UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, *Plaintiff*, v. NATIONAL MARINE FISHERIES SERVICE, *et al.*, *Defendants*.	)	No. 1:24-cv-10332-WGY

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS 1, 2, AND 3 IN PLAINTIFF'S COMPLAINT AND SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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LIST OF ACRONYMS

APA	Administrative Procedure Act
CAA	Consolidated Appropriations Act, 2023
DMF	Massachusetts Division of Marine Fisheries
ESA	Endangered Species Act
M/SI	Mortality or Serious Injury
MMPA	Marine Mammal Protection Act
MRA	Massachusetts Restricted Area
NMFS	National Marine Fisheries Service
PBR	Potential Biological Removal Level
TRO	Temporary Restraining Order
TRP	Atlantic Large Whale Take Reduction Plan
TRT	Atlantic Large Whale Take Reduction Team

INTRODUCTION

The Final Wedge Rule issued by the National Marine Fisheries Service ("NMFS") under the Marine Mammal Protection Act ("MMPA") is consistent with the Consolidated Appropriations Act, 2023 ("CAA"). The plain language of the CAA right whale-related provisions carves out a provision allowing exactly this agency action. Additionally, Congress's intent is clear when understood in the context of contemporaneous regulation and litigation to protect the highly endangered North Atlantic right whale.

In 2021, NMFS implemented a suite of measures in a rule ("TRP Amendment Rule") issued under the MMPA to mitigate the entanglement risk of right whales in vertical buoy line gear. In April 2022, NMFS issued an Emergency Rule under the MMPA closing a wedge-shaped area ("Wedge") of Federal waters off the coast of Massachusetts to vertical buoy line fishing to mitigate a hotspot of fishermen aggregating their gear in the Wedge during the annual migration of right whales through the area. The aggregation was the inadvertent result of closures of adjacent waters implemented by the 2021 TRP Amendment Rule and the Commonwealth of Massachusetts. During those closures, fishermen congregated in the Wedge while waiting for the adjacent waters to reopen. In July 2022, the U.S. District Court for the District of Columbia granted conservation groups' summary judgment motion, holding that the 2021 TRP Amendment Rule violated the MMPA because it did not include measures expected to reduce right whale mortality and serious injury ("M/SI") to below the species' potential biological removal level ("PBR") within six months of implementation. In a November 2022 remedy order, that court ordered NMFS to develop a new compliant rule by December 9, 2024. In December 2022, the Atlantic Large Whale Take Reduction Team ("TRT") discussed new recommended measures to bolster protections for the right whale in a way that would comply with the court's strict timetable. These discussions

considered expanded weak rope configurations, significant line reduction, and vast extended closures to vertical buoy lines, including a closure of an area encompassing the Wedge from February to May. Before NMFS implemented any recommended measures in a new regulation, Congress passed the CAA with provisions pertaining to NMFS' regulation of the lobster fishery.

Responding to the court ruling, Congress set a new path forward in CAA Section 101 for regulation of the lobster fishery with respect to right whales. Section 101(a) provides that the 2021 TRP Amendment Rule is "sufficient" to ensure that NMFS and state authorizations of the lobster fishery "are in full compliance" with the Endangered Species Act ("ESA") and MMPA through December 31, 2028. However, in Section 101(b), Congress carved out an exception for NMFS to "make final an emergency rule that is in place on the date of" the CAA's enactment. In other sections, Congress appropriated millions of dollars to encourage development of new gear technologies that are safer for right whales and directed NMFS to submit annual reports on the status of the right whale and "actions taken and plans to implement measures expected to not exceed [PBR] by December 21, 2028."

The first and second claims in Plaintiff Massachusetts Lobstermen's Association's ("MALA") Complaint challenge the Final Wedge Rule issued by NMFS on February 7, 2024, as contrary to law under the CAA, despite the fact that Congress specifically excepted NMFS' action on the Wedge area. By using an "existing emergency rule" "in place," rather than "in effect," the plain language of Section 101(b) indicates the 2022 Emergency Rule, which was still "in place" at the time of the CAA's enactment because NMFS retained MMPA emergency rulemaking authority to extend the rule. As the only emergency rule issued in the last decade affecting the lobster industry, Congress could not have been referring to anything else in Section 101(b). Further, the plain language of the CAA allows NMFS to "make final" that emergency rule in place (i.e., the

2022 Emergency Rule), which is exactly what NMFS did with the Final Wedge Rule. Moreover, given the context of the CAA's creation and applying traditional canons of statutory construction, Congress's intent is clear, and this Court should hold that NMFS' reading is the best. Any other reading would improperly render Section 101(b) a nullity.

