restricted Areas.
[2] *See* 168 Cong. Rec. S9591, S9607–08 (daily ed. Dec. 20, 2022) (statement of Sen. King).
[3] Pub. L. No. 117–328, Div. JJ, § 101(a), 136 Stat. 4459, 6089–90 (2022).

Species Act (ESA) and the MMPA for another six years, despite that Rule's legal violations.[4] However, Congress also explicitly carved out an exception in § 101(b) allowing NMFS to finalize rulemaking on an emergency rule "in place" at the time of enactment, which can only logically refer to the MRA Wedge emergency rule. DMF continued to raise concerns about these unprotected waters and in 2023, NMFS extended the 2022 emergency rule closing the MRA Wedge for February through April. In early 2024, NMFS finalized the rule following notice-and-comment rulemaking. The Final Rule concludes a policy established in 2022.

The Court should decide this threshold legal question without a trial and, if it finds NMFS acted lawfully under the CAA, proceed to adjudicate Plaintiff's claims on the merits via summary judgment. No *Chevron* analysis is necessary. This Court should reject Plaintiff's construction of the CAA that takes words out of context and would render § 101(b) superfluous. The D.C. Circuit's decision in a separate ESA case is wholly irrelevant here.

ARGUMENT

I. Summary Judgment is the Appropriate Vehicle for Deciding Plaintiff's Claims

A trial is not warranted at any stage of this case. Plaintiff's seven claims (*see* ECF No. 1) all arise under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), which requires the court to review the "whole record" of an agency's action and determine whether to "hold [it] unlawful and set [it] aside" based on one or more of six enumerated statutory factors. *Id.* The APA also instructs the reviewing court to decide all relevant questions of law to the extent necessary to its decision and when presented. *Id.* § 706. In the administrative law context, summary judgment is the appropriate vehicle for resolving claims, but with a "special twist" in that the reviewing court's brief "is only to determine whether the Secretary's decision to

[4] *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252, 269–71 (July 8, 2022) (vacated as moot on other grounds).

promulgate the [regulation at issue] was consonant with [her] statutory powers, reasoned, and supported by substantial evidence in the record." *Assoc. Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997). Thus, there is no role for this Court to play in adjudicating issues of fact on the merits of Plaintiff's claims.

However, to the extent that the Court considers Plaintiff's application for a temporary restraining order or preliminary injunction, Plaintiff wrongly asserts that the Court must disregard or strike NMFS's declaration going to the public interest and the balance of the equities as improper extra-record evidence. ECF No. 28 at 2–4 (citing ECF No. 22-1). Plaintiff conflates this Court's review of the merits of NMFS's decision, which is limited to the record, with its determination of whether the extraordinary remedy of injunctive relief is appropriate pending adjudication of the merits. Remedy is an equitable question that turns on facts and harm outside the record. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24–24 (2008) (relying on agency's extra-record declarations to vacate injunction); *Nat'l Wildlife Fed'n v. NMFS*, 422 F.3d 782, 797 (9th Cir. 2005) (affirming district court's remedy order and reliance on extra-record affidavits from experts); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989 (generally recognized exceptions to rule against extra-record evidence include "cases where relief is at issue, especially at the preliminary injunction stage").

II. This Court Should Resolve the Threshold Statutory Question in Favor of NMFS

A. Statutory Interpretation is the Exclusive Domain of the Court

The authority to interpret law is given to the courts in the first instance. It is settled law that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 544 (1940). Here, Congress left no gap in the CAA for the agency to fill, either implicitly or explicitly. This

Court can resolve the threshold question—whether Congress gave NMFS the authority to complete permanent rulemaking on the MRA Wedge—using normal canons of statutory construction and without applying *Chevron,* which is inapposite here.

B. The Statutory Interpretation Issue Does Not Require a *Chevron* Analysis

NMFS's interpretation of § 101(b) is the best reading of the CAA. To reach this conclusion, the Court need only decide whether NMFS promulgated the Final Rule under its MMPA authorities consistent with the terms of § 101(b). The Court can and should decide the statutory interpretation question without a *Chevron* framework analysis. As such, no practical considerations regarding the status of the *Chevron* doctrine given the pending Supreme Court decision in *Loper Bright Enter. v. Raimondo*, No. 22-451 (2024), arise.

