

PETITION OF	*	IN THE CIRCUIT COURT
CENTER FOR BIOLOGICAL DIVERSITY	*	FOR ANNE ARUNDEL COUNTY
FOR JUDICIAL REVIEW OF THE DECISION	*	STATE OF MARYLAND
OF THE MARYLAND DEPARTMENT OF	*	CASE NO. C-02-CV-24-001281
NATURAL RESOURCES		
IN THE CASE OF:	*	
Petition for the Judicial Review		
Regarding the Maryland Department of	*	
Natural Resources' May 1, 2024 denial of		
inspection of public records in response to	*	
Petitioner's MPIA dated November 9, 2022.		
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**OPPOSITION TO MOTION TO DISMISS AND/OR FOR SUMMARY  
JUDGMENT AND COUNTERMOTION FOR SUMMARY JUDGMENT  
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

Petitioner, the Center for Biological Diversity (the “Center”), by and through its undersigned counsel, hereby opposes the Motion to Dismiss and/or for Summary Judgment filed by the Department of Natural Resources (“DNR”) and files this Countermotion for Summary Judgment (the “Countermotion”) because there is no genuine dispute of material fact related to the Center’s Countermotion, and the Center is entitled to judgment as a matter of law. For its points and authorities in support of its Opposition and Countermotion, the Center states as follows:

**I. INTRODUCTION**

At issue in this case is DNR’s refusal to disclose biological “take”<sup>1</sup> information regarding horseshoe crabs contained in otherwise public records that DNR produced pursuant to the Center’s Maryland Public Information Act (the “MPIA”)<sup>2</sup> request dated November 2, 2022 (the “MPIA Request”). The Center requested, *inter alia*, that DNR produce biological take information that

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<sup>1</sup> Regarding fisheries in Maryland, the term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.” *See* MD. CODE ANN., NAT. RES. § 4-2A-01(i) (2024).

<sup>2</sup> *See* MD. CODE ANN., GEN. PROV. § 4-101, *et. seq.* (2024) (the “MPIA”).

commercial and biomedical horseshoe crab fishermen are required to report to DNR pursuant to the Natural Resources Article of the Maryland Code and the Code of Maryland Administrative Regulations (“COMAR”). *See* MD. CODE ANN., NAT. RES. § 4-206 (2024); COMAR 08.02.10 (“Horseshoe Crabs”) (2024). In response to the Center’s MPIA Request, DNR produced *selected* documents that typically contain horseshoe crab biological take information – namely, DNR’s 2018 through 2022 Atlantic States Marine Fisheries Commission (“ASMFC”) Maryland Horseshoe Crab Compliance Reports (the “ASMFC Reports”) – however, DNR redacted the ASMFC Reports to exclude much of the biological take information responsive to the Center’s MPIA Request (the “Redacted Information”). *See* DNR Motion at Exs. 7-11.

DNR’s Motion, like its final written response to the Center’s MPIA Request, claims that its redactions are not only permissible, but required by the MPIA, entitling it to judgment as a matter of law. *See* DNR Motion at pg. 1 and Ex. 14 (DNR’s MPIA Response). DNR contends that the Redacted Information: (1) constitutes “confidential commercial information” precluded from disclosure by MPIA § 4-335 (“§ 4-335”)<sup>3</sup>; and (2) is confidential pursuant to the federal Magnuson-Stevens Act (the “MSA”) which, in turn, means that DNR cannot produce the Redacted Information pursuant to MPIA § 4-301(a)(2)(ii) (“§ 4-301”). *See* DNR Motion at pgs. 1-2.

DNR is wrong in both regards.

First, as Explained in Section IV.A., *infra*, DNR’s reliance on §§ 4-335 and 4-301 wholly ignores that Title 4 of the Natural Resources Article, pursuant to which the Redacted Information is provided to the DNR, defines “confidential information” and does not include biological take data. *See* Md. Code Ann. § 4-206(d) (“Confidentiality of Information”). Specifically, only

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<sup>3</sup> *See* MD. CODE ANN., GEN. PROV. § 4-335 (2024).

information that “would reveal the income of any person submitting” the information is defined as confidential. *Id.* at § 4-206(d)(1).

Second, as explained in Section IV.B., *infra*, the Redacted Information does not constitute “confidential commercial information” under MPIA § 4-335. The Redacted Information does not contain data regarding “individual harvesters” as alleged by DNR,<sup>4</sup> and Maryland and federal cases addressing this exception make clear that the Redacted Information is not “confidential commercial information.” See *Amster v. Baker*, 453 Md. 68 (2017) (“*Amster*”); see also, *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427 (2019) (“*Argus Leader*”); *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (“*Critical Mass*”); *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (“*National Parks*”).

Third, as explained in Section IV.C., *infra*, the confidentiality provision of the MSA does not apply to the Redacted Information and, as a result, neither does the exception from disclosure under MPIA § 4-301. Simply stated, the MSA does not apply to horseshoe crabs or the biological take information responsive to the Center’s MPIA Request. See NAT. RES. §§ 4-101 and 4-215; COMAR 08.02.10.01; see also, 50 C.F.R. § 600.5 (“Purpose and Scope” of the MSA); 50 C.F.R. § 600.10 (defining the species of fish to which the MSA applies, not including horseshoe crabs).

Finally, as explained in Section IV.D., *infra*, DNR’s argument that the so-called “Rule of Three” requires the redactions is a red herring of DNR’s own making. See DNR Motion at pgs. 13-15. The “Rule of Three” has no force of law, does not supersede the strong public policy of the MPIA, and is only implicated because of the selective way the DNR provided the biological take information requested by the Center – via the redacted ASMFC Reports.

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<sup>4</sup> Compare, DNR Motion at pg. 2 (“the reports ... contained data on individual harvesters of horseshoe crabs”), with DNR Motion at Ex. 7, pg. 4 (containing no reference to “individual harvesters”).

As summarized above, and further explained below, there is no genuine dispute that the redacted information is *not* confidential and, as a result, summary judgment for the Center is appropriate.<sup>5</sup> However, if this Court does not grant the Center’s Countermotion, it must deny DNR’s Motion because it lacks affidavit quality evidence, much less evidence to meet DNR’s burden to prove, beyond genuine dispute, that the biomedical companies consider the Redacted Information to be confidential and that “substantial harm” will result from its disclosure. *See Amster*, 453 Md. at 78.