Plaintiff's third claim challenging the Final Wedge Rule under the *Maine Lobstermen's Association v. NMFS* (D.C. Cir. 2023) ruling also fails. That ruling on a separate agency action is irrelevant because the Final Wedge Rule was implemented under a different statute relying on different scientific support. For these reasons and as explained more fully below, the Court should grant Defendants' motion for partial summary judgment on Claims 1, 2, and 3 of Plaintiff's Complaint, and should deny Plaintiff's request for injunctive relief.

LEGAL FRAMEWORK

I. Marine Mammal Protection Act

Congress enacted the MMPA in 1972 to ensure that marine mammals are not "permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part." 16 U.S.C. § 1361(2). MMPA Section 118 governs the "incidental taking" of marine mammals during commercial fishing operations. *Id.* § 1387(a). MMPA Section 118(f) requires NMFS to "develop and implement a take reduction plan designed to assist in the recovery or prevent the depletion of each strategic stock" that interacts with certain commercial fisheries. *Id.* § 1387(f)(1). The "immediate goal" of a take reduction plan ("TRP") is to "reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal level established for that stock[.]" *Id.* § 1387(f)(2); 50 C.F.R.

§ 229.32 (TRP regulations).[1] A TRT composed of individuals with expertise in the conservation or biology of the marine mammal or the fishery at issue recommends a TRP for consideration by NMFS. 16 U.S.C. § 1387(f)(6)(C), (7)(A).

The MMPA provides NMFS with emergency rulemaking authority. Congress instructed that NMFS "shall . . . prescribe emergency regulations" for species with an established TRP, "[i]f [NMFS] finds that the incidental [M/SI] of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species." *Id.* § 1387(g)(1). NMFS may extend emergency regulations "for an additional period of not more than 90 days or until reasons for the emergency no longer exist, whichever is earlier" if NMFS determines that M/SI from a commercial fishery "is continuing to have an immediate and significant adverse impact on a stock or species." *Id.* § 1387(g)(4). NMFS shall also finalize emergency regulations by "approv[ing] and implement[ing] . . . any amendments to [a TRP] that are recommended by the [TRT] to address such adverse impact." *Id.* § 1387(g)(1)(A)(ii).

II. Consolidated Appropriations Act, 2023

On December 23, 2022, Congress passed the CAA, and on December 29, 2022, President Biden signed the CAA, which included provisions specific to NMFS' regulation of the lobster and Jonah crab fisheries to protect right whales. Pub. L. No. 117-328, Div. JJ, Tit. I, 136 Stat. 4459, 6089-90. In Section 101(a), the CAA deems the 2021 TRP Amendment Rule "sufficient to ensure that the continued Federal and State authorizations of the American lobster and Jonah crab fisheries are in full compliance" with the MMPA and the ESA until December 31, 2028. *Id.* § 101(a). In Section 101(b), Congress carved out an exception, stating that the Section 101(a)

[1] The PBR is the maximum number of marine mammals that can be removed (killed or injured) from a stock by all forms of take (exclusive of natural mortalities) while still ensuring the recovery of the stock to allow it to reach its optimum sustainable population level. 16 U.S.C. § 1362(20).

provisions "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 that affects the American lobster and Jonah crab fisheries. *Id.* § 101(b). The three actions that Congress described in the exception provision (i.e., existing emergency rule, extending emergency rule, making final emergency rule) reflect the mechanisms of the emergency rulemaking provisions in the MMPA described above.

Section 101(a) also directs NMFS to take a series of actions between enactment and December 31, 2028, to facilitate the development of new fishing gear technologies intended to protect right whales and then to incorporate those technologies into a regulation to take effect by that date. *Id.* § 101(a)(1)-(3). The CAA further instructs NMFS to establish a grant program to facilitate the development of those technologies, *id.* § 201(a)(1), and to submit annual reports to Congress describing "the actions taken and plans to implement measures expected to not exceed [PBR] by December 31, 2028," the "amount of [M/SI] by fishery and country," and the "proportion of the American lobster and Jonah crab fisheries that have transitioned to innovative gear technologies that reduce harm to" the right whale, *id.* § 101(a)(3). The CAA authorizes appropriations of up to $50,000,000 per year between 2023 and 2032; not less than $40,000,000 of which must be dedicated to the development of innovative gear and technology. *Id.* § 203(a)(1).

FACTUAL BACKGROUND

I. North Atlantic Right Whale

The North Atlantic right whale (*Eubalaena glacialis*) has been listed as endangered since 1970 and has been protected by the MMPA's take moratorium since 1972.[2] *See* 35 Fed. Reg. 18319 (12/02/70). The right whale population has been in decline since 2010 as a result of human-

[2] For relevant background concerning the ESA, see Dkt. 22 at 2-3.

caused mortality from entanglement in fishing gear and vessel strikes. 89 Fed. Reg. 8333, 8333 (-(02/07/24). The right whale population is approximately 356 individuals as of 2022. *Id.*

Right whales are a "strategic stock," 16 U.S.C. § 1362(19), a designation that requires NMFS to develop and implement a TRP under the MMPA. *See id.* § 1387(f). NMFS first developed a TRP for right whales in 1997, the Atlantic Large Whale Take Reduction Plan . 62 Fed. Reg. 39,157 (07/22/97). NMFS established the TRT in 1997 to develop recommendations for the TRP. *Id.*; 16 U.S.C. § 1387(f)(6)(A)(i).

