IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

DAVID GOETHEL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. _____
v.	)	
	)	
PENNY PRITZKER, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR A TEMPORARY RESTRAINING ORDER
OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

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GLOSSARY

ACE	Annual catch entitlement
ACL	Annual catch limit
APA	Administrative Procedure Act
ASM	At-sea monitor
DAS	Days at sea
FMP	Fishery Management Plan
IOAA	Independent Offices Appropriations Act
NEFOP	Northeast Fisheries Observer Program
NEFSC	Northeast Fisheries Science Center
NEPA	National Environmental Protection Act
NOAA	National Oceanic and Atmospheric Administration
NMFS	National Marine Fisheries Service
PTNS	Pre-Trip Notification System
PSC	Potential sector contribution
RFA	Regulatory Flexibility Act
SBRM	Standardized Bycatch Reporting Methodology Amendment
TAC	Total allowable catch

INTRODUCTION

The Northeast fishing industry is among the oldest industries in the United States, predating the Nation itself. Thousands of livelihoods depend on the ancient cod, halibut, and flounder fishery. It is now under threat of vanishing, entirely as a result of *ultra vires* action by the Department of Commerce and its sub-agencies, the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service. These are the very Federal departments explicitly charged by Congress with preservation of fishing as a business and a way of life.

Federal regulations have forced Northeast fishermen, effectively as a condition of doing business, to carry Federal contractors on their boats to monitor their activities at sea. These monitors observe everything the fishermen do, including the fishermen's compliance with laws governing the fishery. To complicate matters, in a matter of weeks the fishermen will be required to pay the cost of carrying those contractors. The agency has estimated that those costs may run over $700 per day when the monitors are present. The fishermen cannot afford this cost. In the agency's own projections, most will stop fishing and go out of business.

The agency has no authority to impose such a funding obligation. The organic statute, the Magnuson-Stevens Act, provides none. Moreover, several of its provisions (among other statutes) forbid it. The agency's pretext for this "industry funding" requirement is that it has run out of money in its congressional appropriation to pay for the contractors itself. It is a structural feature of the Federal government, though, that Congress, not agencies, sets spending priorities. When Congress has not funded an agency's programs, the agency has no authority to pursue them by other means.

If the agency were empowered to arrange for its own funding, it would at a minimum have to follow the procedures ordained by Congress. It has not done so. The agency announced the transition to industry funding by e-mailing interested parties and posting a notice on its website.

In addition, even assuming for the sake of argument that an industry funding requirement were permissible, the presence of the monitors in the first place is not. Not only does the Constitution preclude such an intrusion, but the entire regulatory structure that led to it rests on an unconstitutional foundation.

Given the agency's legal errors, injunctive relief is appropriate to preserve the status quo. The plight of the fishermen subject to the agency's actions is desperate one. The law, equities, and public interest call out for their protection.

BACKGROUND

I. LEGAL BACKGROUND

A. The Magnuson-Stevens Act

The Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens" or the "Act"), as amended, 16 U.S.C. § 1801 *et seq.*, establishes the basis for the Federal management of domestic fisheries in the United States. 16 U.S.C. §§ 1801(a)(6), (b)(1), (b)(3). Congress granted primary enforcement authority for Magnuson-Stevens to the Secretary of Commerce, who, in turn, delegated its responsibility to the National Oceanic and Atmospheric Administration's ("NOAA's") National Marine Fisheries Service ("NMFS"). *See id.* § 1802(39); Dep't of Commerce, Departmental Designation Order 10-15 § 3.01(aa) (Dec. 12, 2011), *available at* http://goo.gl/QR1tGb.

The Act establishes eight Fishery Management Councils (the "Regional Councils"), each charged with a region of the Nation's coastal waters. The Regional Councils relevant to this case are the New England Fishery Management Council (the "New England Council"), which covers the coastal waters of Maine, New Hampshire, Massachusetts, Rhode Islands, and Connecticut, 16 U.S.C § 1852(a)(1)(A), and the Mid-Atlantic Fishery Management Council (the "Mid-Atlantic Council"), which covers the coastal waters of New York, New Jersey, Pennsylvania, Maryland,

Delaware, Virginia, and North Carolina. *Id.* § 1852(a)(1)(B). Magnuson-Stevens requires that each Regional Council be composed of a set number of voting members including (1) a statutory number of appointees chosen by the Secretary from a list of potential nominees provided by the governors of the region's States, *id.* §§ 1852(b)(1)(C), (b)(2)(A)–(C), plus (2) the "principal State official with marine fishery management responsibility and expertise" from each State, *id.* § 1852(b)(1)(A), and (3) the NMFS's regional director, or his designee, *id.* § 1852(b)(1)(B).[1]

The principal responsibility of the Regional Councils is to prepare and amend Fishery Management Plans (the "FMPs"), which regulate the harvesting of particular fish species or sets of species within the Council's regional purview. The FMPs are approved, implemented, and enforced by NMFS. *See id.* § 1853(a)–(b). Where a fishery extends beyond the territory of any one Council, the Secretary may designate a single Council to prepare the FMP and any FMP amendments for the fishery, or require that the FMP and any amendments be prepared jointly by all the Councils concerned. *See id*. § 1854(f)(1).

Under the Act, the FMPs and implementing regulations must conform to a set of ten "national standards" for fishery conservation and management. 16 U.S.C. § 1851(a)(1)–(10). Under Standard Eight, "[c]onservation and management measures shall … take into account the importance of fishery recourses to fishing communities by utilizing economic and social data … in order to (A) provide for the sustained participation of such [fishing] communities, and (B) to

[1] The membership of the Regional Councils has been questioned. In particular, representation of the fishing industry is "generally skewed towards the larger corporate interests that support larger sized vessels, whereas the small-scale vessel fleets that are the traditional core of coastal communities (and more likely to have conservation interests) are often less represented[.]" *See* Thomas A. Okey, *Membership in the Eight Regional Fishery Management Councils in the United States: Are Special Interests Over-Represented?,* 27 Marine Pol'y 193, 199 (2003).

the extent practicable, minimize adverse economic impacts on such communities." *Id.* § 1851(a)(8).

B. The Northeast Multispecies Fishery Management Plan

This case concerns the FMP governing groundfish (*i.e.*, fish that live in or on the bottom of the water they inhabit). Groundfish freely migrate within the waters of both the New England and Mid-Atlantic Councils, and so are governed throughout their range by the Northeast Multispecies Fishery Management Plan (the "Northeast Multispecies FMP"), developed jointly by the two councils thirty years ago.[2] The Northeast Multispecies FMP and its implementing regulations cover sixteen different species of groundfish, including various types of cod, flounder, hake, halibut, and haddock. 50 C.F.R. § 648.2; *see also* NOAA Fisheries, Greater Atl. Reg., Northeast Multispecies Species List, *available at* http://goo.gl/Is3WNt (last visited Dec. 7, 2015).[3]

Among other things, the Northeast Multispecies FMP, as amended, contains different mechanisms for determining annual catch limits for covered fish species, processes for allotting

[2] New Eng. Fishery Mgmt. Council & Mid-Atl. Fishery Mgmt. Council, Fishery Management. Plan, Environmental. Impact Statement, Regulatory Impact Review & Initial Regulatory Flexibility Analysis for the Northeast Multi-Species Fishery (Aug. 1985), *available at* http://goo.gl/4n9Y1n.

[3] The groundfish fleet has provided the Northeast, and many other areas of the country, with fresh seafood for centuries. Further, groundfish fishermen — and the people in related industries who support their efforts, distribute their product, and sell it — have formed a vital part of the region's history, culture, and economy. In 2012 for example, New England fishermen grossed $68 million from the harvesting of groundfish. *See* Tammy Murphy *et al*., Ne. Fisheries Sci. Ctr., NOAA, 2013 Final Report on the Performance of the Northeast Multispecies (Groundfish) Fishery (May 2013–April 2014) 51 (2d ed. Sept. 2015), *available at* http://goo.gl/wYcalY. And in Fishing Year 2013, the groundfish fleet included 725 active vessels, employing approximately 2,039 crew members. *Id.* at 10. Those crew members and their families are a part of a larger seafood sector that supports nearly 300,000 jobs in countless fishing communities along the east coast of the United States. *See* National Marine Fisheries Serv., NOAA, Fisheries Economics of the United States 2012, 53, 77 (Feb. 2014), *available at* http://goo.gl/v22g5c; *see also* Decl. of Norval Stanley, III at ¶¶ 2-7 ("Stanley Decl.") (Attachment D).

catch entitlements to fishermen, and mechanisms for enforcing these quotas. Shortly after the introduction of the Northeast Multispecies FMP in 1985, NMFS approved Amendment 5, which replaced the plan's original individual species quota control program with a new program that gave fishermen the option of abiding by either a "fleet-wide requirement of time out of groundfishing" or an "individual allocation of days at sea based on historical vessel performance." *See* New Eng. Fishery Mgmt. Council, Nat'l Marine Fisheries Serv., & Mid-Atl. Fishery Mgmt. Council, Final Amendment #5 to the Northeast Multispecies FMP 25 (Sept. 30, 1993), *available at* http://goo.gl/lHpw5r. The individual allocation of "days at sea" ("DAS") assigned to each fisherman was based on historical vessel performance and the average number of groundfishing days in NMFS data for 1988–1990, with the year having the fewest groundfishing days excluded from this calculation. *Id.* at 27. These allocations were set to reduce by equal annual increments of 10 percent. *Id.* at 17, 25, 99. Amendment 5 also implemented a three-year moratorium on new permits, fixing the number of groundfish permits at approximately 5,400 and restricting entry into the market. *Id.* at 23–24, 326.

In 2004, the New England Council adopted Amendment 13 to the Northeast Multispecies FMP, which introduced further changes to the DAS control program. Northeast (NE) Multispecies Fishery; Amendment 13, 69 Fed. Reg. 22,906 (Apr. 27, 2004) (to be codified at 50 C.F.R. pt. 648). Among other things, Amendment 13 readjusted DAS allocation baselines according to NMFS data for Fishing Years 1996–2001, *id.* at 22,909, imposed default DAS reductions of 5 percent and 10 percent in fishing years 2006 and 2009, respectively, *id.* at 22,910, and established mechanisms for fishermen to transfer or lease their DAS each other. *Id.* at 22,911.