## II. FACTUAL BACKGROUND

A. The American Horseshoe Crab. At over four-hundred and fifty million years old, the American horseshoe crab (*Limulus polyphemus*) species is older than the extinct dinosaurs and is among the oldest wildlife species on Earth. *See*, David R. Smith, et al., *Conservation Status of the American Horseshoe Crab, (Limulus polyphemus): A Regional Assessment*, REVIEWS IN

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<sup>5</sup> DNR’s “procedural” argument in footnote 1 of its Motion – that the Center’s Petition for Judicial Review is an improper form of pleading – is incorrect and of no consequence. *See* DNR Motion at pg. 2, fn.1. Maryland courts routinely entertain challenges to decisions of administrative agencies like DNR, including responses to MPIA requests, by way of petitions for judicial review. *Accord, Immanuel v. Comptroller of Maryland* 449 Md. 76, 80 (2016) (MPIA); *Haigley v. Department of Health and Mental Hygiene*, 128 Md. App. 194, 205 (1999) (MPIA); *see also*, MPIA Manual at pg. 5-1 (“Judicial Review and Alternative Dispute Resolution”). Moreover, DNR’s argument that GEN. PROV. § 4-362 solely controls this action and requires the filing of a “complaint” ignores that statute’s permissive use of “may” related to “complaints” and the fact that Md. Rule 7-201(a) makes clear that the “rules of this Chapter govern actions for judicial review ... where judicial review is authorized by statute.” *Id.* DNR’s argument also ignores the Attorney General’s guidance set forth in the MPIA Manual recognizing that Maryland’s appellate courts have “not decided whether proceedings under what is now GP § 4-362 are subject to any ... rules [other than the 2 years statute of limitations] governing administrative appeals”, which are set forth in Chapter 200 of Title 7 of the Maryland Rules. *See* MD. RULE 7-201 et. seq; *see also*, MPIA Manual at 5-1. Most importantly, DNR concedes that the procedural posture of the case causes it no prejudice as the more than eighteen (18) months of communications between the DNR and the Center, and DNR’s extensive Motion, make clear the bases for DNR’s refusal to disclose the Redacted Information and the Center’s objections. *See generally*, DNR Motion.

FISH BIOLOGY AND FISHERIES, Vol. 27, Issue 1 at 135, 152 (2017) (“Smith”).<sup>6</sup> The American horseshoe crab is the only species of horseshoe crab found in North America, primarily along the Atlantic Coast with heavy concentrations in the Middle Atlantic region, including Maryland. *See* ASMFC’s “Horseshoe Crab Life History” at [www.asmfc.org/species/horseshoe-crab](http://www.asmfc.org/species/horseshoe-crab) (last accessed 8-5-24) (“asmfc.org”).

The horseshoe crab is tremendously important to the ecosystems of the Atlantic coastal beaches. *See* asmfc.org, *supra*. The species’ eggs and parts support and sustain dozens of other wildlife species, including the federally threatened Red Knot bird. *See id*; *see also*, Carl N. Shuster, Jr. *et al*, *The American Horseshoe Crab* at 133-154 (Harvard Univ. Press, 2004) (“Shuster”). Unfortunately, due primarily to substantial overfishing, the American horseshoe crab is imperiled with potential extinction, as are species reliant on it as a source of food such as the Red Knot. *Id.*; *see also* Smith, *supra* at 29-30.

To preserve the horseshoe crab, states along the Atlantic coast have undertaken individual and collective conservation efforts through state-specific legislative initiatives as well as participation in the ASMFC’s Horseshoe Crab Management Board’s Interstate Fisheries Management Plan. *See, e.g.*, NAT. RES. §§ 4-101, *et seq.*, and 4-215(b)(18) (“Horseshoe crabs”); COMAR 08.02.10.01; *see also*, [www.asmfc.org/species/horseshoe-crab#management](http://www.asmfc.org/species/horseshoe-crab#management) (last accessed 8-3-24). Because existing conservation efforts have proven insufficient, however, the Center and more than twenty-five (25) additional conservation organizations, including the Maryland Ornithological Society, the American Bird Conservancy, and the American Littoral Society, recently filed a petition<sup>7</sup> to protect the horseshoe crab under the federal Endangered

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<sup>6</sup> Accessible at [www.researchgate.net/publication/311566591](http://www.researchgate.net/publication/311566591) (last accessed 8/4/24).

<sup>7</sup> *See* <https://www.biologicaldiversity.org/species/invertebrates/pdfs/20240212-American-horseshoe-crab-petition.pdf> (last accessed 8/4/24).

Species Act (the “Center’s Endangered Species Application”). *See Exhibit 1*, Affidavit of Will Harlan at ¶ 4 (“Harlan Aff.”).

**B. The Center’s MPIA Request and DNR’s Response.**

On November 9, 2022, the Center submitted its MPIA Request to DNR to obtain information in further support of the Center’s Endangered Species Application. *See* DNR Motion at Ex. 1. Therein, the Center requested that DNR provide copies of “records that document any and all horseshoe crab mortality, take, or related harm, including but not limited to, pharmaceutical [*i.e.*, biomedical], bait, recreational, [and] accidental take” since 2016. *Id.* at Ex. 1, pg. 1. The Center’s MPIA Request sought the horseshoe crab biological take information to better understand the number, location, and death rate of horseshoe crabs in Maryland waters as a means of helping to conserve the species. *See* Ex. 1, Harlan Aff. at ¶ 6; DNR Motion at Ex. 5, pg. 1 (stating that “without this essential scientific data the Center and public are hard-pressed to adequately assess the status of this species and assist in its conservation”). Take numbers by horseshoe crab fisherman, including those involved in the biomedical industry, remain too high according to scientists. *See* Smith at 152; Ex. 1, Harlan Aff. at ¶ 6.

DNR first responded to the Center’s MPIA Request with vague allegations that the documents requested by the Center contained “proprietary or fiscal information” that would have to be redacted. *See* DNR Motion at Ex. 3, pg. 1. When the Center asked what DNR meant by “proprietary or fiscal” information, DNR responded by supplying the language of § 4-335 addressing “confidential commercial information” and “confidential financial information” without further explanation. *See* DNR Motion at Ex. 5 (3-24-23 Email from DNR). On May 1, 2024, DNR issued a final denial letter stating, for the first time, that “the individual numbers of horseshoe crabs listed on harvest reports would be redacted to prevent the disclosure of [as-yet

undefined] confidential commercial information under GP § 4-335.” *See* DNR Motion at Ex. 14. DNR also, for the first time, suggested that the biological take information requested by the Center was protected under the federal MSA. *Id.*

**C. DNR produced redacted 2018-2023 ASMFC Reports regarding horseshoe crabs.**

Before issuing its denial letter, and over the Center’s objections, DNR responded to the Center’s MPIA Request by providing its ASMFC Reports from 2018 through 2023 but redacted all the horseshoe crab biological take information sought by the Center regarding the biomedical industry. *See* DNR Motion at Exs. 7-11. Despite redacting all take numbers related to the biomedical industry, DNR did not redacted similar information regarding **commercial** licensees, including the number of crabs caught by the **commercial** horseshoe crab fishermen for seven years preceding the date of the report. *Id.* at Ex. 7, pg. 3; *see also*, Ex. 8 at pgs. 4-5 (2013-2019).

In their unredacted form, the ASMFC Reports provide separate aggregated numerical information regarding the number of horseshoe crabs caught by: (1) bait fisheries; (2) “Bycatch”; (3) the biomedical industry; and (4) scientific and educational research. *See, e.g.*, Ex. 7 at pgs. 3-4. Regarding the biomedical industry, the ASMFC Reports, in their unredacted form, also provide aggregate totals for: (1) the number of horseshoe crabs caught; (2) the number rejected onboard vessels due to mortality; (3) the number rejected at the bleeding facility due to mortality; (4) the number bled; (5) the number dead at the time of release; and (6) the number that entered the bait fishery after bleeding. *Accord*, DNR Motion at Ex. 7, pg. 6. Most importantly, even in their unredacted form, **none** of the ASMFC Reports identify an individual or company engaged in Maryland’s horseshoe crab fishery. *See* DNR Motion at Exs. 7-11.