II. The 2021 Atlantic Large Whale Take Reduction Plan Amendment Rule

NMFS convened the TRT in 2017 to address a rapidly declining right whale population by mitigating entanglements, which is a leading cause of right whale mortality. 86 Fed. Reg. 51970, 51970-71 (09/17/21). After extensive debate, negotiations, and input from affected stakeholders including state fishery agencies, NMFS published the 2021 TRP Amendment Rule. NOAA_ 00075-129 (Dkt. 21). As relevant here, the 2021 TRP Amendment Rule changed the geographic scope of the existing seasonal Massachusetts closure by expanding the closure area in Massachusetts state waters from its prior boundary northward to the New Hampshire border. NOAA_00124-25; *see also* Dkt. 22-1 ("Coogan Decl.") at Fig. 1 (map of MRA Wedge).

III. NMFS' 2022 Wedge Closure

After the 2021 TRP Amendment Rule went into effect, the Massachusetts Division of Marine Fisheries ("DMF") sent NMFS a letter on January 7, 2022, to alert NMFS to an emerging entanglement risk. NOAA_05750. The expansion of a seasonal closure in state waters by Massachusetts in 2021, and the subsequent incorporation of that closure into the 2021 TRP Amendment Rule, inadvertently left an approximately 200 nautical mile unprotected wedge-shaped area open to trap/pot fishing with high risk of overlap between right whales and vertical

buoy lines. NOAA_00175. 2021 and 2022 data indicated that lobstermen were taking advantage of the open area to wet store and concentrate their trap/pot gear during the closure period, positioning themselves to quickly re-enter the closed areas when they opened in May, thus creating an unusually high density of gear in the Wedge from February to April. *Id.*

Even before the 2021 Rule went into effect and exacerbated the problem, during April 2021 aerial surveys, the Center for Coastal Studies observed both aggregated fishing gear and migrating right whales within the Wedge. *Id.*; Coogan Decl. ¶¶ 13, 15, Figs. 2-4. NMFS understood the gear in the Wedge to be a mix of actively fished gear and wet-stored gear in preparation for the May opening of adjacent waters. NOAA_00175. Based on the confirmed presence of right whales alongside aggregated gear, NMFS determined that the Wedge presented an imminent entanglement threat. *Id.* NMFS issued the 2022 Emergency Rule to prohibit trap/pot fishery buoy lines within the Wedge to reduce the incidental M/SI to right whales. *See* NOAA_00173. Due to the time required to prepare the 2022 Emergency Rule, the closure was in effect only for the month of April 2022. NOAA_05727.

IV. Litigation Challenging the 2021 TRP Amendment Rule and Biological Opinion

NMFS' issuance of the 2021 TRP Amendment Rule and a distinct 2021 Biological Opinion on the authorization of certain U.S. commercial fisheries prompted litigation from conservation groups interested in protecting right whales, as well as the State of Maine and groups associated with the lobster industry. *See Ctr. for Biol. Div. v. Raimondo*, No. 18-cv-112 (D.D.C.) ("*CBD*") (dismissed as moot, Dkt. 260-261); *Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aerospace Workers v. Raimondo*, No. 1:21-cv-275-LEW (D. Me.) (grant of preliminary injunction reversed and vacated by First Circuit at 40 F.4th 36 (1st Cir. 2022), then plaintiff voluntarily dismissed); *Me. Lobstermen's Ass'n v. NMF*S, No. 1:21-cv-2509 (D.D.C.) ("*MLA I*").

In *CBD*, the District Court for the District of Columbia granted conservation groups' motion for summary judgment. *CBD*, 610 F. Supp. 3d 252 (D.D.C. 2022). As relevant to this case, the Court held that Section 118 of the MMPA requires PBR to be achieved within six months of any amendments to the TRP. *Id.* at 279-80. In remedy briefing, NMFS explained to the Court that the "scope of the measures required to reach PBR will have severe economic and social consequences to the affected fisheries and surrounding communities." *CBD*, No. 1:18-cv-112 (JEB), Dkt. 228-1 at 4 (Declaration of Michael Pentony). The Court nonetheless remanded the 2021 TRP Amendment Rule without vacatur and ordered NMFS to finalize a new rule by December 9, 2024, that reduces right whale M/SI in U.S. commercial fisheries to below PBR. *CBD*, 2022 WL 17039193, at *3 (D.D.C. 11/17/22).