Amendment 13 also introduced, for the first time, the concept of a "sector" program into the Northeast Multispecies FMP. *Id.* at 22,914. A sector is an association of fishermen who

contract with each other to abide by certain catch restrictions and management requirements, compiled in a sector operations agreement. Under Amendment 13, sector fishermen could elect to forego DAS limits and receive instead a portion of the "total allowable catch" (a "TAC"), or "annual catch limit" (an "ACL"), for each of the fishery's stocks. *Id.* Through 2009, only two groundfish sectors formed in the groundfish fishery — the Georges Bank Cod Hook Sector and the Georges Bank Cod Fixed Gear Sector; however, the passage of Amendment 16 that same year resulted in the authorization of seventeen new sectors.

Through Amendment 16, the New England Council significantly altered the Northeast Multispecies FMP in order to force the Northeast Groundfish industry fully to a sector program, effectively abandoning the DAS program. At least in theory, Amendment 16 gave fishermen two options: They could agree to join a sector, or they could join the "common pool."

Members of the common pool remain subject to the older "days at sea" regime. *See generally* 50 C.F.R. § 648.82. However, Amendment 16 reduced the total DAS allocated to common pool vessels by 32 percent from 2009 levels and 50 percent from 2006 levels — levels which were already substantially reduced by Amendment 13. Northeast (NE) Multispecies Fishery; Amendment 16, 75 Fed. Reg. 18,262, 18,273 (Apr. 9, 2010) (to be codified at 15 C.F.R. pt. 902, 50 C.F.R. pt. 648). Amendment 16 further changed the reckoning of DAS to 24-hour increments rounded up to the next full day, under which, in the agency's words, "if a vessel fishes 6 [hours], it will be charged for 24 [hours] of DAS usage; a vessel that fishes 25 [hours] will be charged for 48 [hours] of DAS usage." *Id*. And even if a common pool fisherman still has fishing days left in his constricted allotment, he might not be allowed at sea. For example, under current regulations, NMFS can close all or part of the groundfish fishery to common pool permittees during any one of three trimesters of the fishing year if it projects that 90 percent of the total

available common pool allocation for a given species in that area, during that trimester, has already been caught. *See* 50 C.F.R. § 648.82(n)(2)(ii).

As for sector arrangements, Amendment 16 made a number of changes.[4] Most significantly, Amendment 16 introduced new sector operating plan requirements. 75 Fed. Reg. at 18,275–78. The content of a sector's operating plan is regulated by NMFS. These plans must be approved by the agency on a yearly or biyearly basis. 50 C.F.R. §§ 648.87(b)(2), (c).[5] NMFS reserved the right to approve a sector operations agreement. If NMFS refused to approve the agreement, the fishermen in that sector could not fish as a sector. Among other requirements, NMFS demands that the sector operations agreement mandate sector participation in an At-Sea Monitor Program.

C. The At-Sea Monitor Program

The Northeast Multispecies FMP, as amended by Amendment 16, establishes two principal programs by which NMFS monitors the fishing industry.

First, the Northeast Fisheries Observer Program (the "NEFOP") provides "observers" for both sector vessels and ships in the common pool. Observer programs are authorized by Magnuson-Stevens, which allows NMFS to place observers on fishing vessels "for conservation

[4] Amendment 16 eliminated the option of using DAS accounting; sector members would receive annual catch entitlements (an "ACE"). *See* 75 Fed. Reg. at 18,276 (noting that sectors would be exempt from "NE multispecies DAS restrictions"). ACE is based on the sector members' historical landings, or "potential sector contribution" (a "PSC"). *See generally* NMFS, NOAA, How is the Potential Sector Contribution Calculated? (Apr. 2010), *available at* https://goo.gl/wEAfQF. Amendment 16 further revised ACE for each stock, as well as processes for specifying catch limits and distributing entitlements among sectors. 75 Fed. Reg. at 18,266–67.

[5] Sector membership runs for a "fishing year," which starts on May 1. Operating plans must be submitted for the agency's approval by September 1 of the previous fishing year. *See* NOAA, Sector Operations Plan, Contract, and Environmental Assessment Requirements, Fishing Year 2015, 4 (Aug. 2014), *available at* http://goo.gl/I2eSQT.

and management purposes[.]" 16 U.S.C. § 1802(31); 50 C.F.R. § 648.2 ("Observer … means any person certified/approved by NMFS to collect operational fishing data, biological data, or economic data through direct observation and interaction with operators of commercial fishing vessels as part of NMFS' Northeast Fisheries Observer Program and Northeast At-sea Monitoring Program."). In particular, the Act addresses the possibility that FMPs may require the use of observers "on board a vessel of the United States engaged in fishing for species that are subject" to an FMP, "for the purpose of collecting data necessary for the conservation and management of the fishery[.]" *Id.* § 1853(b)(8).

The NEFOP is governed by the Standardized Bycatch Reporting Methodology Amendment (the "SBRM"). *See, e.g.*, Northeast Region Standardized Bycatch Reporting Methodology Omnibus Amendment, 73 Fed. Reg. 4,736 (Jan. 28, 2008) (to be codified at 50 C.F.R. pt. 648); Standardized Bycatch Reporting Methodology Omnibus Amendment, 80 Fed. Reg. 37,182 (June 30, 2015) (to be codified 50 C.F.R. pt. 648); *see generally* 50 C.F.R. § 648.11.[6] The SBRM mandates that vessels carry government-funded on-board observers, when requested by NMFS, in order to collect information about bycatch and other animal species protected under Federal law. 80 Fed. Reg. at 37,183 ("[D]ata are collected on all species of organism caught by the vessels … includ[ing] species managed under the regional FMPs or afforded protection under the Endangered Species Act or Marine Mammal Protection Act, but also includes species of non-managed fish, invertebrates, and marine plants."). When funding for observers under the NEFOP

[6] "Bycatch" refers to "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards." 16 U.S.C. § 1802(2). In contrast to "bycatch," landed fish, or the retained catch, refers to those fish that are harvested and brought to shore for personal use, sale, or post-landing discard. *See* National Marine Fisheries Serv., NOAA, U.S. National Bycatch Report 45, Figure 1.1 (William A. Karp *et al.* eds. Revision E, Sept. 30, 2011), *available at* http://goo.gl/Xf2N9A. Magnuson-Stevens requires that FMPs include a standardized bycatch reporting methodology. 16 U.S.C. § 1853(a)(11); 50 C.F.R. § 648.18.

is exhausted in any given year, the SBRM provides a process for prioritization to maximize the effectiveness of bycatch determinations. 80 Fed. Reg. at 37,184.

Second, Amendment 16 created the At-Sea Monitor Program. It required that sectors participate as a condition for NMFS approval of their operations agreements. 75 Fed. Reg. at 18,278, 18,342 (requiring sectors to develop operational plans that provide for "adequate at-sea/electronic monitoring … no later than FY 2012"); *see* 50 C.F.R. §§ 648.87(b)(1)(v)(B), (b)(2)(xi). These independent monitors are intended to "verify area fished and catch and discards," and monitor "utilization of sector [annual catch entitlement]." 75 Fed. Reg. at 18,342; 50 C.F.R. § 648.2 ("At-sea monitor means any person responsible for observing, verifying, and reporting area fished, catch, and discards of all species by gear type for sector trips as part of an approved sector at-sea monitoring program."). While coverage levels may shift from year-to-year, Amendment 16 mandates a minimum coverage rate to ensure that resulting estimates meet the same coefficient of variation as specified under the SBRM. 75 Fed. Reg. at 18,278, 18,342.[7] The institution of monitoring beyond what was required for conservation and bycatch analysis — the purpose of the NEFOP — was an innovation beyond the text of Magnuson-Stevens.[8]

[7] For Fishing Year 2015, NMFS set the NEFOP coverage rate at 4 percent and the At-Sea Monitor Program coverage rate at 20 percent, for a total coverage rate of 24 percent. 2015 & 2016 Sector Operations Plans and 2015 Contracts & Allocation of Northeast Multispecies Annual Catch Entitlements, 80 Fed. Reg. 25,143, 25,148–49 (May 1, 2015).

[8] The agency has consistently taken the position that the NEFOP and the At-Sea Monitor Program are separate programs with different focuses and purposes. *See* 75 Fed. Reg. at 18,299 ("[A]t-sea monitors are separate and distinct from fishery observers and do not necessarily have to be held to the same standards as fishery observers."); *id.* at 18,297 ("The primary role of at-sea monitors is to verify area fished, catch, and discards by species, by gear type. … [U]nlike observers, at-sea monitors will not be required to collect biological samples, will not collect as much gear information, and will not be responsible for conducting supplemental research projects that are sometimes required of observers. At-sea monitors are intended to complement, not replace, the work performed by observers[.]").

Both NEFOP observers and at-sea monitors are Federal contractors supplied by third parties. 75 Fed. Reg. at 18,278, 18,342; *see* 50 C.F.R. §§ 648.87(b)(1)(v)(B), (b)(2)(xi). Five companies have been approved by NOAA to employ and provide observers and monitors. Northeast Multispecies Fishery; Approved Monitoring Service Providers, 80 Fed. Reg. 8,627, 8,627–28 (Feb. 18, 2015).

Amendment 16 asserted that sectors would be required to contract with the at-sea monitor providers and bear the costs of at-sea monitoring. 75 Fed. Reg. at 18,342 ("[A] sector must develop, implement, and pay for, to the extent not funded by NMFS, an independent third-party … at-sea/electronic monitoring program that is satisfactory to, and approved by, NMFS[.]"). Magnuson-Stevens contains no authorization for NMFS to require industry funding for at-sea monitor programs under the Northeast Multispecies FMP. The Act authorizes one council, the Pacific Northwest Regional Fishery Management Council, to impose *observer* costs on the industry. *See* 16 U.S.C. § 1862(a)(2) ("The North Pacific Council may prepare, in consultation with the Secretary, a fisheries research plan … which … establishes a system … of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan."). Otherwise, the Act is silent on the costs of observer coverage. In practice, NMFS has always funded the at-sea monitor coverage with congressionally-appropriated funds. 80 Fed. Reg. at 37,185 ("The at-sea monitoring program provides supplemental monitoring … to address specific management objectives of the [New England Council.] … To date, we have been able to provide sufficient funding for the groundfish sector at-sea monitoring program such that industry did not have to pay for at-sea monitoring.").