Critical for purposes of DNR’s “Rule of Three” argument, it did disclose the number of biomedical licensees (3-4) and the number of those companies using their licenses (2-3) in each of

the ASMFC Reports. In addition, and contrary to its purported policy not to disclose information regarding specific licensees, DNR disclosed that one of the three licensees in 2018 “collected zero horseshoe crabs.” *See* DNR Motion at Ex.7, pg. 5.

Thus, in summary, DNR refused to reveal the number of horseshoe crabs caught by biomedical companies, including horseshoe crabs that were dead when caught or that died before being returned to the water as required by law, claiming without explanation that the information is confidential and commercial. DNR stated, in conclusory fashion, that releasing such data “*could* provide propriety or fiscal information about those individuals/companies.” DNR Motion at Ex. 3, pg. 1 (DNR Email dated 2-27-23) (emphasis added). Regarding the redacted biomedical take information, it is crucial to note that DNR’s decision to disclose the number of licensees, and that one licensee caught no horseshoe crabs, triggers its “Rule of Three” argument on which it bases its refusal to disclose the take information the Center requested. The Center did not request such information. Due to DNR’s inappropriate and selective redaction of the ASMFC Reports, and its failure to provide an explanation why the biological take information constitutes confidential commercial information, the Center filed the instant action for judicial review.

### **III. SUMMARY OF APPLICABLE LAW**

#### **A. Summary Judgment Standard.**

“A trial court may grant summary judgment when there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law.” *120 W. Fayette St., LLP v. Balt. City*, 413 Md. 309, 329 (2010). “When reviewing a grant of summary judgment, we must make the threshold determination as to whether a genuine dispute of material fact exists, and only where such dispute is absent will we proceed to review determinations of law.” *Remsburg v. Montgomery*, 376 Md. 568, 579 (2003). “The movant has the burden of demonstrating the absence of any issue



of fact. Any doubt as to the existence of such an issue, therefore, will be resolved against [the moving party].” *Gray & Son, Inc. v. Maryland Deposit Ins. Fund Corp.*, 83 Md. App. 584, 597 (1990).

When reviewing the record to determine whether a genuine dispute of material fact exists, “any reasonable inferences that may be drawn from” the facts must be viewed “in the light most favorable to the non-moving party.” *O'Connor v. Balt. Co.*, 382 Md. 102, 111 (2004). “A document can be made part of the motion for summary judgment only through affidavit, deposition, or answers to interrogatories that adequately lay the proper foundation for the document’s admission into evidence.” *Imbraguglio v. Great Atlantic & Pacific Tea Co., Inc.*, 358 Md. 194, 203 (2000).

**B. The Maryland Public Information Act.**

The MPIA provides that “[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees” unless a lawful exemption applies. *See* MD. CODE ANN., Gen. Prov. § 4-103(a) (2024). There “are well-established principles governing the interpretation and application of the [MPIA which] create a public policy and a general presumption in favor of disclosure of government or public records.” *Glenn v. Md. Dept. of Health and Mental Hygiene*, 446 Md. 378, 386 (2016). Notably, the “presumption in favor of disclosure ... *skews heavily the calculus toward disclosure.*” *Id.* (emphasis added). As the Maryland Supreme Court recently stated in *Amster*, “[w]e have repeatedly explained that the provisions of the MPIA reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government.” *Amster*, 453 Md. at 76.

“The provisions of the [MPIA] are to be liberally construed ... in order to effectuate the [MPIA’s] broad remedial purpose.” *Glenn* at 384-85. Conversely, where an exception is asserted, it is to be strictly construed; the “ability *to rebut* the presumption [of disclosure] is not to be construed liberally ... because the [MPIA] was established with the over-arching purpose of allowing oversight of the government, resulting in *a strong practice of disclosure*.” *Id.* at 385-86 (emphasis added).

**C. Maryland’s Regulation of the Horseshoe Crab Fishery.**

In Maryland, the legal authority and the obligation to protect and manage horseshoe crabs as a wildlife species is vested in the State as a “quasi-trustee” for its citizens. *Anne Arundel Cnty. v. City of Annapolis*, 352 Md. 117, 133 (1998). The State, in turn, delegated to DNR the responsibility to exercise the fiduciary obligation to manage and protect fisheries, including horseshoe crabs, “as a *quasi-trustee* ... for the public benefit and to support” the protection of “fisher[ies] to which the entire public are entitled.” *Id.* at 133; *see also*, NAT. RES. §§ 1-101(b), 4-215(b)(18) (mandating a horseshoe crab “fishery management plan”), and 4-701(f)(1)(iii); COMAR 08.02.10.01.

Part of the responsibility vested in DNR to protect the fisheries includes the need to “increase [the] understanding by citizens of the intrinsic value of the fisheries [to] help to ensure the perpetuation of these coveted natural resources for the benefit of future generations.” NAT. RES. § 1-201.1(2). Maryland’s legislature also made clear that DNR must “prevent the erosion of the protections afforded to citizens by the public trust doctrine, which sets forth the responsibility of the government to administer, protect, manage and *conserve* fish”, including the horseshoe crab. *Id.* at § 1-201.1(6) (emphasis added); *see also* § 1-302(c) (the legislature instructed DNR to “conduct [its] affairs [regarding fisheries] with an awareness that [it is a] steward[] of the air, land,

water, [and] living ... resources, and that [it has] an obligation to protect” the fisheries “for the use and enjoyment of this and all future generations”).

To monitor the continued viability of the horseshoe crab population, and to reduce persistent overfishing, the State requires that DNR collect and maintain data regarding the number of horseshoe crabs harvested in Maryland’s waters as part of a fishery management plan. *See* NAT. RES. § 4-215(b)(18). To facilitate this, the legislature also adopted regulations that require DNR to collect horseshoe crab take information from permittees. *See* COMAR 08.02.10.01.

The statutory duty to report and maintain horseshoe crab take information applies equally to commercial and **biomedical** harvesters. *Id.* at 08.02.10.01 F. and G. Finally, and critical for purposes of the competing motions for summary judgment, the Maryland legislature also specifically defined the information reported to DNR by licensed fishermen that is protected as confidential – namely, information that “would reveal the income of any person submitting the report.” NAT. RES. § 4-206(d).

#### IV. ARGUMENT

Against the backdrop of the strong public policy of the MPIA, coupled with DNR’s fiduciary obligations set forth in the Natural Resources Article and the Public Trust Doctrine, DNR refuses to disclose horseshoe crab biological take information that the Center requested. Ironically, the Center seeks this information to save a species that the State has directed DNR to protect and DNR refuses to disclose the information to protect the hypothetical concerns of biomedical companies. *See* DNR Motion at pgs. 10-14. To accomplish its misguided end, DNR’s Motion argues that the Redacted Information is either “confidential commercial information” under MPIA § 4-335 or exempt from disclosure by MPIA § 4-301 because it is confidential pursuant to the

MSA. *Id.* at pg. 1. DNR is wrong on both fronts, its motion must fail as a result, and the Center's Motion must be granted.