On appeal of *MLA I*, the U.S. Court of Appeals for the District of Columbia Circuit vacated portions of the 2021 Biological Opinion and remanded without vacatur the 2021 TRP Amendment Rule. *MLA v. NMFS*, 70 F.4th 582, 586 (D.C. Cir. 2023) ("*MLA II*"). The *CBD* district court subsequently vacated its July 2022 and November 2022 orders and dismissed the case as moot. *CBD*, 2024 WL 324103 (D.D.C. 01/24/24).

V. TRT Planning Post-*CBD* Ruling and CAA Enactment

After the summary judgment ruling in *CBD*, and while *MLA II* was still pending before the D.C. Circuit, the TRT reconvened and discussed recommending measures that could comply with the court's strict timetable. The surest way to comply would have been massive seasonal closures to vertical buoy lines, coupled with large-scale implementation of ropeless fishing in the lobster fishery, but the ropeless technology was not (and still is not) yet ready for large-scale implementation. In December 2022, the TRT proposed, and a majority of the TRT members voted in support of, recommending that NMFS implement measures including line reductions in open

waters, expanded use of weak rope configurations, and massive closures (i.e., many thousands of square miles) to vertical buoy lines where gear would be entirely removed from the water and brought to shore for extended periods rather than being redeployed in open waters. NOAA_4656-4673. One such closure encompassed the Wedge area from February to May. NOAA_4656-60; *see also* NOAA_4729-30. Following the TRT vote, but before NMFS could implement a new regulation, Congress passed the CAA. In the only legislative history about the CAA, Senator Angus King from Maine described the toll that the *CBD* ruling's requirement for future regulations would have on Maine fishermen but emphasized that he and his Congressional colleagues viewed the CAA as "in no way" diminishing "the standards of" the ESA or MMPA; rather "it merely pauses that economic death sentence until we have time to know how to navigate the solution . . ." 168 Cong. Rec. S9591, S9608 (daily ed. 12/20/22). Senator King did not explain CAA Section 101(b), but emphasized that the CAA as a whole is "a compromise" that "leaves in place [existing] protective measures. . . . " *Id*. at S9607.

VI . 2023 Emergency Rule and Plaintiff's Unsuccessful Motion for a Temporary Restraining Order

In early 2023, NMFS extended the 2022 Emergency Rule consistent with MMPA Section 118(g)(4) and CAA Section 101(b), closing the Wedge during the entire hotspot season from February 1 to April 30 and reopening May 1, 2023. *See* NOAA_05033.[3] On February 1 and 2, 2023, Plaintiff MALA filed a complaint and motion for a temporary restraining order ("TRO") and preliminary injunction in the U.S. District Court for the District of Columbia, seeking to enjoin the 2023 Emergency Rule as violating the CAA. *MALA v. NMFS*, No. 1:23-cv-293 (JEB) (D.D.C.) ("*MALA v. NMFS*") (Dkt. 1, 2). Chief Judge Boasberg denied Plaintiff's motion for a TRO, finding

[3] NMFS did so in response to concerns expressed by the Commonwealth of Massachusetts. *See* NOAA_05750 (01/07/22, 12/12/22 DMF letters),

that Plaintiff failed to establish irreparable harm. *Id.* (02/16/23 Min. Order); 02/16/2023 Hearing Trans. at 30 ("I am talking about more than de minimus harm, harm that is significant, and there's simply no proof of that. The harm is very cursorily and vaguely described."), 31 ("So I think that in the weighing of all the factors, that the plaintiff[ ] ha[s] not been able to show irreparable harm dooms this motion and I will deny it."). The court gave Plaintiff an opportunity to file a preliminary injunction motion with additional testimony substantiating irreparable harm. *Id.* at 31. Plaintiff chose not to do so and also chose not to appeal. NMFS successfully moved to dismiss the case as moot when the Wedge opened on May 1, 2023. *MALA v. NMFS,* Dkt. 40.

VII. 2024 Final Wedge Rule

On September 18, 2023, NMFS published the proposed rule to amend the TRP to expand the boundaries of the Massachusetts Restricted Area to include the Wedge. 88 Fed. Reg. 63,917. NMFS reviewed and considered all written and oral public submissions received during the comment period, including comments from Plaintiff. NOAA_5733. On February 7, 2024, NMFS issued the Final Wedge Rule challenged in this case, which finalized the 2022 Emergency Rule. 89 Fed. Reg. 8333 (NOAA_05725-41).

STANDARD OF REVIEW

The Administrative Procedure Act governs judicial review of NMFS' decisions under the MMPA and CAA. 16 U.S.C. § 1374(d)(6); 5 U.S.C. §§ 701-706. Agency action can be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "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 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. Plaintiff Has Not Demonstrated an Injury-In-Fact to Establish Standing.