Federal agencies interpret statutes in a limited capacity: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (finding the Clean Air Act Amendments left a gap for the agency to fill via regulation where Congress did not specify its intention on the applicability of the "bubble concept"). The Supreme Court recognized that courts should give some deference, or "controlling weight," to agency interpretations, *id.* at 844, especially where it requires "more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.*

Congress, however, does not explicitly leave a gap for an agency to fill in all cases nor does an agency have that special knowledge in all circumstances. Thus, *Chevron* does not apply to *all* agency interpretations of *all* statutes. Instead, the *Chevron* framework only applies to the judicial analysis of agency regulations in the specific situation described by the Supreme Court: where "[t]he power of an administrative agency to administer a congressionally created …

program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (citation omitted). There are two critical elements: (1) the agency interpretation must occur "by regulation" and (2) the regulations must be for "a statutory scheme it is entrusted to administer." *Id*. at 844.

Neither element is present here. First, NMFS's promulgation of the Final Rule did not result in a gap-filling regulation that elucidated § 101. Rather, NMFS interpreted the CAA to allow it to propose and finalize an MMPA rulemaking it had previously taken via emergency regulation. 89 Fed. Reg. at 8346–47. Second, NMFS is bound by the CAA's specific instructions in § 101(a)(1)-(3) (e.g., promote the innovation and adoption of gear technologies, promulgate a new rule by December 31, 2028, and submit annual reports to Congress), but Congress did not task NMFS with administering the section 101 itself, nor did NMFS issue the Final Rule as part of its administration of the CAA. This is in contradistinction to the MMPA, which NMFS is charged with administering, including by promulgating regulations. *See* 16 U.S.C. § 1382(a) ("The Secretary . . . shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subchapter."); *see also id.* § 1362(12)(B) (defining Secretary in 16 U.S.C. § 1387, which governs marine mammal incidental take in commercial fisheries, to mean Secretary of Commerce). Further, unlike the MMPA, NMFS has no special knowledge related to the specific provisions of section 101. Thus, *Chevron* does not apply, and it falls to the Court to interpret whether NMFS promulgated the Final Rule under the MMPA consistent with the CAA.

III. The Exception in Subsection 101(b) Provides NMFS the Authority to Include the MRA Wedge in its Seasonal Massachusetts Restricted Area

When the Court interprets the entirety of section 101, it should honor congressional intent to exclude the Final Rule at issue here from the ambit of § 101(a). *See City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020) (statutory interpretation is an exercise in determining

Congress's intent). The words "EXCEPTION," "the provisions of subsection a shall not apply," and "make final" clearly demonstrate that Congress intended to exempt *some* emergency rule, not yet final, from the protections afforded to federal and state lobster fishery authorizations in § 101(a). ECF No. 31 at 8–9. Beyond these words, the context in which the CAA was enacted—where Maine desperately wanted a hiatus from new legal requirements, *Ctr. for Biological Diversity v. Raimondo*, No. 18-112, 2024 WL 324103, at *3 (D.D.C. Jan. 29, 2024), but Massachusetts still had a dire right whale conservation situation not yet rectified, ECF No. 48-1 ¶¶ 7–11 (Decl. of Daniel J. McKiernan), underscores that the only logical reading of § 101(b) is that Congress intended to allow NMFS to promulgate a final rule seasonally closing the MRA Wedge, however inartfully drafted § 101(b) may be.

Plaintiff's effort to pull specific words such as "existing," "extend," or "in place" wholly out of their context in the statute, ECF No. 13 at 10-13, should not control the Court's interpretation, because it produces the absurd result of rendering § 101(b) a nullity. Instead, the canon against surplusage must control the Court's interpretation of § 101(b).

The canon against surplusage instructs that, in interpreting statutory text:

> If possible, every word and every provision is to be given effect (*verba cum effectu sunt accippienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provisions or to have no consequence.