A. **The Redacted Information is *Not Confidential* Under the Provisions of the Natural Resources Article That Require its Disclosure to DNR.**

When the Maryland legislature enacts a clear and unambiguous statute, Maryland's courts must apply it as written. *Accord, Baltimore Harbor Charters, Ltd. v. Ayd*, 365 Md. 366, 384 (2001). Where, as here, a statute lists the circumstances to which it applies, a court may not expand that definition to an unspecified circumstance. In this regard, Maryland's courts "have long applied the principle of statutory construction '*expressio unius est exclusion alterius*' – the expression of one thing is the exclusion of another." *Id.* (citations omitted).

In the instant case, the legislature enacted § 4-206 of the Natural Resources Article regarding confidential information as part of the statutory scheme that obligates licensed fishermen to disclose the biological take information that the Center requested. *See* NAT. RES. §§ 4-101; 4-206(c); *see also*, COMAR 08.02.10.01.F ("Reporting and Penalties"). Specifically, the relevant COMAR provision states that an "individual in possession of a horseshoe crab landing permit shall record the harvest" and provide the information to DNR. COMAR 08.02.10.01.F. The failure to provide the information required by COMAR can result in the suspension or revocation of a license. *Id.* Notably, biomedical licensees are equally obligated to provide DNR with this information, subject only to the confidentiality of § 4-206(d). COMAR 08.02.10.01.G.(1)(b).

When the legislature enacted the reporting requirements related to horseshoe crabs in the Natural Resources Article and COMAR, it expressly addressed the "Confidentiality of information" and defined confidential information as that which "would reveal the income of any person submitting the report." NAT. RES. § 4-206(d). Here, none of the information requested by

the Center or redacted from the ASMFC Reports includes information specifically defined by the legislature as confidential.

This Court should reject DNR's invitation to expand the definition of confidential information set forth in NAT. RES. § 4-206 (d) by bootstrapping § 4-335's inapplicable "confidential commercial information" to *biological* take information that does not reveal the income of the *undisclosed* biomedical licensees. See DNR Motion at pg. 8 ("In this case [DNR] redacted the [ASMFC Report] to prevent the disclosure of 'confidential commercial information' under § 4-335(2)").<sup>8</sup> Because the Redacted Information is not confidential according to the statutory scheme that mandates its disclosure to DNR – namely Title 4 of the Natural Resources Article – DNR's Motion must be denied, and the Center's Countermotion must be granted.

**B. The Redacted Information is Not "Confidential Commercial Information" Exempt from Disclosure Pursuant to MPIA § 4-335.**

Even if this Court were to ignore the clear language of § 4-206, as further explained below, the Redacted Information does not meet § 4-335's test for "confidential commercial information" under the Maryland Supreme Court's recent *Amster* decision (see 453 Md. at 88) or the federal cases addressing the similar exception in the FOIA. See *supra*, *Argus Leader*; *Critical Mass*; and *National Parks*.

A preliminary issue that distinguishes this case from *Amster* and *National Parks* is the existence of an applicable statutory definition of confidential information, namely § 4-206(d). Where, as here, confidential information is defined, this Court's analysis should begin and end by applying the clear and unambiguous language of that statute. See *Argus Leader* at 434-44. Should this court ignore § 4-206(d) and instead apply the common law definition of "confidential

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<sup>8</sup> While the DNR cites the Memorandum of Understanding of the Atlantic Coastal Cooperative Statistics Program as authority to prohibit the release of the horseshoe crab biological take records, this MOU is neither binding federal or state law.

commercial information” set forth in *Amster* and *National Parks*, as explained below, DNR fails to meet its burden and its Motion must be denied.

1. *The Redacted Information is Not “Confidential Commercial Information” under MPIA § 4-335 and the Maryland Supreme Court’s decision in Amster.*

When an express definition of confidential information is lacking, Maryland and federal courts apply the common law test originally adopted in *National Parks*, namely: otherwise public records are exempt from disclosure as “confidential commercial information” if it is “likely *either*: (1) to impair the government’s ability to obtain necessary information in the future; *or* (2) to cause *substantial harm* to the competitive position of the person from whom the information is obtained.” *Amster* at 78 (analyzing *National Parks*) (emphasis added).

In *National Parks*, the plaintiff sought records regarding concessions operated at various national parks. *National Parks*, 498 F.2d at 766. The National Parks Service refused to produce the records relying on the federal equivalent of Maryland’s § 4-335 regarding “confidential commercial information.” *Id.* at 766 (citing 5 U.S.C. § 552). The federal equivalent to § 4-335 (FOIA § 552(b)(4)) requires that, for information to be exempt from disclosure, the information must be: (1) commercial or financial; (2) obtained from a person; *and* (3) privileged or confidential. *Id.* Because the parties agreed that the information was commercial or financial in nature, the only issue in dispute was whether the information was “confidential.” *Id.* at 766. The trial court, believing that the information was confidential, granted summary judgment in favor of the National Parks Service and the plaintiff appealed. *Id.*

On appeal, the D.C. Circuit Court of Appeals recognized that there was no applicable definition for “confidential” information in any relevant statute. *Id.* As such, the Court examined prior precedent and legislative history to arrive at the two-part test for confidential commercial information stated above, namely, where disclosure would: (1) pose a risk that the government

would not receive the information in the future; *or* (2) subject the party whose information was disclosed to “**substantial harm** to [its] competitive position.” *Id.* at 768-71 (emphasis added).

Regarding the first prong, the *National Parks* Court held that because the information sought in that case, as here, was compulsorily “supplied to the government **pursuant to statute** ... there was no risk that disclosure would prevent the government from obtaining the information in the future” and the information, as a result, was not exempt from disclosure under the first prong of the *National Parks* test. *Id.* at 78 (emphasis added). Proceeding the second prong of the analysis – whether disclosure was likely to lead to “substantial harm to [the owner of the information’s] competitive position” – the DC Circuit Court reversed the trial’s court’s grant of summary judgment because, *as here*, the agency failed to establish a record on this critical issue. *Id.*<sup>9</sup>

In the instant matter, as conceded by DNR and made clear in the Natural Resources Article and related COMAR provisions, the unknown biomedical companies are statutorily required to provide the Redacted Information to DNR as a condition of their horseshoe crab fishing license. *See* DNR Motion at 8 and Ex. 15; *see also*, NAT. RES. § 4-206(c); COMAR 08.02.10.01. As such, as in *National Parks*, disclosure of the information is required by statute and “there is no risk that disclosure would prevent [DNR] from obtaining the information in the future.” *Amster* at 78; *National Parks* at 771. As such, as in *National Parks*, DNR therefore fails to meet the first prong of the *National Parks* test.

Because DNR cannot meet the first prong of the *National Parks* test, it must establish beyond genuine dispute that the Redacted Information poses the likelihood of “**substantial harm**” to the competitive positions of the *unnamed* biomedical companies. *Id.* at 770-71 (emphasis

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<sup>9</sup> In doing so, the appellate court noted that the trial court also had the ability to redact the information to “prevent inappropriate disclosures by excising from otherwise disclosable documents” information that would pose “the likelihood of substantial harm to the competitive positions” of the parties. *Id.* at 771.

added). Here, as in *National Parks*, there is no factual record cited by DNR to meet its burden and, as a result, its Motion must be denied. See DNR Motion at pgs. 3-5; 9-10.