On at least one occasion, NMFS has disclaimed the legal authority to require industry funding. In 2013, NMFS adopted Framework 48 which introduced modifications to the At-Sea

Monitor Program implemented by Amendment 16. Framework Adjustment 48 Interim Final Rule, 78 Fed. Reg. 26,118, 26,129 (May 3, 2013) (to be codified at 50 C.F.R. pt. 648). Framework 48 contained two provisions related to funding that were proposed by the New England Council, but rejected by NMFS in the final rule as "not consistent with goals and objectives" of the FMP, Magnuson-Stevens, and other Federal laws. *Id*. at 26,119.

NMFS rejected a proposal to delay sectors' responsibility for implementing and funding at-sea monitoring until fiscal year 2014. NMFS nevertheless expressed an intent "to cover 100 percent of the costs of sector at-sea monitoring" in 2013. *Id.* This promise was conditioned on the availability of funds in NMFS's appropriations. *Id.* ("Because NMFS funding depends on Congressional appropriations, funding levels fluctuate, and NMFS cannot guarantee sufficient funding to meet the coverage levels required by the FMP to monitor [annual catch limits] and sector [annual catch entitlements]."). In addition, NMFS rejected a "long-term solution" for cost-sharing proposed by the New England Council, under which industry would have been obligated to pay only the "direct costs of at-sea monitoring, specifically the daily salary of the at-sea monitor," *id.* at 26,120, while program costs, such as monitor training and data storage, would have been borne by the government. NMFS considered this proposal to violate the Anti-Deficiency Act, and other appropriations laws. *Id.*

II. FACTUAL BACKGROUND

A. Groundfish Fishermen Must Join a Sector to Survive.

Industry experience has demonstrated that the common pool is not a viable economic option for fishermen who make their living on groundfish; sector membership is their only real choice. *See* Decl. of David T. Goethel at ¶ 21 ("Goethel Decl.") ("As a practical matter, fishermen have no choice but to join a sector.") (Attachment A); Decl. of Mark S. Phillips at ¶ 3 ("Phillips Decl.") ("I had no choice but to join a sector because the common pool was not a viable economic

option.") (Attachment C); *see also* Decl. of John Haran at ¶ 5 ("Haran Decl.") (describing one sector as "a corporate entity born out of necessity due to government regulation of the Northeast groundfish industry") (Attachment B).

When NOAA surveyed groundfish permit holders in spring 2010, although "most active groundfish permit holders" had joined a sector, "46% said they felt forced into joining or felt they had no other choice," with many others joining because sector membership "was the 'lesser of two evils'" (8 percent), because "they could not make a living in the common pool" (15 percent), or because "the sector regulations were less risky" than those of the common pool (18 percent). Daniel S. Holland *et al*., Ne. Fisheries Sci. Ctr., NOAA, A Survey of Social Capital and Attitudes toward Management in the New England Groundfish Fishery 7 (July 2010) (emphasis added), *available at* http://goo.gl/GbOjKP. Although 80 percent of all fishermen felt that allocation of fishing entitlements was "unfair or very unfair," 98 percent of fishermen in the common pool did. *Id.* Shortly before finalization of Amendment 16, at a meeting of NMFS stakeholders in New Bedford, Massachusetts, a "common theme" of fishermen was "the involuntary nature of sectors." Emily Keiley, Univ. of Mass. Dartmouth, Sch. for Marine Sci. & Tech., Report of the Northeast Fisheries Summit 4 (Mar. 8, 2010), *available at* http://goo.gl/Fqvpka. Those fishermen "expressed having felt forced into the decision [to join sectors] because the alternative (joining the common pool) would have put them out of business." In other words, for "the majority of fishermen enrolled in sectors," the decision to join "was purely one of necessity." *Id*. at 5.

The inability of fishermen to make their living in the common pool has been widely reported in the media. The significant reduction of available DAS was described by the executive director of the Northeast Seafood Coalition as "[j]ust another slash or nail in the coffin for anyone who remained in the common pool." Richard Gaines, *NOAA cuts 'common pool' limits in half*,

Gloucester Times, Sept. 1, 2010, *available at* http://goo.gl/g6zIfJ. One industry member stated that "[t]he implementation of catch shares [that is, sectors] in New England was about as voluntary as Stalin's collective farms … You didn't have to join one voluntarily, but the other option was Siberia." Dan McDonald, *Fishing tales of woe: 'It's about overregulation'*, S. Coast Daily, Nov. 10, 2010, *available at* http://goo.gl/hA8AGa.

Within a year of Amendment 16's promulgation, an estimated 55 percent of all FMP permit holders, who caught nearly 98 percent of all groundfish, left the common pool to join sectors. 2010 Sector Operations Plans & Contracts, and Allocation of Northeast Multispecies Annual Catch Entitlements, 75 Fed. Reg. 18,113, 18,114 (Apr. 9, 2010). This trend continued through Fishing Years 2011–2014. During that time sector membership averaged at 58 percent of eligible permit holders, with peak sector enrollment of 62 percent recorded in fishing year 2013. *See* National Marine Fisheries Serv., NOAA, Fishing Years 2015–2020 Northeast Multispecies Sector Operations Plans & Contracts: A Draft Programmatic Environmental Assessment 21 (Feb. 2015), *available at* http://goo.gl/lm3ZJJ. For Fishing Year 2015, NMFS expects common pool vessels to harvest only a combined 1.2% of all groundfish. 80 Fed. Reg. at 25,145.

Even as to fishermen in the sectors, the negative economic impact of Amendment 16 is well documented. In its analysis of Northeast Fishery Sector 10, the Massachusetts Division of Marine Fisheries concluded that sector landings and gross revenues "showed a precipitous decline," with landings experiencing a 61 percent decrease of approximately 1.2 million pounds, and net revenue decreasing 52 percent or $1,183,400. Dr. David Pierce *et al.*, Mass. Div. of Marine Fisheries, Comparative Economic Survey and Analysis of Northeast Fishery Sector 10 (South Shore, Massachusetts) 6 (Nov. 2011), *available at* http://goo.gl/xyitzz. In the Commonwealth's

separate analysis of twelve sectors and the common pool, it found a net revenue loss of $11 million. *Id.* at 8.

These trends were substantiated by the Massachusetts Marine Fisheries Institute, which determined that Amendment 16's expansion of the sector program, and its revised quota allocation process, had resulted in "$21 million in direct economic losses and foregone yield of $19 million for the Massachusetts groundfish fishery." Steve Cadrin *et al*., Mass. Marine Fisheries Inst., A Report on Economic and Scientific Conditions in the Massachusetts Multispecies Groundfishery 2 (Nov. 2010), *available at* http://goo.gl/sEhxrE. The damage was so serious that Governor Deval Patrick asked the Department of Commerce to provide "$21 million in direct economic relief to the Massachusetts groundfish fleet." He expressed concern at the consolidation of the industry into sectors. Letter from Gov. Deval L. Patrick, Commonwealth of Mass., to Sec'y John E. Bryson, Dep't of Commerce (Nov. 15, 2011), *available at* http://goo.gl/dYUe8U.

B. NOAA Intends to Force the Industry to Fund the At-Sea Monitor Program.

Since Amendment 16 was finalized, NMFS has threatened to force sectors to bear the cost of at-sea monitoring. *See, e.g.*, Framework Adjustment 45, 76 Fed. Reg. 23,042, 23,043 (Apr. 25, 2011) (to be codified at 50 C.F.R. pt. 648); 78 Fed. Reg. at 26,119. Yet with each warning of a transition to industry funding, NMFS has managed to procure sufficient funds to cover the costs of the At-Sea Monitor Program.[9]

[9] *See, e.g.*, 2013 Sector Operations Plans & Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements, 78 Fed. Reg. 25,591, 25,597 (May 2, 2013) ("For FYs 2010 and 2011, there was no requirement for an industry-funded [at-sea monitor] program, but NMFS was able to fund an [at-sea monitor] program[.] … [NMFS] will pay for ASM coverage of sector trips during FY 2013."); 2014 Sector Operations Plans & Contracts and Allocation of Northeast Multispecies Annual Catch Entitlement, 79 Fed. Reg. 23,278, 23,284 (Apr. 28, 2014) ("The draft operations plans submitted in September 2013 included industry-funded ASM plans for FY 2014. However, because NMFS will be funding and operating ASM for sectors in FY 2014, we have removed these ASM plans from the final sector operations plans.").

At the beginning of the 2015 fishing year, however, NMFS published a final rule approving sector contracts and operational plans for the next two seasons. 80 Fed. Reg. at 25,143, 25,155. NMFS asserted that "[s]ince fishing year 2012, industry has been required to pay for their costs of [at-sea monitoring coverage.]" *Id.* at 25,148. At the same time, NMFS announced that, as a result of the updated coverage levels of the SBRM, "sector vessels will be responsible for paying the at-sea portion of costs associated" with sector monitoring "before the end of the 2015 fishing year."[10] *Id.* Significantly, NMFS refused to approve any contract for 2015 or 2016 unless it included language requiring the sector to fund the At-Sea Monitor Program when NMFS funding ran out. *See, e.g.*, XIII Ne. Fishery Sector, Inc. [Sector 13], Sector Operations Plan & Agreement for Fishing Years 2015–2016 (attached to Complaint as Exhibit 7); Haran Decl. at ¶ 17.

Throughout fishing year 2015, there has been an increase in concern over the possible economic catastrophe of transitioning to industry-funded at-sea monitoring. The U.S. Senate Committee on Appropriations had previously reported that sector monitoring "present[ed] substantial financial challenges to the participants as well as to the economic sustainability of the fishery and fishing communities throughout the region." S. Rep. No. 113-181, at 37 (2014). The Senate had directed NMFS to prioritize funding for at-sea monitoring with the money appropriated to the National Catch Share Plan and NEFOP for fiscal year 2015. *Id.* A June 2015 Senate Appropriations Committee report commented that "[s]ince fiscal year 2012, the Committee has

[10] NMFS further indicated that it would fund some portion of observer costs for 2015, but that these funds would be exhausted before the beginning of calendar year 2016. 80 Fed. Reg. at 25,149, 25,155; *see also* Memorandum from William A. Karp, Sci. & Research Dir., Nat'l Marine Fisheries Serv., to John K. Bullard, Regional Adm'r, Nat'l Marine Fisheries Serv. (Apr. 23, 2015), *available at* http://goo.gl/MrJfbk. Beyond that point, if NMFS had insufficient funding available for its own coverage costs, it would "consider other measures, including emergency action, to allow sectors to continue fishing while still ensuring that [NMFS could] adequately monitor sector catch for management purposes." 80 Fed. Reg. at 25,155.

directed NMFS to provide adequate funding for at-sea and dockside monitoring for all fisheries with approved catch share management plans," *i.e.*, the sector system. S. Rep. No. 114-66, at 31 (2015).