Mundell v. Acadia Hosp. Corp., 92 F.4th 1, 12 (1st Cir. 2024) (quoting Justice Antonin Scalia & Bryan A. Garner, *A Dozen Canons of Statutory and Constitution Text Construction*, 99 *Judicature* 2 (2015)). Courts cannot treat statutory language "as stray marks on a page - notations that Congress regrettably made but did not really intend." *Consumer Data Indus. Ass'n v. Frey*, 26 F.4th 1, 8 (1st Cir. 2022) (quoting *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 478 (2017)). Ensuring that each portion of a statute is given effect means that "no part will be

inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). Stated otherwise, "[a] court should not construe a statute so as to render any of it a nullity." *In re Acushnet River & New Bedford Harbor: Proc. re Alleged PCB Pollution*, 712 F. Supp. 1019, 1032 (D. Mass. 1989) (citing *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

While this canon is often described as one of interpretation, the Supreme Court has stated that "[i]t is our *duty* 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (emphasis added) (citation omitted). Elsewhere, the Supreme Court refers to this canon as the "cardinal principle of statutory construction." *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *see also Samuels v. Bureau of Prisons*, 498 F. Supp. 2d 415, 421 (D. Mass. 2007) (characterizing the canon against surplusage as a "settled rule" (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 36 (1992)). Appropriate statutory interpretation requires giving effect to all of a statute's words and provisions to avoid an unreasonable interpretation. *See, e.g.*, *Mundell*, 92 F.4th at 12 ("We adhere closely to that instruction [to give every word and provision effect] here."). Although Plaintiff quibbles about the exact meaning of various words to support its argument that § 101(b) cannot be read to authorize the Final Rule, ECF 13 at 10–13, that interpretation renders § 101(b) entirely meaningless. On the other hand, NMFS's reading comports with the purpose of § 101(b) and is the only reasonable interpretation.

In canvassing decisions from the Supreme Court, First Circuit, and subordinate district courts that considered whether to apply the canon against surplusage, Conservation Groups have been unable to find a case where the court adopted an interpretation that rendered an entire

provision meaningless.[5] The closest any courts get is finding *individual words* within a statute to be clarifying, redundant, or a mistake rather than implying unique independent meaning. *See generally City of Providence v. Barr*, 954 F.3d at 42–43 ("sometimes Congress may consider a specific point important or uncertain enough to justify a modicum of redundancy." (cleaned up)); *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (finding a court can "reject words as surplusage if inadvertently inserted or if repugnant to the rest of the statute." (cleaned up)).

Our canvass revealed no case where a court interpreted a statute to render an *entire provision* meaningless surplusage, the result Plaintiff's preferred interpretation would generate. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also Yates v. United States*, 574 U.S. 528, 543 (2015) ("We resist a reading . . . that would render superfluous an entire provision passed in proximity as part of the same Act."). Plaintiff asks this Court to do exactly that by interpreting § 101(a) as controlling, thus rendering Congress's clear intent to carve out an exemption in § 101(b) for an emergency rule completely without effect. Plaintiff's argument that a clear exception to a general rule somehow would violate Congress's intent in setting that general rule is facially illogical.

In sum, adopting Plaintiff's reading that § 101(b) does not apply to the April 2022 emergency rule that was the factual and legal predicate to the Final Rule, or any other rule, would be a marked break from accepted practices of statutory interpretation.

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[5] Conservation Groups reviewed nearly 60 cases that considered the canon of surplusage in these jurisdictions. A cross-section of cases that focus on the canon against surplusage where a term or provision would be rendered meaningless as a function of having no effect is provided. *See, e.g.*, *Duncan*, 533 U.S. at 174; *Mundell*, 92 F.4th at 12; *Ecker v. United States*, 527 F. Supp. 2d 199, 202–03 (D. Mass. 2007); *Benoit v. Tri-Wire Eng'g Sol., Inc.*, 612 F. Supp. 2d 84, 89 (D. Mass. 2009). Notably, Plaintiff does not cite a single case where a court found an entire section of a statute mere surplusage.