Whether a plaintiff has standing to sue is a threshold jurisdictional question. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998). To satisfy Article III's standing requirements, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth. v. Laidlaw Env'l. Servs. (TOC)*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The burden of establishing these elements rests squarely on a plaintiff, who must meet the burden by alleging facts that "affirmatively" and "clearly" demonstrate standing. *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990). An organizational plaintiff must show either that it has "representational standing," which is contingent upon the ability of at least one of its members to bring suit, or that it has "organizational standing," which turns instead on whether the organization itself suffered an injury-in-fact. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). If suing on behalf of its members, organizations must show that its members meet the threshold requirements for standing. *Hunt v. Washington Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977). Plaintiff has not sufficiently established injury-in-fact to proceed with Claims 1, 2, and 3 of its Complaint.[4]

[4] Plaintiff has failed to establish standing to proceed with any of its claims, but Defendants limit this motion to Claims 1, 2, and 3 because those are the claims the Court has suggested it may wish to hear at the March 14, 2024, hearing. *But see* Dkt. 51 (limiting hearing to the "statute and regulations" which are basis of Claims 1 and 2). Nevertheless, this Court could dismiss the entire case on standing grounds.

As to representational standing, Plaintiff has not satisfied its burden. Plaintiff's Complaint does not include attachments from members to establish that at least one member has standing to bring suit. *See* Dkt. 13, n.4 (explaining declarations submitted with emergency injunction motion are not part of the Complaint). Instead, the Complaint rests on conclusory allegations that Plaintiff's members have endured "economic, aesthetic, cultural, and procedural injury to . . . interests in the Massachusetts lobster fishery through the imposition of illegal closures to fishing grounds." Dkt. 1 ¶ 16. Plaintiff's Complaint also asserts, without corroborating support, that Plaintiff's members "currently fish and intend to continue to fish and keep their gear in the waters subject to the [Final Wedge Rule] that is the subject of this Complaint." *Id.* ¶ 9. This is not enough to establish injury.

Although Plaintiff attached two declarations from members with its preliminary injunction motion, these declarations do nothing further to establish an injury that is "concrete and particularized" and "actual or imminent." *Friends of the Earth*, 528 U.S. at 180. Mr. Sawyer's declaration does not establish that he fishes at all, or that he intends to fish in the Wedge area during the closure months. *Cf. Spokeo v. Robins*, 578 U.S. 330, 339 (2016) ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" (quoting *Lujan*, 504 U.S. at 560)). Instead, Mr. Sawyer hypothesizes about the potential losses of other fishermen, alleging that the Final Wedge Rule seasonal closure "will deprive lobstermen of their ability to make a living for three (3) full months," Dkt. 13-1 ¶ 13, and that the seasonal closure "will result in many lobstermen losing large sums and perhaps being forced out of business." *Id.* ¶ 14. These entirely speculative statements do not establish injury-in-fact of any particular members. *Cf. Lujan*, 504 U.S. at 566 ("[s]tanding is not an ingenious academic exercise in the conceivable") (internal citation omitted). Mr. Meschino's declaration fares no better. Mr. Meschino does not explicitly

state that he intends to fish in the Wedge area in the future, but vaguely states that "[i]n or about January or February of 2023, [he] fished exclusively in the area encompassed by the Wedge." Dkt. 13-2 ¶ 8. Despite having had the opportunity to collect relevant information, he provides no concrete data, numbers, or business records to support his allegation that "[t]he 2023 Wedge Closure harmed [him] financially and significantly disrupted [his] income." *Id.* ¶ 10. Mr. Meschino merely offers conclusory statements that he "will lose a significant portion of [his] income[,]" *id.* ¶ 12, and "it would be a significant blow to [his] business" if the Final Wedge Rule were allowed to stand. *Id.* ¶ 13. With these two declarations, Plaintiff has failed to establish an "actual or imminent" injury, rather than one that is "conjectural or hypothetical." *Lujan,* 504 U.S. at 560; *see also id.* at 561 (plaintiff's burden substantially higher at trial stage). Plaintiff has not established that one of its members would have standing to sue individually.

As to organizational standing, Plaintiff has not established how the organization's interests are harmed by the Final Wedge Rule. Plaintiff's Complaint devotes several paragraphs to explaining how, as an organization, it has been at the forefront of pursuing efforts to protect the right whale population, Dkt. 1 ¶ ¶ 10, 13-15, and been a part of the larger marine resource management community. *Id.* ¶¶ 7-8. If anything, these paragraphs establish that Plaintiff has an interest that would *benefit* from the protective measures of the Final Wedge Rule. The only allegation of organizational injury in Plaintiff's Complaint is the same conclusory statement used for its members – that MALA endured "economic, aesthetic, cultural, and procedural injury to . . . interests in the Massachusetts lobster fishery through the imposition of illegal closures of fishing grounds." *Id.* ¶ 16. This conclusion is unsupported.