Individual members of Congress have echoed that direction. By letter dated April 29, 2015, a bipartisan group of eight U.S. Senators representing the States of Maine, New Hampshire, Massachusetts, and Rhode Island requested that NMFS prioritize funding for the At-Sea Monitor Program over any coverage required by the SBRM, as directed by the "very clear" language in the Senate's appropriations reports. Letter from U.S. Sen. Susan Collins *et al.*, to Eilleen Sobeck, Assistant Adm'r for Fisheries, Nat'l Marine Fisheries Serv. (Apr. 29, 2015) (attached to Complaint as Exhibit 4). The senators were concerned that "very high [at-sea monitoring] costs" — in the area of "$650 to $800 per trip" — would "unreasonably burden already struggling members" of the Northeast fishing industry. *Id.* However, to date, NMFS has refused to comply with this request. Letter from Eileen Sobeck, Assistant Adm'r for Fisheries, Nat'l Marine Fisheries Serv., to U.S. Sen. Susan Collins (June 5, 2015) (attached to Complaint as Exhibit 5).

In June 2015, the New England Council again petitioned NMFS — as it had at least twice before — to delay industry-funded monitoring. *See* 78 Fed. Reg. at 26,119 (Framework 48); Framework 45, 76 Fed. Reg. 23,042, 23,043 (April 25, 2011) (to be codified at 50 C.F.R. pt. 648). NMFS rejected both of those proposals; it insisted that the suspension of at-sea monitoring would "jeopardize the management of the groundfish fishery," despite the recognized "economic difficulty for individual fishermen." Letter from John K. Bullard, Reg'l Adm'r, Greater Atl. Regional Fisheries Office, NOAA, to Thomas A. Nies, Exec. Dir., New Eng. Council (July 30, 2015) (attached to Complaint as Exhibit 6).

Following that rejection, Massachusetts Governor Charles Baker and his State's congressional delegation wrote to the Secretary of Commerce to express concern about NMFS's insistence on shifting the cost of at-sea monitoring to industry despite the heavy burden it would place on industry. Letter from Gov. Charles D. Baker, Commonwealth of Mass., to Sec'y Penny Pritzker, Dep't of Commerce *et al.* (Aug. 17, 2015), *available at* http://goo.gl/qeeNTV.

On November 10, 2015, the NOAA Northeast Fisheries Science Center (the "NEFSC") published a notice that "[b]ased on the data … on actual fishing effort … federal funds in the major at-sea monitoring contracts for northeast groundfish sectors will be expended by December 31, 2015." E-mail from Jennifer Goebel, Ne. Fisheries Sci. Ctr., NOAA (Nov. 10, 2015) (attached to Complaint as Exhibit 1). "Transition of monitor sea-day costs to industry will … be effective January 1, 2016." *Id.* Therefore, effective January 1, 2016, sectors will be responsible for monitor sea-day costs, while NMFS continues to fund shoreside costs. *Id.*

On December 2, 2015, NOAA provided a subsequent notice that a potential agreement between three at-sea monitoring contract providers may allow Federal funds to cover at-sea monitors beyond the December 31, 2015 deadline. E-mail from Jennifer Goebel, Ne. Fisheries Sci. Ctr., NOAA (Dec. 2, 2015) (attached to Complaint as Exhibit 2). However, these agreements have not been finalized. Even if they are finalized, NOAA still believes that at-sea monitoring funds will run out in early 2016 and "sectors will need to ensure they have agreements in place as soon as possible to provide a smooth transition to industry funding[.]" E-mail from Craig Woolcott, Cong. Affairs Specialist, Office of Legislative & Intergovernmental Affairs, NOAA (Dec. 2, 2015) (attached to Complaint as Exhibit 3).

C. Industry Funding will Devastate the Northeast Groundfish Industry.

The effect of NMFS's November 10 Order on the industry are devastating, even in the agency's own estimation. According to a NOAA-sponsored study, the expected cost for industry-

funding at-sea monitoring is $710 per day per fisherman when a monitor is present. Greater Atl. Reg'l Fisheries Office and Ne. Fisheries Sci. Ctr., NOAA, A Preliminary Cost Comparison of At Sea Monitoring and Electronic Monitoring for a Hypothetical Groundfish Sector 6 (June 10, 2015), *available at* http://goo.gl/m3ZRYt. On June 26, 2015, at a meeting of the New England Council, NEFSC economist Chad Demarest presented a report concluding that "nearly 60% of the fleet could see negative returns to owner when full 2015 ASM costs are factored in." *See* New Eng. Fisheries Mgmt. Council, Draft Report: Preliminary Evaluation of the Impact of Groundfish-Sector Funded At Sea Monitoring on Groundfish Fishery Profits 10 (June 19, 2015) [hereinafter "NEFSC Study"], *available at* http://goo.gl/WbCeSq.[11] The consequences would be widespread:

> [P]rofit declines may have second-order effects such as the laying off of crew, reductions in maintenance and safety expenditures, etc., and these reductions in necessary inputs affect upstream shoreside markets. Reductions in profits due to industry-funded ASM may impede the ability for owners to make capital investments and may affect the ability of domestic producers to compete in the ever-more-globalized marketplace.

Id.

Those costs, furthermore, are predicted to be heaviest for those least able to bear them: the crew and owners of the small boats that form the "traditional core of coastal communities." *See* Okey, 27 Marine Pol'y at 199. The 16 boats smaller than 30 feet are evidently projected to be wiped out completely. NEFSC Study at 13, Table 12. For the 141 boats between 30 and 50 feet, total revenue is projected to decline almost 60 percent (from $17.5 million to $7.3 million). *Id.* The crew's shares would decline a similar amount (from $4.9 million to $2.1 million). *Id.* The total returns to the boat owners would decline *76 percent* (from $6.6 million to less than $1.6 million). *Id.* Nearly 40 percent of such boats would no longer be active, and their crews

[11] The study considered this an over-estimate given partial funding from NMFS in 2015. *Id.* The underlying fact, though, is that the agency itself expects that industry funding could potentially put more than half of the regulated groundfish industry out of business.

presumably unemployed. *Id.*[12] The study recognizes these prospects, describing it as a "restructuring of the fleet." *Id.* at 10.

D. Fishermen Plaintiffs will be Irreparably Harmed Unless the Court Enjoins the Industry-Funding Mandate.

1. David Goethel

David Goethel is a New Hampshire fisherman who has been a sector member since 2010 due to the economic constraints of the common pool. *See* Goethel Decl. at ¶¶ 2, 6, 8, 21. Mr. Goethel will be forced to pay for the costs of at-sea monitors by NMFS's recent orders, and will not be able to stay in the groundfish business if so. *Id.* ¶ 16.

Mr. Goethel has been fishing since the age of 8; he has earned his livelihood through commercial fishing since the 1970s. *Id.* ¶ 2. Mr. Goethel takes day-long fishing trips on his 44-foot trawler. *Id.* Mr. Goethel grosses roughly $1,500 in fish sales on an average fishing trip. *Id.* ¶ 14. Of this, he typically incurs approximately $200 in fuel costs and had to spend $300 to lease fish quota from other fishermen in his sector to cover any and all species he might pull in which are outside the scope of his own NMFS-allocated quota. *Id.* With the impending deadline to pay for the At-Sea Monitor Program, Mr. Goethel will be forced to subtract, by NOAA's estimate, $710 from the remaining $1,000, leaving less than $300 to split between his crewman, himself, and the boat to cover boat expenses for trips where a monitor is present. *Id.* ¶ 15.[13] Even if he is only covered at the current 20 percent monitor rate, Mr. Goethel will be unable to remain economically viable in the groundfish industry if he is forced to pay for these at-sea monitors. *Id.* ¶¶ 15–16.

[12] The owners of the largest boats, in contrast, would stand as the beneficiaries of consolidation in the industry. *Their* returns could nearly triple. NEFSC Study at 13, Table 12.

[13] The boat expenses include docking bills, insurance, and maintenance and repair costs. *Id.* ¶ 14.

Mr. Goethel cannot avoid being subject to the Northeast Multispecies FMP, because he might catch groundfish even when he does not target them. *Id.* ¶ 7. The common pool — which, he reports, fishermen commonly call the "cesspool," *id.* ¶ 21 — is not a viable option either. If Mr. Goethel chose to leave his sector and join the common pool, among other restrictions, he would be awarded a DAS allocation of a mere 22 days per year, and may not be able to use them all because of common pool closures. *Id.* ¶ 20.

If Mr. Goethel is forced to pay for a monitor, he will have no way to make enough money on an average fishing trip to make a profit or to remain economically viable. He will be driven out of the fishing business and may have to sell his boat to meet his personal expenses. *Id.* ¶¶ 16–17.

2. XIII Northeast Fishery Sector, Inc.

XIII Northeast Fishery Sector, Inc. ("Sector 13" or the "Sector") is a corporation organized under Section 501(c)(5) of the United States Internal Revenue Code composed of 32 fishermen, using 20 active boats, to engage in fishing under the Northeast Multispecies FMP. Haran Decl. at ¶¶ 2, 6, 23. Its mission includes "encouraging responsible fishing methods and practices to conserve fishery and other environmental resources, advancing and ensuring survival of sustainable fisheries[.]" *Id.* ¶ 4. Sector 13 has been forced to negotiate a contract for industry funding with one of the at-sea monitoring companies. *Id.* ¶ 18. The Sector has "no bargaining power" in those negotiations. *Id.* ¶ 20. The best rate the Sector has been able to negotiate is potentially for $485 per day, plus additional expenses in cases where a boat begins and ends its trip at different ports. *Id.* ¶ 22. If the Sector is unable to conclude a deal at that rate, it may have to accept a higher one. *Id.* ¶ 18.

The Sector, too, will be irreparably damaged if the industry must pay for at-sea monitors. Sector 13's boats "cannot afford to pay any amount of money for an at-sea monitor." *Id.* ¶ 22. If

the industry is forced to fund the At-Sea Monitor Program, the number of fishing vessels that will remain economically viable will be reduced to three boats. *Id.* ¶ 26; *see also id.* ¶¶ 27–29 (describing the case of one Sector member); Phillips Decl. at ¶¶ 16–20 (facts of an additional Sector member). If that happens, the Sector itself will go out of business for lack of funds to sustain its required organizational activities. Haran Decl. at ¶¶ 12, 30.