The sole “evidence” on which DNR relies to meet the second prong of the *National Parks* test is an unverified statement on NOAA’s website. See DNR Motion at pg. 10. DNR claims that NOAA’s website states that “disclosure of the [Redacted Information] in Table 4 of the [ASFMC] Reports would allow identification of the data contributors and *possibly* put them at a competitive disadvantage.” *Id.* at pg. 10 (emphasis added). In doing so, DNR takes “creative license” with the content of NOAA’s unverified webpage.

Contrary to DNR’s assertion, the webpage simply warns that unnamed “[f]ederal statutes prohibit public disclosure of landings ... *that would allow identification* of the data contributors *and* possibly put them at a *competitive disadvantage*.” *Id.* The NOAA webpage does *not* state, as DNR claims, that disclosure *of the Redacted Information* “would allow identification of the data contributors” of the Redacted Information. DNR Motion at 10 (emphasis added). DNR also never explains, much less proves, that disclosure of the Redacted Information “would allow identification” of the biomedical companies at issue.

DNR’s reliance on the NOAA webpage misconstrues the legal standard established by *National Parks*, which requires that the DNR establish beyond genuine dispute that disclosure is “likely” to cause “*substantial* harm”. See *Amster* at 78 (quoting *National Parks* 498 F.2d at 770); DNR Motion at 10-12 (emphasis added). Not only does NOAA’s website recite the wrong standard, but the unverified statement is inadmissible on summary judgment. See *Imbraguglio v. Great Atlantic & Pacific Tea Co., Inc.*, 358 Md. 194, 203 (2000); *Vanhook v. Merchants Mut. Ins. Co.*, 22 Md. App. 22, 26-27 (1974).



DNR's Motion provides no admissible evidence supporting DNR's unexplained allegation that the biological take information sought by the Center is *likely* to result in "substantial" competitive harm to the biomedical companies. *See National Parks* at 711. Unlike *National Parks*, here the Center does not seek records that would directly pertain to a specific commercial licensee or the commercial activities of those entities at issue – *i.e.*, the commercial use of horseshoe crab blood for medical purposes by biomedical and pharmaceutical companies. *See* DNR Motion at Ex. 1. DNR also never explains why the disclosure of the number of *dead horseshoe crabs* (*i.e.*, the mortality figures) is likely to cause "substantial" competitive harm. *See* DNR Motion at pgs. 9-10. Notably, similar mortality records are available to the public for all other wildlife species managed by the State of Maryland.<sup>10</sup>

The general location of live horseshoe crabs is public knowledge and has been the subject of ongoing study and public disclosure by numerous entities for many years. *See, e.g.*, Richard Lathrop Jr., et al., *Mapping the Critical Horseshoe Crab Spawning Habitats of Delaware Bay* (Rutgers 2013), available at [crssa.rutgers.edu/projects/hcrab/](http://crssa.rutgers.edu/projects/hcrab/) (last visited 8.6.24). Similar biological take records of the sort requested by the Center have been released by the State of Delaware. *See, e.g.*, Delaware Bay Ecosystem Technical Committee Report to ASMFC, *Delaware Bay Horseshoe Crab Harvest Recommendation for 2024*, Oct. 2, 2023, at Figure 3 (containing horseshoe crab take information for the last two (2) decades).<sup>11</sup> And NOAA maintains an online

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<sup>10</sup> *See, e.g.*, Maryland permitting for taking of state endangered species located at <https://onestop.md.gov/licenses/endangered-species-permit-5d1540a554f24d03e9997e5c> (last visited July 8, 2024). Even NOAA makes clear that wildlife take records are not "confidential commercial information," but ordinary wildlife records that are traditionally and frequently released to the public. *See, e.g.*, NOAA incidental take permit library for threatened and endangered species located at <https://www.fisheries.noaa.gov/national/endangered-species-conservation/incidental-take-permits> (last visited 7-8-24).

<sup>11</sup> The Report can be found at [www.asmfc.org/uploads/file/6539327bDBETC\\_ARM\\_HSC\\_2023\\_HarvestRecommendationMemo.pdf](http://www.asmfc.org/uploads/file/6539327bDBETC_ARM_HSC_2023_HarvestRecommendationMemo.pdf). *Id.* (last accessed on 8/2/24).

searchable database of commercial fish landings for each state, sortable by the species of fish, including horseshoe crabs in Maryland, that are publicly available and specifically labeled as non-confidential. See [fisheries.noaa.gov/sustainable-fisheries/commercial-fisheries-landings](http://fisheries.noaa.gov/sustainable-fisheries/commercial-fisheries-landings) (last visited 8-2-24).<sup>12</sup>

Next, it is highly relevant to this Court's analysis that *none of the biomedical companies* that reported the Redacted Information to DNR *have moved to intervene* in this case to protect the alleged confidentiality of the biological take information they are obligated to report. As conceded by the Attorney General's MPIA Manual, for purposes of DNR's Motion, this Court should infer that the DNR notified the biomedical companies that their biological take information was the subject of the Center's MPIA Request. See MPIA Manual at Ch. 3, pg. 3-57 ("the custodian [of the requested information] should usually contact the person potentially affected by release so that the person ... may potentially seek judicial intervention..."). The Attorney General's Office specifically advises agencies such as the DNR that in "appropriate cases, *particularly ones involving [allegedly] confidential commercial ... records*, the [DNR] should consider *inviting* affected persons to intervene" such as the biomedical companies. *Id.* (emphasis added).

To the extent that the biomedical companies thought that the release of the Redacted Information would pose "a substantial risk" of competitive harm, this Court can also reasonably infer that the companies would move to intervene – an inference that is also conceded in the Attorney General's MPIA Manual. See MPIA Manual at C.5, pg. 5-2. The Attorney General's

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<sup>12</sup> Utilizing the NOAA database and the ASMFC Reports disclosed by DNR, for example, one can determine the total pounds, and approximate number, of male horseshoe crabs taken by biomedical companies in any given year. "To the extent that any data requested under the FOIA are in the public domain, the submitter is unable to make any claim to confidentiality – a *sine qua non* of the exemption." *Amster* at 86.

Office concedes in the MPIA Manual that “an affected person’s *failure to seek intervention may itself be an indication that the records are not truly confidential.*” See MPIA Manual at C. 5, pg. 5-2 (emphasis added). Thus, the only factual evidence before this Court regarding whether the biomedical companies consider biological take information to be confidential – the biomedical companies’ failure to intervene – clearly weighs against confidentiality, supports the Center’s Motion, and precludes summary judgment in favor of DNR.