In its emergency injunction motion, Plaintiff tries to establish organizational standing by asserting: "The [MALA] 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' regulation of the lobster industry is directly germane to its purpose and thus it has standing to challenge the permanent Wedge Closure." Dkt. 13 at 9. Again, Plaintiff uses speculative language without substantiating its allegation – here, that membership dues will decrease. Other than a general interest in advocating for lobstermen to continue fishing, Plaintiff provides no further explanation for how the organization *itself* has suffered a concrete and particularized injury, or will imminently do so, due to the Final Wedge Rule. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (hold that to find standing exists with no injury other than injury to advocacy would eviscerate standing doctrine's actual injury requirement). Therefore, as a threshold matter, Plaintiff has not established this Court's jurisdiction, and the Court may dismiss Plaintiff's claims.[5] *See* Fed. R. Civ. Pro. 12(h)(3) (subject matter jurisdiction must exist at each stage of litigation).

II. Plaintiff's First and Second Claims Fundamentally Misinterpret the CAA.

Even if this Court finds that Plaintiff has standing to proceed, the Final Wedge Rule is consistent with CAA Section 101(b), which carves out an exception for "any action taken to . . . make final an emergency rule that is in place on the date of enactment of this Act, affecting lobster and Jonah crab." CAA § 101(b); NOAA_05736. The plain language of Section 101(b) supports NMFS' action to finalize the 2022 Emergency Rule with the Final Wedge Rule. Furthermore, applying traditional principles of statutory construction and considering context, NMFS' reading of the provision is the best and only reading that gives effect to all provisions of the CAA.

[5] Additionally, to the extent that Plaintiff argues it has established harm because it seeks to enforce the CAA, Plaintiff misunderstands its burden. *See* Dkt. 22 at 9-11 (describing Supreme Court and First Circuit precedent that, at emergency injunction stage, plaintiff must still demonstrate likelihood of irreparable harm apart from alleged statutory violation).

A. The Plain Language of CAA Section 101(b) Supports the Final Wedge Rule.

Plaintiff's first claim incorrectly alleges that there was no emergency rule "existing" at the time Congress enacted the CAA and, therefore, the Final Wedge Rule is an entirely new regulation subject to the prohibitions of CAA Section 101(a). Dkt. 1 at 16-17. To start, Plaintiff mistakenly equates the terms "existing" and "in place" with "in effect."[6] Congress exempted any action to "make final" an emergency rule that was "in place" on December 29, 2022. CAA § 101(b). That is what NMFS did here. NMFS never repealed the 2022 Emergency Rule and the emergency conditions that justified the Rule (i.e., the seasonal hotspot of aggregated gear and migrating whales) remained. When the waters reopened in May, the 2022 Emergency Rule closure was no longer in effect, only because the conditions that justified it are seasonal and NMFS appropriately limited the closure dates to the hotspot season. But NMFS retained emergency rulemaking authority to extend the 2022 Emergency Rule under MMPA Section 118(g)(4) because the conditions giving rise to the emergency persisted. *See* NOAA_5739 n.7 (explaining NMFS has authority to extend emergency rules under MMPA, but not *ad infinitum*). Contrary to Plaintiff's contentions, NMFS is not reading the word "rule" out of Section 101(b); rather, NMFS is giving effect to Section 101(b) by recognizing that the 2022 Emergency Rule was still able to be extended or finalized. *See* 16 U.S.C. §§ 1387(g)(4), 1387(g)(1)(A)(ii). Thus, the 2022 Emergency Rule was still "in place" in December 2022, as Congress articulated.[7] CAA § 101(b); NOAA_05736.

[6] Plaintiff inaptly cites two cases to equate "in place" with "in effect," Dkt. 13 at 10, but those courts used the phrase colloquially and were not interpreting statutes where Congress used the phrase "in place."

[7] To the extent Plaintiff relies on off-handed comments by Chief Judge Boasberg during a hearing on Plaintiff's TRO motion in *MALA v. NMFS*, No. 1:23-cv-293 (D.D.C.), those musings never formed the basis for any court opinion in that case and are entitled to little, if any, weight. Indeed, Chief Judge Boasberg specifically described this statutory issue as "one that I probably need to think about more." *MALA v. NMFS*, 02/16/2023 Hearing Transc., at 30.