STANDARD OF REVIEW

In determining whether to grant a motion for a temporary restraining order, the court should apply the same four-factor analysis that would be used to evaluate a motion for preliminary injunction. *See, e.g.*, *Francis v. Pulley*, No. 06-480, 2006 U.S. Dist. LEXIS 93792, at *5 (D.N.H. Dec. 28, 2006). To grant a preliminary injunction, a district court must find the following four elements are established: "(1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest." *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements*, 794 F.3d 168, 171 (1st Cir. 2015); *see also Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1009 (1st. Cir. 1981).

If an agency does not act with the force of law — for example, when it has not followed formal notice-and-comment procedures — the agency's act receives deference commensurate only with its power to persuade. *United States v. Mead Corp*., 533 U.S. 218, 233–34 (2001). Acts of a Federal agency that do carry the force of law are generally reviewed under the standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "The first question a court must ask when looking at an agency interpretation of a statute is whether Congress has spoken on that issue." *Western Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 139 (D. Mass. 2010). In answering that question, "the reviewing court must first exhaust the traditional tools of statutory construction," including "examination of the statute's text, legislative history, and structure, as well as its purpose." *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 752

(D.C. Cir. 2000) (quotes and citations omitted). If not, a court defers to the agency's interpretation "if it is reasonable and consistent with the statutory purpose and legislative history. However, a court will not uphold [an agency's] interpretation that diverges from any realistic meaning of the statute." *Id*. at 752–53 (quotes, alterations, and citations omitted).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Although the regulatory structure is complex, this case is ultimately a very simple one. "[A]n agency literally has no power to act … unless and until Congress confers power upon it," *see Louisiana Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986); and no statute grants NMFS the authority to coerce industry funding for at-sea monitors. Magnuson-Stevens does not authorize it — on the contrary, several of its provisions impliedly foreclose such a requirement. 16 U.S.C. §§ 1854(d), 1862(a)(2) (defining the circumstances under which the agency can require industry funding); *id.* § 1853 (defining the mandatory and permissive contents of an FMP); *id.* § 1851(a)(8) (requiring the agency to "minimize adverse economic impacts on [fishing] communities"). No other statute appears to contain any such authority, and several forbid it. *See* 31 U.S.C. § 1341(a)(1)(A)–(B) (prohibiting Federal officers from, *inter alia*, "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"); *id.* § 3302(b) (requiring that money received "for the Government" be deposited in the Treasury); *id.* § 9701(b) (defining when an agency may "prescribe regulations establishing the charge for a service or thing of value provided by the agency"). In the absence of such authority, to allow the agency to impose an industry funding requirement on its *own* initiative would be "to grant to [NMFS] power to override Congress," and violate the rule that "[a]n agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374–75.

Even if NMFS had statutory authority to require industry funding (and none is evident), it must at a minimum follow statutory procedures. NMFS has failed to do so. In the past, even when it authorized monitoring programs in the industry sectors, NMFS only asserted the theoretical possibility of industry funding. The *additional* step of *actually requiring* fishermen to start writing checks as of a date certain, as NMFS did last month, works a substantive change in the obligations of regulated parties. This action requires the agency to follow APA rulemaking procedures. *See Levesque v. Block*, 723 F.2d 175 (1st Cir. 1983). It implicates several other statutes requiring the agency to evaluate the effect of a new regulation on (for example) the environment, 42 U.S.C. § 4332(C), and small businesses, 5 U.S.C. §§ 603, 604. NMFS has not done so. At a minimum, NMFS must be compelled to do so before it begins taxing industry in the manner proposed.

Still more fundamentally, the industry funding requirement fails because the At-Sea Monitor Program itself violates the Constitution. The requirement that fishermen carry at-sea monitors on their vessels is unconstitutional. *See* U.S. Const. amend. III; U.S. Const. amend. IV. And finally, although this Court need not reach the question, the Magnuson-Stevens Act itself violates structural provisions of the Constitution in vital respects, *see* U.S. Const., art. II, § 2, cl. 2 (Appointments Clause); U.S. Const. amend. X, and acts flowing from those infirmities — including the Northeast Multispecies FMP — are void.

A. Defendants Lack Statutory Authority to Impose Industry Funding of At-Sea Monitors.

The most obvious reason that an industry-funding requirement exceeds NMFS's statutory authority is that Magnuson-Stevens does not authorize it. The Act simply does not grant NMFS authority to levy funding for at-sea monitors on its own authority, independent of congressional appropriations. It appears that NMFS has not cited any source of statutory authority for an industry funding requirement. The Federal Register notices proposing the at-sea monitor regulations, *see*

Northeast (NE) Multispecies Fishery; Amendment 16, 74 Fed. Reg. 69,382 (proposed Dec. 31, 2009) (to be codified at 50 C.F.R. pt. 648), and finalizing those regulations a year later, 75 Fed. Reg. 18,262, cite none. The agency seems to have simply asserted it.

Because NMFS "may not confer power upon itself" and "has no power to act … unless and until Congress confers power upon it," *see Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374, its actions are *ultra vires* and its regulations are invalid unless it can point to a delegation from Congress. *See American Library Ass'n v. Federal Commc'ns Comm'n*, 406 F.3d 689, 699 (2005).[14] No such delegation being evident, NMFS may not require Plaintiffs to fund their at-sea monitors.

At least three particular aspects of Magnuson-Stevens confirm that Congress intended no delegation. *First*, inferring a power to require industry funding contradicts the statute's structure. Magnuson-Stevens already includes provisions specifying the kinds of fees that the agency can impose on industry, *see* 16 U.S.C. §§ 1854(d), 1862(a)(2), and those provisions do not allow industry funding for at-sea monitors in the Northeast. Under Section 1854(d), NMFS can require fishermen to pay permitting fees, *see id.* § 1854(d)(1) (cross-referencing 16 U.S.C. § 1853(b)(1)), and it can charge for the "the actual costs directly related to the management, data collection, and enforcement" of two types of program: a "limited access privilege program," or "LAPP", and a "community development quota program," *see id.* § 1854(d)(2)(A). NMFS has consistently insisted that the sector system is not a LAPP, *see Lovgren v. Locke*, 701 F.3d 5, 22 (1st Cir. 2012) ("[W]e must defer to the agency's reasoned decision that [Amendment 16]'s sector program is not

[14] The burden is not on Plaintiffs to prove that the statute "expressly precludes" industry funding, but on NMFS to prove that its "exercise of quasi-legislative authority is rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Railway Labor Execs.' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (quotation marks omitted).

a LAPP[.]"), and at-sea monitoring does not fit the definition of a community development program either, *see* 16 U.S.C. § 1855(i) (describing programs for using fisheries to support certain Alaska and Pacific coast communities). Likewise, by authorizing the Pacific Council to require industry funding for observers, *see id.* § 1862(a)(2), Congress demonstrated that when it wants NMFS to be able to independently fund monitoring programs, it knows how to do so.

Second, and similarly, Magnuson-Stevens defines with specificity the kinds of requirements that NMFS is permitted to include in fishery management plans. One subsection of the Act covers the "[r]equired provisions," *id*. § 1853(a), and another includes the "[d]iscretionary provisions," *id.* § 1853(b). Neither subsection refers to industry funding, or any other method by which NMFS can fund its own law enforcement and data collection activities in excess of what Congress appropriates.

When Congress enumerates regulatory powers specifically granted to an agency, courts infer that it denies the agency additional powers. *EchoStar Satellite L.L.C. v. Fed. Commc'ns Comm'n*, 704 F.3d 992, 999 (D.C. Cir. 2013); *Railway Labor Execs' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 670–71 (D.C. Cir. 1994). Conversely, when Congress want to make lists of agency powers nonexclusive, it knows how to do so. In fact, it has done so in the context of other ocean fishery regulations. *See Turtle Island Restoration Network v. National Marine Fisheries Serv.*, 340 F.3d 969, 975 (9th Cir. 2003) (citing 16 U.S.C. § 5503(d)). Congress, having expressly set out (1) the circumstances under which NMFS *can* require fees, and (2) what a fishery management plan *must* contain and what it *may* contain, could hardly have impliedly left NMFS authority to dream up *additional* requirements to impose on the sectors. *See Arctic Sole Seafoods v. Gutierrez*, 622 F. Supp. 2d 1050, 1060 (W.D. Wash. 2008) (explaining that NMFS "has read into [Magnuson-Stevens] a requirement that … Congress did not impose," and rejecting the

agency's position because "[a] regulation may not serve to amend a statute or to add to the statute something which is not there") (alterations and quotes omitted).

Third, it disregards the statute's purpose, as codified in the Act's text. Congress has required that the administration of Magnuson-Stevens be governed by a set of ten binding "National Standards." *See* 16 U.S.C. § 1851(a) ("Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management."); *see also id.* § 1853(a)(1)(C) (requiring that the "conservation and management measures" of a fishery management plan be "consistent with the national standards"). One of those standards requires NMFS to undertake regulation with special solicitude for fishermen and their communities: National Standard 8 expressly requires NMFS to "***take into account the importance of fishery resources to fishing communities*** by utilizing economic and social data … in order to (A) ***provide for the sustained participation of such communities***, and (B) to the extent practicable, ***minimize adverse economic impacts on such communities***." *See id.* § 1851(a)(8) (emphasis added).

The language of National Standard 8 is not empty; on the contrary, it is judicially enforceable in cases where the agency's acts harm the people and communities that Congress ordered NMFS to protect. *See North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650, 666 (E.D. Va. 1998) (concluding that fishery quota productions violated Section 1851(a)(8)); *see also Motor Vehicle Mfrs. Ass'n 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 … entirely failed to consider an important aspect of the problem[.]"). It also follows from Congress's practice of requiring — and the judiciary's practice of assuming — that agencies do not regulate in a vacuum, and must consider not only the benefits of regulation, but the costs to regulated parties. *See generally*

Michigan v. Environmental Prot. Agency, 135 S. Ct. 2699 (2015). The industry funding requirement, though, ignores that mandate. Far from ensuring "the sustained participation" of fishing communities and "minimiz[ing] adverse economic impacts" on them, it *terminates* them as participants in the fishing industry. In enacting such language, Congress did not reserve to NMFS the implied power to drive Plaintiffs and countless others off the seas and out of business. *See Arctic Sole Seafoods*, 622 F. Supp. 2d at 1061 (rejecting agency interpretation because it "leads to absurd results — the inevitable elimination of the fishery"); *id.* ("Nothing in the language or the legislative history of the statute suggests that Congress hoped to eventually eliminate the fishery[.]").[15]

The principle that NMFS cannot act without a grant of statutory authority carries special weight in this case, where the agency seeks to extract money from regulated parties in order to fund its own operations and programs. "[T]he power to tax," after all, "involves the power to destroy," *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819); thus "only Congress has the power to levy taxes." *Thomas v. Network Solutions*, 2 F. Supp. 2d 22, 29 (D.D.C. 1998); *see* U.S. Const., art. I, § 9, cl. 7; *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974) ("Taxation is a legislative function, and Congress … is the sole organ for levying taxes[.]"). Industry funding of at-sea monitors is thus not only *ultra vires* as a statutory matter, but an unconstitutional intrusion on Congress's exclusive taxation authority.