Finally, as instructed by the *National Parks* Court, and briefly explained below, this Court can easily and readily redact the ASMFC Reports in a manner that precludes any threat of “competitive harm”, much less the “substantial harm” that DNR fails to explain, much less prove, in its Motion. Here, all the Court must do is redact from the ASMFC Reports the number of biomedical licenses issued by DNR and used, as well as the ASMFC Reports unnecessary differentiation between the take numbers for different classes of licenses. Doing so will protect the alleged, but unexplained, confidential nature of the information as it relates to biomedical companies by redacting the number of companies that are licensed and catch horseshoe crabs.

2. *The Redacted Information is Not “Confidential Commercial Information” under the Argus Leader Test.*

As conceded by DNR, neither of Maryland’s appellate courts have addressed the “confidential commercial information” standard since *Amster*, in which the Maryland Supreme Court cited with approval and followed the *National Parks* and *Critical Mass* decisions. See *Amster* at 77-81. As noted in the DNR’s Motion, after the *Amster* decision the United States Supreme Court decided *Argus Leader*, which overturned nearly fifty (50) years of precedent and changed the test applicable to “confidential commercial information” under FOIA. To date no Maryland appellate court has adopted the *Argus Leader* test and, as a result, this Court must follow the Maryland Supreme Court’s decision in *Amster*. That said, even if this Court disregards the

Maryland Supreme Court’s decision in *Amster* in favor of *Argus Leader*, DNR’s Motion must still be denied.<sup>13</sup>

First, as previously explained, DNR has provided no admissible evidence in its Motion, including any that would establish that the biological take records are “customarily and actually treated as private by its owner.” *See* DNR Motion at pgs. 9-15. Second, DNR has provided no admissible evidence that horseshoe crab biological take records are “provided to [DNR] under an assurance of privacy” as required by *Argus Leader* – except to the extent of the protection specified in NAT. RES. § 4-206(d) which does not apply to biological take information. Instead, state-managed wildlife species such as the horseshoe crab are protected by DNR as a trustee for the citizens of Maryland. In other words, DNR owes a fiduciary duty to the people of the State of Maryland in its capacity as a “quasi-trustee” of this vital resource and no duty is owed to the biomedical companies except that which is set forth in § 4-206. DNR cites to no assurances

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<sup>13</sup> Interestingly, the Attorney General’s MPIA Manual requires that DNR follow *both* the *National Parks* *and* the *Argus Leader* tests, stating as follows:

Unless and until the [Maryland Supreme] Court decides the issue, the safest course for custodians faced with a request for commercial information that was required to be provided to the government is to consider how both the *National Parks* test and the *Argus Leader* test would apply. In other words, if the information required to be provided to the government is confidential under both tests, then it should undoubtedly be protected from disclosure. But it is a more difficult call if the information meets only the *Argus Leader* test – *i.e.*, the information’s owner actually and customarily keeps the information private – but not the *National Parks* test – *i.e.*, the release of the information would not cause any substantial competitive harm to the information’s owner nor impair the government’s ability to obtain the information in the future. In that scenario, custodians should make their decisions in consultation with agency counsel *and after considering the position of the owner of the information.*

MPIA Manual at pgs. 3-28 to 3-29 (emphasis added).

expressly given to licensees that the information will not be disclosed other than as set forth in § 4-206. *See* DNR Motion at pgs. 9-10.

The United States Supreme Court has long recognized a “state's substantial interest in preserving and regulating the exploitation of the fish and game and other natural resources within its boundaries *for the benefit of its citizens.*” *Hughes v. Oklahoma*, 441 U.S. 322, 342-43 (1979) (emphasis added). Since *Hughes*, state courts, including in Maryland, have upheld the right and duty to manage wildlife for the explicit benefit of the public under the public trust principles. *See Anne Arundel Cnty. v. Annapolis*, 352 Md. 117, 133 (1998); *see also, Pullen v. Ulmer*, 923 P. 2d 54, 60 (Alaska 1996); *People v. Rinehart*, 377 P. 3d 818, 823 (Cal. 2016); *Democko v. Iowa Dep’t of Nat. Res.*, 840 N.W. 2d 281, 293-94 (Iowa 2013); *State ex rel. Pollution Control Coordinating Bd. v. Kerr-Mcgee Corp.*, 619 P. 2d 858, 861 (Okla. 1980).

Amongst the states, the common law right to control and regulate wildlife is entrusted in the state by the people. Specifically, forty-eight states either explicitly or implicitly recognize a public trust in wildlife or public trust like duties to wildlife, including the state of Maryland. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1471-76.<sup>14</sup> For over 125 years, Maryland has followed this public trust of wildlife concept, recognizing as early as 1899, that:

The authorities agree that the ownership of all game animals and birds is in the people in their sovereign capacity, that is, in the State, and no individual has any property rights in game other than such as the State may permit him to acquire, and even when game has been captured and reduced into possession by the individual with the permission of the State, his ownership in it may be regulated and restrained by appropriate legislation enacted for considerations of state or the benefit of the community. In other words, the

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<sup>14</sup> Almost all states recognize that the “take” of state protected species is subject to public examination and inquiry. California, for example, posts the take information Plaintiffs request here on a public website. *See* <https://nrm.dfg.ca.gov/documents/ContextDocs.aspx?cat=CESA-Permitting> (last visited 8-11-24).

cases hold that the question of enjoyment in this field is one of public policy and not of private right.

*Stevens v. State*, 43 A. 929, 930-31 (Md. 1899) (confirming the state's ability to prosecute an individual for illegally killing rabbits).<sup>15</sup>

Similarly, under Maryland's Environmental Standing Act, the State recognizes its duties as a trustee for natural resources, including wildlife, because it provides that any person who has an interest in environmental protection possessed by the people of Maryland has standing to sue in Maryland courts. *See* NAT. RES. § 1-503 (a)(3). This common interest in the state's wildlife, held by the people, is administered in Maryland akin to *Stevens v. State*.

Because the Maryland trust-like duties to protect natural resources are for the people of Maryland, information regarding how the trust is managed, such as biological records regarding the taking of horseshoe crabs, must be made available to the public to promote transparency regarding whether the fiduciary is upholding its duties. This is in line with the purposes of the MPIA, Maryland Environmental Standing Act, and the State's interest in conserving and protecting wildlife discussed in *Hughes*. *See also*, NAT. RES. § 1-502; GEN. PROV. § 4-103, *Hughes*, 441 U.S. at 338-39. Thus, any assurance of privacy in this instance by DNR would be illegal and *ultra vires*.

Finally, Maryland often utilizes decisions and authority under the federal FOIA to guide its MPIA decision. In *National Ass'n of Home Builders v. Norton*, 309 F.2d 26 (D.C. Cir. 2002), the D.C. Circuit held that "the public interest in disclosure" of specific wildlife locations, even on private land, outweighs the privacy interests reflected by the agency's withholding, and specifically rejected the confidential commercial exemption as an excuse to preclude release of

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<sup>15</sup> *Accord, Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972).

such public information. *Id.* at 30.<sup>16</sup> The horseshoe crab biological take records at issue in this litigation are, likewise, not confidential or commercial in any sense.