The plain language of CAA Section 101(b) closely tracks the authority vested in NMFS by the MMPA emergency rulemaking provisions. CAA Section 101(b) recognizes that NMFS has issued an emergency rule, just as 16 U.S.C. § 1387(g)(1)(A)(i) provides. Section 101(b) allows for NMFS to extend that emergency rule, just as 16 U.S.C. § 1387(g)(4) allows. Section 101(b) grants NMFS the ability to make final that emergency rule, a power granted in 16 U.S.C. § 1387(g)(1)(A)(ii). Congress did not come up with the CAA exception provision in a vacuum, but carved out its exception for NMFS' only emergency rule affecting the lobster industry based on the framework that Congress had already established in the MMPA.

Plaintiff's alternative theory that the plain language refers to "any number of" hypothetical new emergency rules concerning right whales and lobster fishing that NMFS might create and publish "between the time Congress passed the CAA and its execution" is illogical. Dkt. 13 at 15. When Congress passes an appropriations bill, the time between passage and signature by the President is unpredictable but cannot exceed 12 calendar days. U.S. Const. Art. I, sec. 7, cl. 2. Congress passed the CAA on December 23, and President Biden signed it on December 29, 2022, but the President could have taken even less time. Realistically, NMFS cannot draft and publish a new emergency rule in a matter of days. Coogan Decl. ¶ 19. By comparison, NMFS was alerted to the emergency hotspot in the Wedge area in January 2022 and issued the 2022 Emergency Rule as quickly as it could – on March 2, 2022 – more than a month later. Plaintiff's interpretation thus improperly renders the exception provision superfluous. *See TRW v. Andrews*, 534 U.S. 19, 31 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."). Plaintiff should not be permitted to write Section 101(b) out of the CAA.

Plaintiff's second claim mistakenly alleges that the Final Wedge Rule violates the plain language of the CAA because it expands the geographic scope of the 2023 Emergency Rule and therefore does not "make final" the exact same rule.[8] Dkt. 1 at 17. The 2023 Emergency Rule is irrelevant; the Final Wedge Rule finalizes the 2022 Emergency Rule. As a factual matter, Plaintiff is incorrect because the Final Wedge Rule keeps the same boundaries as the 2022 Emergency Rule (and the 2023 Emergency Rule). *See* Coogan Decl. ¶¶ 21, 22. Because the geographic scope is identical, Plaintiff's second claim fails.

B. Applying Canons of Statutory Construction, NMFS' Reading of Section 101(b) Is the Best.

Furthermore, given the context of the CAA's creation and applying traditional canons of statutory construction, NMFS' reading is the best. First, Congress's intent is clear given that the 2022 Emergency Rule is the *only* emergency rule "affecting lobster and Jonah crab" that NMFS has issued in at least the last decade. NOAA_05736. Plaintiff identifies no other existing emergency rule that Congress might have had in mind when it drafted Section 101(b). If Section 101(b) did not apply to the 2022 Emergency Rule, then the exception provision would be entirely

[8] In its Motion for a Preliminary Injunction (but not its Complaint), Plaintiff raises in a footnote the corollary argument that the Final Wedge Rule does not make final the 2022 Emergency Rule, because it does not implement a closure of the exact same duration. Dkt. 13 at 12 n.6. This argument is raised cursorily, and should not be considered for this reason. But in any event, it would fail because the phrase "make final" does not require such temporal overlap. In administrative law rulemaking, there is no requirement for a final rule to look the same as the proposed (or in this case, emergency) rule, and final rules often do diverge as a result of taking public comments into account. The MMPA emergency rulemaking provisions reflect that principle. 16 U.S.C. § 1387(g)(1)(A)(ii). Here, moreover, the public expected that NMFS would promulgate a final rule for the entire three-month duration of the seasonal hotspot emergency. *See, e.g.*, NOAA_05742 (01/04/23 DMF letter), NOAA_05750 (01/07/22, 12/12/22 DMF letters), NOAA_05758 (08/12/23 DMF letter); NOAA_04730 (12/02/22 TRT meeting, discussing proposed closure of area including Wedge from February to May); 87 Fed. Reg. 55405, 55408 (09/09/22) (NMFS, soliciting public input on making extension of existing closure to cover Wedge area final); Coogan Decl. ¶ 17.

superfluous. *See TRW*, 534 U.S. at 31; *Herman*, 244 F.3d 32 (1st Cir. 2001) ("[A] statute should be construed so as not to render any of its phrases superfluous.").

Second, NMFS' reading of Section 101(b) makes the most sense in context of the CAA's right whale provisions as a whole. Congress directed NMFS to, *inter alia*, facilitate development of new gear technologies and submit annual reports on actions taken to reduce harm to right whales before 2028. CAA §§ 101(a)(1)-(3). It would be an odd reading of the statute if Congress exhorted NMFS to take steps to sustain right whale numbers into the future, while at the same time precluding NMFS from finalizing the one emergency rule issued in decades that provides empirically based protections. And that reading is all the more odd when adopting it would render an entire subsection of the statute inoperative. Taken with the Section 203(a)(1) provision allocating millions of dollars to innovate new gear technologies, Congress was not intending to erase existing protections for right whales, but rather refocusing everyone's efforts on a path forward for new fishery-wide regulations in a post-*CBD* ruling world.