By intruding on Congress's taxation authority, NMFS's industry funding requirement also violates at least three statutes governing agency finance. For example, the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A)–(B), prohibits Federal officers from "mak[ing] or authoriz[ing] an

[15] *Cf. Western Sea Fishing Co.*, 722 F. Supp. 2d at 140 ("Had Congress charged the Secretary with merely preventing overfishing, the Secretary likely would have responded with eliminating fishing altogether. … [Instead the statute] creates a duty to allow for harvesting at optimum yield in the present, while at the same time protecting fishery output for the future[.]")

expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation" and from "involve[ing] [the United States] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law[.]" *Id.* Federal agency funding is premised on the assumption that when congressional appropriations run out, agencies have to shut down too, and their operations — even statutorily mandated ones — are suspended until Congress provides more. *See Environmental Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995) (concluding that lack of appropriated funds "prevent[ed] the Secretary from complying with" a mandatory statutory duty and ordering that compliance "is delayed until a reasonable time after appropriated funds are made available"). If NMFS finds that at-sea monitoring is more expensive than Congress's appropriation will pay for, it must curtail its demands on industry, not demand that fishermen provide their own funds instead.

Likewise, the Miscellaneous Receipts Statute provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." *See* 31 U.S.C. § 3302(b); *see also Scheduled Airlines Traffic Offices v. Department of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (explaining that the Miscellaneous Receipts Statute "derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause, that 'no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law'") (quoting U.S. Const. art. I, § 9, cl. 7).

The payments to be made by fishermen for at-sea monitors surely constitute "money for the government"; they are mandated by NMFS and would go to support a program that the agency created and regulates in detail. *American Fed'n of Gov't Emp. v. Federal Labor Relations Auth.*, 388 F.3d 405, 408 (3d Cir. 2004) ("[P]ublic money includes money from any source such as taxes,

customs and user fees, and other proceeds of government agency activities.") (citing 31 U.S.C. § 3302(b)). The fact that the funds would formally go to the providers of at-sea monitoring makes no legal difference. As the Government Accountability Office has explained, "an agency cannot avoid section 3302(b) by authorizing a contractor to charge fees to outside parties and keep the payments in order to offset costs that would otherwise be borne by agency appropriations." Government Accountability Office, 2 Principles of Federal Appropriations Law at 6-177 (3d ed. 2006).

NMFS itself has taken the position, in litigation and rulemaking, that the Anti-Deficiency Act and Miscellaneous Receipt Statute preclude it from placing Federal contractors on vessels unless Congress appropriates the money to pay for it. The agency successfully defended that position in litigation earlier this year. In *Anglers Conservation Network v. Pritzker*, the court addressed challenges to NMFS's fisheries observers, a program related to (though separate from) the at-sea monitors. No. 14-509, 2015 U.S. Dist. LEXIS 135320 (D.D.C. Oct. 5, 2015). In that case, environmental group plaintiffs demanded that NMFS require observers on 100 percent of fishing vessels covered by the fishery management plan at issue. The agency responded that doing so would violate the Anti-Deficiency Act and the Miscellaneous Receipts Statute — and the court agreed. Although plaintiffs in that case pointed to other circumstances where the agency was allowed to share costs with industry, the court agreed with the agency that those programs were expressly authorized "by statute for particular fisheries only." *Id.* at *30 n.9 (citing 16 U.S.C. § 1862 as to Pacific fisheries).[16]

[16] The New England Council had proposed industry funding that would have covered part, but not all, of the costs of 100 percent observer coverage. The NMFS took the position that it had no power to demand industry funding on its own: "Upon legal analysis of this measure, the cost-sharing of monitoring costs between NMFS and the industry would violate the Antideficiency Act. Therefore, based on this analysis, there is no current legal mechanism to allow cost-sharing of monitoring costs between NMFS and the industry." Fisheries of the Northeastern United States;

In fact, NMFS adopted much the same position as to at-sea monitoring under the Northeast Multispecies FMP. When NMFS addressed Framework 48, it disapproved a measure for "At-Sea Monitoring Cost-Sharing" proposed by the regional council: "To serve as a more long-term solution to the cost burden of at-sea monitoring to sectors, Framework 48 proposed a mechanism for sharing of at-sea monitoring costs between sectors and NMFS. … NMFS has disapproved this cost-sharing measure because it is not consistent with other applicable laws as developed. Specifically, ***the Anti-Deficiency Act and other appropriations law prohibits Federal agencies from obligating the Federal government except through appropriations and from sharing the payment of government obligations with private entities***." 78 Fed. Reg. at 26,119–20 (emphasis added). NMFS has conceded, in other words, that the Anti-Deficiency Act precludes it from creating programs it cannot afford and offloading those costs onto the industry.

Congress has authorized agencies to charge "user fees" in some circumstances; the Independent Offices Appropriations Act ("IOAA") permits Federal agencies to "prescribe regulations establishing the charge for a service or thing of value provided by the agency." *See* 31 U.S.C. § 9701(b). But industry funding is not a user fee.[17] That delegation permits agencies to impose "only specific charges for specific services to specific individuals or companies." *Federal Power Comm'n v. New Eng. Power Co.*, 415 U.S. 345, 349 (1974) (addressing prior version of IOAA, then-codified at 31 U.S.C. § 483a). The idea of a permissible user fee under the IOAA

Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 14, 79 Fed. Reg. 10,029, 10,034, 10,036 (Feb. 24, 2014) (to be codified at 50 C.F.R. pt. 648); *id.* at 10,039 ("For example, if observer monitoring costs are $ 700 per sea day, NMFS and industry cannot split the costs 50/50, or by any other proportion, nor can NMFS accept contributions directly from industry to fund observer monitoring costs.").

[17] Even if NMFS were to assert (for the first time) that industry funding imposes a simple user fee, such a *post hoc* rationalization would "contradict[] the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action[.]" *Michigan*, 135 S. Ct. at 2710.

"presupposes an application" by regulated parties for some kind of benefit, and in return for which an agency can charge for its services. *Id.* The presence of an at-sea monitor is not a privilege sought by fishermen. Rather, the NMFS places at-sea monitors in order to pursue its own regulatory goals. NMFS may contend that monitoring is good for the fishing industry in the long run (though a funding requirement plainly is not), but that is of no matter. Industry-wide assessments intended to improve the "'economic climate,'" where what the government provides in return "'can be primarily considered as benefitting broadly the general public,'" are not permissible user fees, but forbidden taxes. *Id.* at 350.

If the agency did have statutory authority to require industry funding, that would raise still other infirmities. Industry funding compels sectors to enter contracts to purchase at-sea monitoring services from private companies. *See* Sector 13 Decl. at ¶ 18; 75 Fed. Reg. at 18,278, 18,342; *see* 50 C.F.R. §§ 648.87(b)(1)(v)(B), (b)(2)(xi). But as the Supreme Court has decided, Congress has no authority under the Commerce Clause to compel people to enter commercial transactions. *See National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) (explaining that the Commerce Clause does not permit the Federal government to "compel[] individuals to become active in commerce by purchasing a product") (opinion of Roberts, C.J.); *id.* at 2644 ("[O]ne does not regulate commerce that does not exist by compelling its existence[.]") (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

While the parties regulated by the Northeast Multispecies FMP may be engaged in commercial fishing, they cannot be compelled to enter the market for at-sea monitors. *Id.* at 2590–91 ("Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today.") (opinion of Roberts, C.J.). At a minimum, this Court should interpret the

relevant statutes as withholding authority to require industry funding, in keeping with the rule that statutes should be "construe[d] … to avoid a question of [their] constitutionality, where such a construction is fairly possible." *United States v. Pappas*, 613 F.2d 324, 329 (1st Cir. 1979) (quotation marks omitted).

It does not matter that industry funding is a condition of organizing a sector, because the legal and practical consequences are the same. As a legal matter, if the agency cannot constitutionally impose a regulatory requirement on a natural person, it cannot do so to a legal person either. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("A corporation is simply a form of organization used by human beings to achieve desired ends."). Requiring sectors to contract with at-sea monitoring companies is no better than requiring individual fishermen to do so.

Additionally, as a practical matter, the choice whether to organize as a sector is in reality no choice at all. By design and in practice, NMFS long ago rendered sector membership the only economically viable way to be a fisherman in the groundfish fishery. *See supra* pp. 12–14; 19–21. Federal courts have long recognized that when the government cannot constitutionally "*order[]*" someone to do something (*e.g.*, fund an at-sea monitor), it also cannot "*pressure*" him or her to do it. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013) (emphasis added). Any other rule "would allow the government to produce a result which it could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quotes omitted).

The agency has long known that the fishermen would never join sectors willingly. After Amendment 16 was promulgated, it was subject to several challenges. They involved scores of plaintiffs from the northeast groundfish industry who asserted that the NMFS had no right to enforce Amendment 16 without allowing a referendum of fishing permit holders and fishing boat

crew members. *See Lovgren v. Locke*, 701 F.3d 5, 21 (1st Cir. 2012) (citing 16 U.S.C. § 1853a(c)(6)(D) (requiring a referendum before adoption of an "individual fishing quota program")). NMFS ultimately prevailed, *see id.* at 22 ("Moreover, federal defendants' argument that the text does not permit the conclusion that A16's sector program is subject to the referendum requirement is correct."), but having fought to avoid a referendum on the sector system, NMFS cannot now assert that sector membership is "voluntary" in any meaningful way. In turn, the agency cannot characterize industry funding as anything more than a funding mandate on unwilling regulated parties —which the agency has no power to impose.