**C. The Redacted Information is not confidential pursuant to the Magunson-Stevens Fisheries Act and MPIA § 4-301 Does Not Apply.**

DNR’s second basis for refusing to release the Redacted Information is MPIA § 4-301, which precludes the production of records where “the inspection would be contrary to a federal statute or regulation....” *See* DNR Motion at pgs. 11- 15; Ex. 14. The federal statute DNR relies upon for application of § 4-301 is the confidentiality provisions of the MSA. *See* 16 U.S.C. § 1881a(b); *see also* DNR Brief at 11-15. However, narrowly construing this exception and resolving all inferences against DNR as this Court must, DNR’s argument is unavailing. In summary, the flaw with DNR’s argument is that neither the horseshoe crab nor the ASMFC Reports containing horseshoe crab biological take information are governed by the MSA. Further the Maryland legislature has specifically defined what information reported to DNR is considered confidential and biological take information is not protected. *See* NAT. RES. § 4-206(d).

The MSA was enacted in 1976 and created eight federal independent “Fishery Management *Councils*” with jurisdiction *in federal waters* – from 3-200 miles from the East Coast. *See* 16 U.S.C. §§ 1801 and 1852. The MSA requires that the eight fishery *Councils* prepare a fishery management plan “for each fishery *in federal waters* that requires conservation and management” and that is subject to the MSA. *See Martha’s Vineyard/Dukes County Fisherman’s*

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<sup>16</sup> Maryland state law is similar: “The purpose of this list is to *inform the public* of rare species, to provide an indication of their degree of rarity, to solicit additional information on the status and distribution of these species, and to promote an interest in their conservation.” List of Rare, Threatened, and Endangered Animals of Maryland (November 2023) at 3 (emphasis added) [https://dnr.maryland.gov/wildlife/Documents/rte\\_Animal\\_List.pdf](https://dnr.maryland.gov/wildlife/Documents/rte_Animal_List.pdf) (last visited July 10, 2024). *See also* Donald C. Baur and Ya Wei Li, *Endangered Species Act: Law Policy and Perspectives*, 3<sup>rd</sup> ed. (American Bar Association, 2021) at 341-360 (chapter on state endangered species acts, noting in the first paragraph the central fact that “state governments traditionally have been the chief stewards of wildlife within their borders.”).

*Ass'n v. Locke*, 811 F. Supp. 2d 308, 312 (2011); 16 U.S.C. §§ 1851-54 (2006). Critically, horseshoe crabs are not among the fish defined as governed by the MSA (*see* 50 C.F.R. § 600.10) and the MSA does not assert jurisdiction over the ASMFC. *See* 50 C.F.R. § 600.5 (noting that the MSA “govern[s] the operation of the Eight Regional Fishery Management **Councils**”) (emphasis added).

The ASMFC, unlike the “Eight [federal] Regional Fishery Councils” governed by the MSA, is a regional **commission** created and governed by a compact between all East Coast **states** that primarily governs fisheries in state-controlled waters from 0 to 3 miles from the East Coast. *See* Atlantic Coastal Fisheries Act, 16 U.S.C. §§ 5101-08 (2006). In Maryland, horseshoe crab fishing is governed by the DNR at the state level, as well as Maryland’s participation in the ASMFC at a regional level. DNR’s jurisdiction and obligations regarding horseshoe crabs and the take information related thereto are set forth in the Natural Resources article and COMAR, not the MSA. *See* Md. Code Ann., Nat. Res. §§ 4-101, *et seq.* (2022); COMAR § 08.02.10.01.

An examination of the Congressional statutes creating the ASMFC confirms that this commission possesses limited authority, none of which includes mandating confidentiality requirements inconsistent with federal and state law. *See* P.L. 77-539 (1942) and P.L. 81-721 (1950). DNR ignores that ASMFC management operates under the 1984 Atlantic Striped Bass Conservation Act, 16 U.S.C. § 1851, and the 1993 Atlantic Coastal Fisheries Cooperative Management Act (1993), 16 U.S.C. § 5101, and not the MSA. Critically, neither of the statutes applicable to the ASMFC contains a relevant confidentiality provision. NOAA’s own regulations make clear that ASMFC is **not** Congressionally authorized under Magnuson-Stevens Fisheries Act. *See* 50 C.F.R. § 697.1.



Further, the biological take information provided to DNR and requested by the Center's MPIA Request is governed by a confidentiality provision in the Maryland Code, created by the Maryland legislature, that clearly does not protect the Redacted Information. *See* NAT. RES. § 4-206. As noted above, information provided to DNR is considered confidential if it “would reveal the income of any person submitting the report.” *Id.* Here, none of the information sought by the Center or redacted by DNR would violate the lone confidentiality provision that applies.

Even if horseshoe crabs were covered by the MSA, which they are not, the biological take information requested by the Center and the ASMFC Reports are not covered by the MSA's confidentiality provisions. In material part, the confidentiality provisions of MSA make clear that only:

[I]nformation submitted to the Secretary, a State fishery management agency, or a marine fisheries commission by any person *in compliance with the requirements of this chapter* shall be confidential and shall not be disclosed ...” (emphasis added).

16 U.S.C. § 1881a(b)(1). Critically, horseshoe crab biological take records are *not* submitted to the DNR “in compliance with requirements” of the MSA, and DNR has provided no citation to any state or federal statute or regulation that says otherwise. *See* DNR Motion at 1-12. Instead, as set forth above, the Redacted Information is submitted to DNR in compliance with Maryland's Natural Resources Article and COMAR. *See* Nat. Res. Art. § 4-215; COMAR § 08.02.10.01. That information is also governed by a confidentiality provision specifically tailored by the Maryland legislature that clearly does not protect the biological take information requested by the Center including the Redacted Information. *See* Md. Code Ann., Nat. Res. § 4-206.

Even if the biological take information requested by the Center or the Redacted Information in the ASMFC Reports was provided pursuant to the MSA, which it was not, the MSA recognizes that such information can still be disclosed if released “in an aggregate or summary form which

does not directly or indirectly disclose the identity or business of any person who submits such information.” See MSA, 16 U.S.C. § 1881a. In fact, DNR concedes this point. See DNR Motion at pg. 12. As explained in Section II.C., *supra*, the DNR could have easily redacted the ASMFC Reports to meet the confidentiality provisions of the MSA. Similarly, pursuant to *National Parks*, this Court can do the same.

Finally, DNR relies upon the definition of “confidentiality” contained in the Atlantic Coastal Fisheries Data Collection Standards and wholly ignores the clear language of Section 4-206 of the Natural Resources Article. Even if the data collection standards somehow superseded Maryland law, which they do not,<sup>17</sup> the standards only protect information that is “identifiable with any person or entity *and* prohibited by law from being disclosed.” DNR Motion at Ex. 17, pg. 14. Again, the biological take information requested by the Center is not “identifiable with any person or entity” and not protected from disclosure by any *applicable* law. As such, the self-serving confidentiality provisions of the collection standards relied upon by DNR do not provide DNR protection from the clear mandate of the MPIA.