IV. The D.C. Circuit's Decision in the Maine Lobstermen's Association Challenge to the 2021 Biological Opinion is Irrelevant

Plaintiff incorrectly claims that the Final Rule is just a continuation of the worst-case scenario modeling and unsupported assumptions that the D.C. Circuit found unlawful in *Me. Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582, 586 (D.C. Cir. 2023) (vacating the 2021 Biological Opinion while remanding the 2021 Rule without vacatur). That decision is irrelevant to the question here of whether NMFS acted consistent with the CAA in promulgating the Final Rule closing the MRA Wedge under its MMPA authority.

First, contrary to Plaintiff's assertions, ECF No. 1 ¶¶ 30, 61, 66, 89; ECF No. 13 at 16-17, the Final Rule closing the MRA Wedge is not based on the vacated 2021 Biological Opinion. After a rash of right whale deaths in 2017, NMFS initiated a formal ESA section 7 consultation and subsequently issued a new biological opinion in May 2021. This opinion analyzed the effects of the continued operation of the lobster fishery on critically endangered right whales, including how those effects would be modified by the proposed MMPA regulation NMFS finalized in September 2021. As the Final Rule states, the regulation at issue here is "simply not promulgated on the basis of the [vacated] 2021 Biological Opinion." 89 Fed. Reg. at 8344.

Second, the D.C. Circuit did not reject all of the "science underlying NMFS's [] actions," as Plaintiff implies. ECF No. 13 at 17. Regardless, the data underpinning the closure of the MRA Wedge under the MMPA is wholly different from the assumptions and modeling underpinning the 2021 Biological Opinion, a decision document issued in fulfillment of the agency's ESA obligations. NMFS based its scientific justifications for the Final Rule on recent visual and acoustic detections of right whales as well as visual observations of lobster gear in the MRA Wedge from February through April of past years. *See, e.g.*, AR_5434, 5435, 5477, 5479, 5481 (aerial, shipboard surveys, acoustic detections, and opportunistic sightings data gathered over the

last several years demonstrating a high density of right whales in the MRA Wedge and waters north in the later winter and early spring); AR_5429, 5470, 5472, 5432 (2021 and 2022 aerial surveys documenting increased and aggregated fixed fishing gear present in February, March, and April, at the same time that right whale sightings were high); AR_5486 (Duke habitat model used in the Environmental Assessment predicting that between three and seven right whales are present in the MRA Wedge waters north to New Hampshire at any given time between February and April). NMFS's analysis does not rely on unsupported assumptions or consider worst-case scenarios. This MMPA action, undertaken under a different statute to fulfill different agency mandates, is supported by its own administrative record and a separate and distinct informal consultation process under the ESA. ECF No. 21-1 (Index to AR); 89 Fed. Reg. at 8344.

Third, Plaintiff's assertion that the "D.C. Circuit completely rejected NMFS's argument against worst case scenarios that . . . justify the permanent Wedge Closure Rule," ECF No. 13 at 17, is ill-conceived. As just demonstrated, the Final Rule restricting fishing in the MRA Wedge was promulgated under NMFS's section 118(f) MMPA authority, 16 U.S.C. § 1387(f), and was not based on the assumptions in the ESA consultation that the D.C. Circuit rejected. 89 Fed. Reg. at 8346. Therefore, even if this Court finds that the D.C. Circuit decision is relevant, the appeals court explicitly recognized that the ESA and the MMPA are different processes. *Me. Lobstermen's Ass'n*, 70 F.4th at 601 ("The phase one rule presents a different situation . . . we are not convinced the error claimed by the lobstermen is fatal to the [2021 Rule].")

Finally, neither the D.C. Circuit nor the federal district court in a separate lawsuit had occasion to analyze § 101(b), thereby rendering Plaintiff's reliance on the D.C. Circuit decision inapt. *Me. Lobstermen's Ass'n*, 70 F.4th 582; *Ctr. for Biological Diversity*, 2024 WL 324103.

CONCLUSION

For the foregoing reasons, the Court should find for Federal Defendants.

Respectfully submitted this 12th day of March, 2024,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent via mail to those indicated as non-registered participants on March 12, 2024.

/s/ Erica A. Fuller
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