B. Defendants Have Failed to Observe the Procedural Requirements for Imposing Industry Funding.

Even if Defendants were empowered to require industry funding for at-sea monitors — and as discussed above, no such authority appears — the agency would at a minimum have to follow the procedural requirements for doing so. NMFS has followed no procedure, beyond posting a notice on its website and circulating an email. That ignores the administrative procedures ordained by Congress.

When an agency announces a rule — *i.e.*, a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," *see* 5 U.S.C. § 551(4) — it is required to follow the APA's rulemaking procedures. Those procedures include providing notice and the opportunity for comment. *See id.* § 553. Industry funding is a substantive rule; it compels a substantive change in the regulated parties' obligations. Before the announcement, regulated fishermen were required only to carry at-sea monitors; now, they must also prepare to pay for them, under legal threat. *See Levesque*, 723 F.2d at 182 (rule considered legislative when "the circumstances surrounding the promulgation of th[e] rule suggest that it was meant to have legislative effect"). Setting the date upon which industry funding would begin is

itself an agency action. *See Natural Res. Def. Council, Inc. v. Environmental Prot. Agency*, 683 F.2d 752, 762 (3d Cir. 1982) ("[W]ithout an effective date a rule would be a nullity because it would never require adherence."). But it came without warning or procedure: Until last month, NMFS had covered the costs of monitor coverage for five years. NMFS had required sectors to acknowledge the *possibility* of industry funding, but the additional step of compelling sectors to start writing checks was the one that actually changed regulated parties' obligations.[18] Failure to grant notice and comment is grounds to set aside the industry funding notice and remand to the agency. *See Idaho Cnty. v. Evans*, No. 02-80, 2003 U.S. Dist. LEXIS 23459, at *21-22 (D. Idaho Sept. 30, 2003).

Besides following the APA's rulemaking procedures under Section 553, there are also matters that NMFS was required to study before it could require sectors to start paying. For example, Magnuson-Stevens requires that the agency "shall" comply with the Regulatory Flexibility Act ("RFA") in promulgating fishery management plans. *See* 16 U.S.C. § 1855(e). The RFA requires that agencies prepare reports on the effect of proposed and final rules on small businesses, and discussing alternatives that might minimize any harms for those businesses. *See* 5 U.S.C. §§ 603, 604. No such report accompanied either the agency's initial warnings earlier this year or its announcement of November 10; industry funding is procedurally invalid for that reason. *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1437 (M.D. Fla. 1998) (remanding to agency for reconsideration of Magnuson-Stevens fishery management quotas under the RFA, where "[c]onsideration of the record as a whole convince[d] [the court] that the Secretary's

[18] By the same token, in the absence of any indication that NMFS funding would ever cease, the theoretical possibility of industry funding was likely not even ripe for review, or final under the APA. *See Center for Auto. Safety v. National Highway Traffic Safety Admin.*, 452 F.3d 798, 805 (D.C. Cir. 2005). Now is Plaintiffs' only real opportunity to seek judicial review of the industry funding requirement.

defalcation unlawfully compromised his ability to render a reasoned and informed judgment with respect to the reduced quotas' economic impact on small businesses").

Another procedural requirement arises from the National Environmental Protection Act ("NEPA"). NEPA requires agencies to prepare environmental impact assessments for their significant acts. 42 U.S.C. § 4332(C); 16 U.S.C. § 1854(i) (directing the Secretary to "revise and update agency procedures for compliance with [NEPA]"). As of August 2014, the agency was "*planning* to prepare an environmental assessment (EA) that provides the required information to assess the impacts of sector operations," *see* Greater Atl. Reg'l Fisheries Office, NOAA, Sector Operations Plan, Contract, and Environmental Assessment Requirements, Fishing Year 2015 at 4 (Aug. 21, 2014) (emphasis added), *available at* http://goo.gl/JsdVHh; *id.* at 18 ("A single EA is being developed by NOAA Fisheries for all sectors."), but Plaintiffs are not aware that NMFS has ever *completed* such an assessment. Certainly the November 10 notice does not evince any effort to review the environmental consequences of industry funding.

The fact that NMFS addressed the RFA and NEPA in approving Amendment 16 is of no moment. Approval of Amendment 16 was a separate action, more than half a decade ago, and it has itself altered the environmental and business landscape. A supplemental environmental impact assessment in light of the changed facts is thus required. *See* 40 C.F.R. § 1502.9(c)(1) ("Agencies [s]hall prepare supplements to either draft or final environmental impact statements if … [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.").

C. In the Alternative, At-Sea Monitoring is Unconstitutional and the Fishery Management Plans are Invalid.

The arguments above are sufficient to grant Plaintiffs the relief they seek in this case — protection from an industry funding requirement. However, if this Court determines that industry

funding is permitted under Magnuson-Stevens and the Northeast Multispecies FMP, it must address other serious questions — questions which would be mooted by a narrower decision — about at-sea monitoring and the fishery management plans themselves.

1. <u>At-sea monitoring violates the constitution.</u>

Assuming *arguendo* that the agency is permitted to require industry funding for at-sea monitors, the question would still remain: Can the agency require the placement of at-sea monitors at all? At least two constitutional provisions indicate not.

First, requiring fishermen to carry at-sea monitors violates the Fourth Amendment. The Supreme Court has held that a "search" occurs, for purposes of the Fourth Amendment, when the government engages in a "physical intrusion" on private property "for the purpose of obtaining information." *United States v. Jones*, 132 S. Ct. 945, 949 (2012); *see also United States v. Cardona-Sandoval*, 6 F.3d 15, 21 (1st Cir. 1993) (holding that the master of a vessel has a Fourth Amendment right to challenge searches). That is exactly what at-sea monitors do: They physically travel on fishing vessels, and not just to collect information, but to evaluate compliance with law governing discards, confirm the location the vessel fishes, and other matters. *See* 50 C.F.R. § 648.87(b)(1)(v)(B).[19] And "searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable … subject only to a few specifically established and well-delineated exceptions," *City of Los Angeles v. Patel*, 135 S. Ct.

[19] "It is well settled … that the Fourth Amendment's protection extends beyond the sphere of criminal investigations, and the government's purpose in collecting information does not control whether the method of collection constitutes a search." *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (citation and quotes omitted). However, the information that at-sea monitors collect can be used in civil and criminal enforcement proceedings, as well as for civil forfeiture. *See* 50 C.F.R. § 600.735.

2443, 2452 (2015) (quotes and alterations omitted), none of which has been claimed by the government here. It is therefore constitutionally invalid.[20]

Second, it violates the Third Amendment. U.S. Const., amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner[.]"). Although rarely litigated, compelling fishermen to accommodate Federal law enforcement officers on multi-day fishing voyages appears to fit the bill. *See, e.g.*, Phillips Decl. ¶ 2 (describing presence of at-sea monitors on "extended, multi-day trips, ranging from 5-10 days"). Fishing vessels are surely "houses" within the meaning of the Third Amendment when fishermen live in them for days at a time, and at any rate the term should be interpreted *in pari materia* with the use of "houses" in the Fourth Amendment, where it includes all manner of private property, including vessels. *Cardona-Sandoval*, 6 F.3d at 21–22; *United States v. Alfaro-Moncada*, 607 F.3d 720, 729 (11th Cir. 2010) (explaining that "[a] cabin is a crew member's home — and a home 'receives the greatest Fourth Amendment protection,'" though finding a "border search" reasonable on the facts presented). Requiring fishermen to maintain the monitors on board is "quartering"; in fact, Magnuson-Stevens itself refers to "quartering" of observers, who travel on fishing boats in much the same way. 16 U.S.C. § 1853(b)(8).

Perhaps the only difficult question is whether the monitors count as "soldiers," but significant authority suggests that they should.[21] Even Justice Story, in his commentary on the

[20] One court has held that an at-sea observer program pursuant to the Marine Mammal Protection Act does not violate the Fourth Amendment, reasoning that the fishing industry is "closely regulated" and that the regulations providing for observers "provides an adequate substitute for a warrant." *Balelo v. Baldrige*, 724 F.2d 753, 766 (9th Cir. 1984). That decision cannot be squared with the Supreme Court's recent decision in *Patel*, which limited the "closely regulated industry" exception to a handful of industries (liquor or firearm sales, mining, automobile junkyards) that pose a "clear and significant risk to the public welfare." 135 S. Ct. at 2454–55.

[21] At the very least, the Supreme Court's purposive treatment of the Third Amendment counsels for giving the term "soldiers" a broad interpretation. *See Griswold v. Connecticut*, 381

Constitution, concluded that the Third Amendment makes no arbitrary distinction between different Federal officers: "[The Third Amendment's] plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all ***civil*** and military intrusion." Joseph Story, 3 Commentaries on the Constitution of the United States 747 (Fred B. Rothman ed., 1991) (emphasis added). Some contemporary scholarship appears to agree. Christopher J. Schmidt, *Could a CIA or FBI Agent be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 St. Louis L.J. 587 (2004).

This Court should conclude that the agency is not permitted to force fishermen to carry monitors.

2. <u>Magnuson-Stevens is facially unconstitutional.</u>

Magnuson-Stevens's system of regional fishery management councils promulgating fishery management plans is facially unconstitutional because the fishery management councils are improperly constituted. The membership of the fishery management councils is defined by statute:

> The voting members of each Council shall be:
> (A) The principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.
> (B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee, except that if two such directors are within such geographical area, the Secretary shall designate which of such directors shall be the voting member.
> (C) The members required to be appointed by the Secretary in accordance with paragraphs (2) and (5).

U.S. 479, 484 (1965) (explaining that "[t]he Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of" the right to privacy[,]" which in turn protects marital relationships from regulatory intrusions).

16 U.S.C. § 1852(b)(1). The members appointed by the Secretary of Commerce, in turn, are appointed "from a list of individuals submitted by the Governor of each applicable constituent State." *See id.* § 1852(b)(2)(C). In submitting such a list, each Governor is required to meet certain criteria and follow certain procedures, including submitting a revised list, or additional explanation for the original list, at the Secretary's request. *Id.*

This structure violates two provisions of the Constitution.

First, it violates the Appointments Clause. Under that clause, the appointment of "inferior Officers" of the United States — individuals who exercise "significant authority pursuant to the laws of the United States" but whose "work is directed and supervised at some level" by a "principal" officer, *Edmond v. United States*, 520 U.S. 651, 662–63 (1997) — may be vested by Congress "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, § 2, cl. 2.