**D. DNR’s Reliance on the So-Called “Rule of Three” is Self-Created and Inapplicable.**

Finally, the DNR relies upon the so-called “Rule of Three” as legal authority to withhold horseshoe crab biological take information. See DNR Brief at 10, 12, 15. There exist myriad problems with this argument, including the central fact that the “rule” is found in no statute or regulation. What DNR does cite, NOAA’s commercial landing data caveats web page, again only applies to fisheries that are regulated under the MSA. It is beyond genuine dispute that the

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<sup>17</sup> The standards make clear, as DNR concedes, that the confidentiality provisions are only to be implemented “as fully as possible.” See DNR Motion at pg. 13. Here, the standards cannot supersede the clear and unambiguous language of Natural Resources Article § 4-206 or the important public policy underlying the MPIA.

horseshoe crab, and the information sought by the Center regarding the horseshoe crab in the Centers MPIA, is not regulated under or governed by the MSA. *See, supra*, § IV.C.

It is also undisputed that biomedical companies are not fishermen or fishing companies; they merely want the horseshoe crab blood provided to them (and for which cheap effective alternatives exist).<sup>18</sup> Finally, it is undisputed that the “Rule of Three” in the NOAA policy is not a binding regulation pertaining to biomedical companies by the State of Maryland, and the policy itself never went through public notice and comment at either the federal or state level for horseshoe crabs.<sup>19</sup> The “rule” in sum is not a rule but an unlawful edict conveniently invoked by DNR’s selective redaction of the ASMFC Reports, and then relied upon by DNR to label information regarding biological takes of a wildlife species “confidential.”

In conclusion, nowhere has DNR identified a specific federal or state law that prohibits the disclosure of ordinary wildlife take information. Indeed, the federal regulatory section cited by DNR to administratively justify withholding this information based on agency policy, 16 U.S.C. § 1881a, refers exclusively to federal fisheries, not state management of a wildlife species. Nowhere can DNR cite a specific Congressional or state legislative provision that authorizes, not to mention mandates, keeping horseshoe crab take data confidential. Therefore, contrary to DNR’s claim,

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<sup>18</sup> On July 26, 2024, the United States Pharmacopeia Microbiology Expert Committee approved the inclusion of *Chapter <86> Bacterial Endotoxins Test Using Recombinant Reagents*, which permits the use of non-animal-derived reagents for endotoxin testing obviating the need for horseshoe crab blood for this test. *See* [usp.org/news/expert-committee-approves-endotoxin-testing-using-non-animal-derived-reagents](https://usp.org/news/expert-committee-approves-endotoxin-testing-using-non-animal-derived-reagents).

<sup>19</sup> DNR also claims that the Atlantic Coast Fisheries Data Collection Standards prohibit the release of horseshoe crab biological take data. *See* DNR Brief at 13-14. While it is true the Atlantic Coast Fisheries Data Collection Standards possess a confidential information provision, this provision is based on that information “*prohibited by law* from being disclosed to the public.” (emphasis added). DNR cannot bootstrap nonbinding commission policies to federal and state law and then attempt to use it to counter the strong public policy of the MPIA.

there is no federal statute or regulation that would justify a custodian to deny the inspection of the public wildlife biological take record requested by the Center under § 4-301(a)(2)(ii).

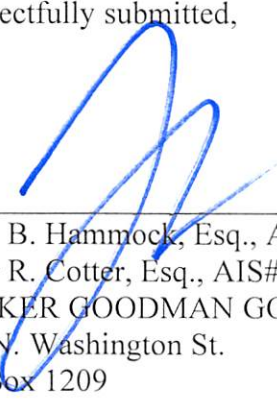
## **V. CONCLUSION**

For all of the preceding reasons, this Court should deny DNR's Motion, grant the Center's Countermotion, and immediately order the agency to release the previously redacted information pertaining to biological take information included on horseshoe crab take permit applications and other state agency records. This Court, additionally, should rule that the people of Maryland have a right to the biological information relating to how horseshoe crabs are taken, when and where they are taken, and the specific number of mortalities and injuries throughout the collection and bleeding process.

## **REQUEST FOR HEARING**

The Center hereby requests a hearing on the DNR's Motion and on the Center's Countermotion.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 12th day of August 2024, a copy of the foregoing was electronically filed and served on the party listed below via MDEC:

Carl N. Zacarias  
Emilie R. Schwartz  
Assistant Attorneys General  
Office of the Attorney General  
Tawes State Office Building  
580 Taylor Avenue, C-4  
Annapolis, Maryland 21401



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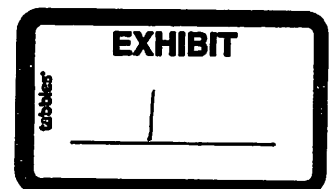
Peter R. Cotter, Esq.

PETITION OF	*	IN THE CIRCUIT COURT
CENTER FOR BIOLOGICAL DIVERSITY	*	FOR ANNE ARUNDEL COUNTY
FOR JUDICIAL REVIEW OF THE DECISION	*	STATE OF MARYLAND
OF THE MARYLAND DEPARTMENT OF	*	CASE NO. C-02-CV-24-001281
NATURAL RESOURCES	*	
IN THE CASE OF:	*	
Petition for the Judicial Review	*	
Regarding the Maryland Department of	*	
Natural Resources' May 1, 2024 denial of	*	
inspection of public records in response to	*	
Petitioner's MPIA dated November 9, 2022.	*	
* * * * *		

**AFFIDAVIT OF WILL HARLAN**

I, Will Harlan, being over eighteen (18) years of age and competent to testify as to the matters set forth herein, state as follows:

1. I am currently employed as the Southeast Director and Senior Scientist for the Center for Biological Diversity (the "Center").
2. I have reviewed the Center's Opposition to Motion to Dismiss and/or for Summary Judgment and Countermotion for Summary Judgment (the "Opposition and Countermotion").
3. The factual allegations and information contained in the Opposition and Countermotion are true and accurate based upon my personal knowledge.
4. The Center, and more than twenty-five (25) additional conservation organizations, including the Maryland Ornithological Society, the American Bird Conservancy, and the American Littoral Society, recently filed a petition to protect the horseshoe crab under the federal Endangered Species Act (the "Petition").
5. In an effort to support the Petition, the Center filed the MPIA request attached to DNR's Motion at Exhibit 1 in order to obtain biological take information regarding the endangered population of the horseshoe crab.



6. One reason for the Center's MPIA Request seeking this take information is to better understand the number, location, and death rate of horseshoe crabs in Maryland waters as a means of helping the species' conservation. Take numbers by horseshoe crab fishermen, including those involved in the pharmaceutical or biomedical industries, remain too high.

7. The Center does not seek records that would directly pertain to a specific commercial licensee or the commercial activities of those entities at issue – *i.e.*, the commercial use of horseshoe crab blood for medical purposes by biomedical and pharmaceutical companies. Likewise, the Center does not seek records regarding the number of biomedical licenses issued or the number of such licenses utilized.

8. To date, the DNR has never explained why the number of horseshoe crabs caught by the biomedical licensees, or that die in the blood-harvesting process, is considered "confidential information" or "commercial or proprietary".

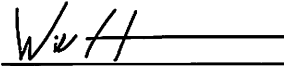
**[signature on following page]**



I HEREBY CERTIFY UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING IS TRUE AND ACCURATE BASED UPON MY PERSONAL KNOWLEDGE.

August 9, 2024

Date

A handwritten signature in black ink, appearing to read 'Will Harlan', is written over a horizontal line.

Will Harlan