The only legislative history for the CAA right whale provisions does not rebut NMFS' interpretation, as Plaintiff claims. Dkt. 13 at 14. Senator King characterized the CAA right whale provisions as "a compromise that has been negotiated between the various people interested in this issue and this body that leaves in place all of those protective measures that I mentioned – the weak links, the weaker ropes, the ropes out of the water, the marking of the gear." 168 Cong. Rec. S9591, S9607 (daily ed. 12/20/22). The omission of the 2022 Emergency Rule from that list is hardly a smoking gun. The list does not purport to be exclusive and, in fact, the 2021 TRP Amendment Rule (which Section 101(a) explicitly preserves), included other measures such as various other closures that Senator King did not mention. Plaintiff also fails to acknowledge that Senator King stressed the legislation was not intended to weaken existing regulations but only

extend the timeline for imposing new industry-wide regulations until better technologies could be developed. *Id.* at S9608 ("We are talking about a 6-year pause as time to collect the data and develop the gear."). *Cf.* NOAA_05742 (01/04/23 DMF letter, stating "In fact, the budgetary language provides authorization for you to continue with this action"); *MALA v. NMFS*, No. 1:23-cv-00293 (JEB) (D.D.C.), Dkt. 22-11 ¶ 11 (Decl. of DMF Director Daniel McKiernan).

Finally, Plaintiff's reading would create an unnecessary conflict between the CAA and Congress's intentions expressed in the MMPA. In the MMPA, Congress expressly declared it the policy of the United States to protect marine mammals within its jurisdiction. 16 U.S.C. §§ 1361(1), (2), (6), 1371(a), 1372(a), 1387(f)(2). Again, the CAA did not negate that intention; it simply established Congress' preferred path for achieving those future protections for right whales impacted by the lobster fishery. *See* 168 Cong. Rec. at S9608 (Senator King, stating Section 101 in no way diminishes "the standards" of the ESA or MMPA). Plaintiff's flawed logic would vitiate CAA Section 101(b) and that part of Section 101(a) specifically carving out an emergency rule exception. *See* CAA § 101(a) ("Notwithstanding any other provision of law *except as provided in subsection (b)* . . . .") (emphasis added). NMFS' reading is the best reading of the law.

The language of the CAA is not ambiguous, and this Court can uphold NMFS' Final Wedge Rule based on the plain language and statutory interpretation tools alone. However, to the extent that the Court reaches the end of its CAA Section 101(b) statutory analysis and decides that it is appropriate to make a ruling based on the doctrine set forth in *Chevron v. NRDC*, 467 U.S. 837 (1984), the Court may wish to wait until the Supreme Court provides further guidance on the applicability of that doctrine, which the Supreme Court is expected to do in June 2024. Delaying until after the Supreme Court issues its decision in *Loper Bright Enterprises v. Raimondo*, No. 21-

5166, will still allow this Court to make a ruling well in advance of the effective date of the next Final Wedge Rule closure (i.e., 02/01/25).

III. Plaintiff's Third Claim Fails Because the Final Wedge Rule Is Not Affected by the D.C. Circuit's Ruling on a 2021 Biological Opinion.

Plaintiff's third claim challenging the Final Wedge Rule under *MLA II* rests on a faulty premise. Dkt. 1 at 17-18*;* Dkt. 13 at 16. The *MLA II* ruling addressed an entirely separate agency action under an entirely different statute–an ESA Section 7 consultation concerning Federal authorization of the lobster fishery that involved gaps in data pertaining to issues like allocation of entanglements between countries. NOAA_05736. The *MLA II* ruling did not strike down any specific modeling tools, like the Decision Support Tool. Rather, in its opinion, the D.C. Circuit held that it was unlawful under the ESA for NMFS to resolve data gaps using a benefit of the doubt approach in favor of the species. *MLA II*, 70 F.4th at 595-600. The Final Wedge Rule, promulgated under the MMPA with a different administrative record, does not rely on a benefit of the doubt approach, but on empirical data (e.g., right whale sightings, acoustic surveys inside the MRA Wedge Area, and vertical buoy-line fishing gear density data). NOAA_05727, 05731-32; Coogan Decl. ¶ 23. The Final Wedge Rule is one of those "realistic cases" where NMFS made "a scientifically defensible decision without resort to a presumption in favor of the species." *MLA II*, 70 F.4th at 600. Accordingly, the holding in *MLA II* is not relevant to the Final Wedge Rule.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for partial summary judgment on Claims 1, 2, and 3 in Plaintiff's Complaint, dismiss those claims, and deny Plaintiff's request for injunctive relief.

Date: March 12, 2024 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

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