Although the councils are supervised by NMFS and ultimately by the Secretary of Commerce, their members exercise significant independent power. The council members propose fishery management plans, amendments, and framework adjustments; they conduct hearings; they determine annual catch limits. *See* 16 U.S.C. § 1852(h). The councils have the ability to constrain the Secretary. 16 U.S.C. § 1854(a) (the Secretary may only approve, disapprove, or partially approve the plan given to him; he may not modify it on his own authority); *id*. § 1854(h) (the Secretary may not repeal or revoke a plan without the council's approval). That is adequate to render them inferior officers of the United States, who must be appointed consistently with the Appointments Clause. *See Freytag v. Commissioner*, 501 U.S. 868, 881 (1991). The fact that they

are appointed instead by governors directly, or by the Secretary (whose discretion is constrained by the lists provided by the governors), renders the councils constitutionally unsound.[22]

Second, it violates the Tenth Amendment.[23] *See Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237, 248 (D. Conn. 2005) (commenting that "such an attack [on Magnuson-Stevens] might have considerable merit"). The Supreme Court has long held that Congress may not conscript State officers for Federal programs. *Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). But that is precisely what Magnuson-Stevens does. It requires State officials responsible for "marine fishery management" to participate in a Federal council or designate someone else to sit in his stead, 16 U.S.C. § 1852(b)(1)(a); it requires State governors to submit lists of potential council members to the Secretary for his approval, including resubmitting at the Secretary's request, *id*. § 1852(b)(2). The statute imposes obligations directly on State officers and gives the Secretary authority to direct the governors' activities, conduct which the Supreme Court has forbidden.

If the New England and Mid-Atlantic Councils are improperly constituted, then their acts are invalid, and the Northeast Multispecies FMP is void. *See Ryder v. United States*, 515 U.S.

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[22] At least two Presidents have commented that Magnuson-Stevens may violate the Appointments Clause, *see* Press Release, White House, Statement by President George W. Bush Upon Signing [H.R. 5946], 2007 U.S.C.C.A.N. S83 (Jan. 27, 2007); Press Release, White House, Statement by Ronald Reagan on Signing a Bill Concerning Marine Sanctuaries and Maritime Safety (Oct. 19, 1984), *available at* http://goo.gl/dH5tWG. *See also* John-Austin Diamond, *Regional Fishery Management Councils: A Governance Framework on Unstable Constitutional Grounds*, 1 Grant L. & Pol'y J. 73 (2008).

[23] Plaintiffs have standing to raise Tenth Amendment claims in this litigation. "[W]here the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government." *Bond v. United States*, 131 S. Ct. 2355, 2366–67 (2011).

177, 188 (1995) (Appointments Clause); *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012) (same); *see generally Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (voiding Federal act that violated structural provisions of the Constitution). Plaintiffs would prefer that this Court rest on narrower grounds, but their livelihoods are threatened with utter destruction if the industry funding requirement is enforced. They must therefore reserve their right to argue for relief on broader grounds if narrower grounds are not adequate.

II. THIS COURT SHOULD GRANT PROMPT RELIEF

A. Plaintiffs are Entitled to a Temporary Restraining Order.

1. Plaintiffs are likely to suffer irreparable harm.

If Plaintiffs are forced to pay for at-sea monitors, they and many others will lose their livelihoods: Mr. Goethel and many others like him will have to stop fishing under the Northeast Multispecies FMP, sell their vessels, and give up their fishing licenses. Sector 13 will cease to exist. The First Circuit has held that likely destruction of a business is adequate to prove irreparable harm. *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005) (commenting that "threat of substantial loss of business and certainly bankruptcy qualifie[s] as the sort of irreparable harm needed to support [a] preliminary injunction").

To the extent that they can survive industry funding — for example, by shifting into other fishing markets, selling their quota allotment to other fishing license holders, or other devices — their financial losses will be almost impossible to estimate precisely, depending as they would on counterfactual speculations. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18 (1st Cir. 1996) ("If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel.").

And even if their damages were susceptible to precise measurement, they would still be irreparable because they would be irrecoverable. Because of the agency's sovereign immunity, even if the industry funding requirement is unlawful, Plaintiffs will have no ability to seek reparations for the period when it is in effect. *See Smoking Everywhere, Inc. v. Food & Drug Admin.*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010) ("Where a plaintiff cannot recover damages from an agency because the agency has sovereign immunity, 'any loss of income suffered by [the] plaintiff is irreparable per se.'") (quoting *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (alteration in original)), *aff'd sub nom. Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 898 (D.C. Cir. 2010) ("The district court's finding that this loss would be irreparable absent an injunction appears entirely reasonable."). That, too, is enough to establish their irreparable injury.

2. The balance of equities and the public interest justify a temporary restraining order.

Congress has balanced the equities and the public interest in Plaintiffs' favor. Congress ordered that the agency's administration of Magnuson-Stevens must "provide for the sustained participation" of fishing communities and "minimize adverse economic impacts on such communities." 16 U.S.C. § 1851(a)–(b). Plaintiffs' livelihoods, and those of others in their community and industry, *see* Stanley Decl. at ¶¶ 2–7, are at risk — threatened by the agency — even though Congress's evaluation of the public interest has called for special solicitude toward them. *Gordon v. Holder*, 721 F.3d 638, 652-53 (D.C. Cir. 2013) ("[The Supreme Court] prohibits a district court from second-guessing Congress's lawful prioritization of its policy goals.").

The agency has no plausible interest, from a fishery management perspective, in maintaining the At-Sea Monitor Program in the absence of a congressional appropriation. At a minimum, insofar as NMFS wants shipboard information related to bycatch, NMFS has its observer program, NEFOP, as a backup.

The agency may claim an interest in orderly administration of its fishery management regulations. But even on the agency's own account, Congress has spoken: The premise of the November 10 Order is that Congress has not appropriated funds sufficient to cover the agency's preferred monitoring arrangement. Given that the agency has no authority to continue any of its activities without a delegation of authority and appropriation of funds by Congress, *Environmental Def. Ctr.*, 73 F.3d at 872, the lack of appropriated money for at-sea monitoring demonstrates Congress's judgment that the program is not worth funding. The aspects of the Northeast Multispecies FMP that Congress *has* funded may of course proceed; only the unfunded parts must be terminated. Allowing Plaintiffs to go about their business without it would best serve the public interest, not the agency's *ultra vires* efforts to sustain it. *Id.* at 653 ("[E]nforcement of an unconstitutional law is always contrary to the public interest.").

3. <u>This Court is authorized to grant temporary injunctive relief.</u>

This Court has authority to preserve its jurisdiction by issuing injunctive relief to preserve the status quo. *See* 28 U.S.C. § 1651 ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *Federal Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 608 (1966) ("It must be remembered that the courts of appeals derive their power to grant preliminary relief here not from the [organic statute], but from the All Writs Act and its predecessors dating back to the first Judiciary Act of 1789."). This case requires such relief: Without injunctive relief, it is probable that Plaintiff David Goethel and many other fishermen subject to the industry-funding requirement will be permanently driven off the seas, while Plaintiff Sector 13 ceases to exist at all — preventing this Court from granting complete relief and potentially mooting the case. Plaintiffs have timely invoked this Court's jurisdiction; the Court should act to protect it until it can reach a final merits judgment.

One superficial obstacle to temporary relief is Magnuson-Stevens's special judicial review provision. That provision covers "[r]egulations promulgated by the Secretary under this chapter" and "actions that are taken by the Secretary under regulations which implement a fishery management plan." *See* 16 U.S.C. § 1855(f)(1)–(2). Section 1855(f) incorporates the APA in most respects. *See id.* § 1855(f)(1) (providing that covered agency actions "shall be subject to judicial review to the extent authorized by, and in accordance with [the APA]"). One exception, however, is that in cases governed by Section 1855(f), "section 705 of [the APA] is not applicable." *See id*. § 1855(f)(1)(A). Because Section 705 of the APA authorizes a court reviewing agency action to "postpone the effective date of action taken by it, pending judicial review" and to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings," *see* 5 U.S.C. § 705, some courts have understood Magnuson-Stevens to generally preclude pre-merits injunctive relief. *See, e.g., Turtle Island Restoration Network v. Department of Commerce*, 438 F.3d 937, 944 (9th Cir. 2006). That principle is inapplicable in this case, for two reasons.

This case presents no ordinary need for injunctive relief, but something more serious — a situation where the controversy could simply evaporate in a matter of weeks if industry-funded monitors are required of Plaintiffs. The threat is not merely to Plaintiffs, but to this Court's ability to maintain jurisdiction and grant relief. It appears that there is no reported decision preventing this Court from so holding. It also appears that there is no reported decision where a court was confronted with a conflict between Section 1855(f) and its own jurisdiction. This Court may decide as a matter of first impression that its preliminary review is governed not by Section 1855(f), but by its authority to "issue all writs necessary or appropriate in aid of [its] jurisdiction[]." 28 U.S.C. § 1651.

Second, Section 1855(f)'s restrictions do not apply because Section 1855(f) itself does not apply, in the agency's own view. That review provision presupposes that the regulations and final agency actions to which it applies are "published in the Federal Register." 16 U.S.C. § 1855(f)(1). Yet the agency has not published its order for industry funding of at-sea monitors in the Federal Register. If the agency does not consider its industry funding order to be the type of action which must be published, it cannot seek to limit Plaintiffs' relief based on statutory provisions that only apply to orders that do require publication. In cases where Section 1855(f) is inapplicable, regulated parties can still proceed under the background principles of the APA, which applies to "final agency action for which there is no other adequate remedy in a court." *See* 5 U.S.C. § 704.

At a minimum, Section 1855(f) does not apply because many of Plaintiffs' claims are not ordinary challenges to agency administrative acts, but "general collateral challenges to unconstitutional practices and policies," such as violations of the Third Amendment, Fourth Amendment, Tenth Amendment, and Appointments Clause. *McNary v. Haitian Refugee Ctr., Inc*., 498 U.S. 479, 492 (1991). Magnuson-Stevens's review provision does not apply to a "facial constitutional challenge" to the act itself. *See, e.g.*, *General Elec. Co. v. Environmental Prot. Agency*, 360 F.3d 188, 191–92 (2004).

CONCLUSION

This Court should enjoin Defendants from requiring industry funding for at-sea monitors. To the extent that the At-Sea Monitor Program has not been funded through congressional appropriation, it should be allowed to lapse until such time as Congress chooses to fund it again.

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Respectfully submitted,

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