



March 3, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Gina Raimondo  
Secretary of Commerce  
U.S Department of Commerce  
1401 Constitution Ave NW  
Washington, DC 20230

**Re: Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery (86 Fed. Reg. 51970; September 17, 2021).**

Dear Secretary Raimondo:

On September 17, 2021, the U.S. Department of Commerce's National Marine Fisheries Service (NMFS) published a final rule implementing the Atlantic Large Whale Take reduction plan. The plan aims to reduce incidental mortality and serious injury to three species of whales in the northeast United States. The Office of Advocacy of the U.S. Small Business Administration respectfully submits the following comments on the final rule. NMFS should grant a **60-day delay** of the May 1, 2022 implementation deadline for the final rule to allow small businesses additional time to procure gear necessary for compliance with the rule.

## **I. Background**

### **A. The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility

Act (RFA),<sup>1</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>2</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>3</sup>

## **B. Background of the Final Rule**

On September 17, 2021, NMFS finalized a rule that implemented modifications to rope and gear by lobster fisherman aimed at reducing incidental injury and mortality of three species of whales found in the northeastern Atlantic.<sup>4</sup> The rule modifies requirements related to vertical buoy lines, gear marking, and weak rope requirements among other modifications.<sup>5</sup>

Specifically, the rule requires that fisherman use either engineered weak rope or manufactured weak insertions at specific placement locations along the fishing line such that they would break if they encountered a specified weight (the weight of a whale).<sup>6</sup> In addition, the rule requires fisherman to mark their gear with state-specific coloring, as well as additional color markings depending on the types of permits held by the vessel.<sup>7</sup>

## **II. Advocacy's Comments on the Final Rule**

### **A. NMFS should grant a 60-day extension to the May 1, 2022, compliance deadline to allow small businesses additional time to comply with the final rule.**

As the NMFS indicates in its analysis, these requirements impact 3,086 small fishing businesses: 1,173 holding federal permits and 1,913 that only fish in state-managed waters (except the exempted areas in Maine). Advocacy heard from small lobster fishermen and representatives

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<sup>1</sup> 5 U.S.C. §601 et seq.

<sup>2</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>3</sup> *Id.*

<sup>4</sup> Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations; Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery, 86 Fed Reg. 51970, (September 17, 2021).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 51973.

<sup>7</sup> *Id.* at 51974.

from the Maine Lobstermen's Association regarding the challenges that they are facing in complying with NMFS' rule by the May 1, 2022 compliance deadline.

First, as indicated in the Maine Lobstermen Association's letter to the agency, dated February 17, 2022, there is currently only one rope manufacturer that produces a NMFS-approved weak rope. This same manufacturer only started producing purple weak rope, the rope color required for Maine fishermen, in February 2022. The manufacturer has an approximately six-week lead time per order. The manufacturing delay, coupled with ongoing global supply shortages and shipping delays for materials due to the ongoing Covid-19 pandemic, makes the lead time to receive compliant rope even longer, and creates uncertainty regarding whether a fisherman will receive their gear in time to be compliant with the May deadline.

In addition to challenges with receiving manufactured rope in a timely manner, fishermen are also facing challenges in ordering and receiving NMFS-approved plastic weak links. According to the Maine Lobstermen Association letter, only two weak links are currently approved, and a third one is pending. These links may be ordered but are not available for purchase in retail marine supply stores, further complicating the ability of fishermen to obtain the necessary gear in a timely manner.

If these fishermen are unable to obtain the necessary gear by the May 1, 2022 deadline, they will be forced to cease operations, causing a significant loss in revenue. The Maine Lobstermen's Association points out that the affected fisheries typically haul out their gear in June to perform maintenance prior to the shedder season. Without an extension, many of these businesses will have to shut down operations until they can acquire and set up the new gear required by this rule, meaning they will lose a month's revenue during "prime spring fishing." They estimate this to amount to approximately \$7.3 million according to the Maine Department of Marine Resources.<sup>8</sup>

These small businesses care about the conservation and protection of these endangered whales and stand ready to comply with the requirements of the rule. However, the agency is placing them in an impossible scenario in which through no fault of their own they will not be in compliance by the May 1 deadline. In addition, if they are not granted a short delay of the compliance deadline, they may stand to lose significant amounts of revenue, or in some instances their entire business.

### **III. Conclusion**

Advocacy respectfully requests that NMFS delay the compliance deadline of May 1, 2022 for these requirements by **60 days** to allow small businesses additional time to obtain the necessary gear. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

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<sup>8</sup> This figure has not been independently verified by Advocacy. *See enclosure.*

Sincerely,

/s/

Major L. Clark, III  
Deputy Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

/s/

Prianka P. Sharma  
Assistant Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

Copy to: Dominic Mancini, Deputy Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

Enclosure: Letter from the Maine Lobstermen's Association, February 17, 2022



# MAINE

## Lobstermen's Association, Inc.

2 Storer St, Ste 203 \* Kennebunk, ME 04043  
207-967-4555 \* 866-407-3770 \* [www.maine lobstermen.org](http://www.maine lobstermen.org)

The Honorable Gina Raimondo  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Avenue NW  
Washington, DC 20230

Dear Secretary Raimondo:

The Maine Lobstermen's Association (MLA) is writing to urge you to grant a 60-day delay to the May 1, 2022 implementation deadline for the latest round of modifications to the Atlantic Large Whale Take Reduction Plan (Whale Rule). The MLA fully understands the importance of implementing these regulations in a timely manner, but unfortunately, and despite the Maine lobster industry's best efforts, our fleet will not be able to meet this deadline. Furthermore, according to the NMFS Decision Support Tool, this short delay would increase risk to right whales by less than one percent.

A 60-day delay will allow Maine's federal fleet to comply with the new gear marking requirements without disrupting the spring lobster fishery and avoid losing a month of income which would cost these 1300 lobstermen \$7.3 million, according to the Maine Department of Marine Resources (DMR). These boats would normally haul out and do gear work in June, as they wait for the shedder season to start. A May implementation date would force them to lose a month of prime spring fishing.

It is important to note that Maine only learned of this federal gear marking requirement when the FEIS was published in July 2021. NMFS did not include this gear marking option for Maine's federal fleet in either its scoping document or in its Proposed Rule, and Maine DMR believed the Maine fleet was already compliant with anticipated new gear marking requirements. DMR had worked transparently with NMFS to accomplish early implementation of gear marking requirements that would conform to the new Whale Rule when it became effective, thus avoiding any disruption to the fishing season. The MLA raised its concerns with NMFS through a letter to GARFO on July 28, 2021, and to the Office of Information and Regulatory Affairs in the Office of Management and Budget on July 29, 2021 (both are attached).

A 60-day delay would also allow the entire Maine fleet time to comply with the new weak insert requirements. NMFS has been very prescriptive in how the industry can meet the new

weak insert requirements. The agency has approved only weak rope, weak sleeves, and manufactured weak inserts, if there is data that the product meets the required 1700 pound breaking strength.

But lobstermen must choose the weak insert option that will allow them to safely and predictably haul back gear over the course of the fishing season. Manufactured weak rope quickly loses strength as it is fished due to penetration of sediment into the rope, crushing of fibers as it passes through the hauler, and from exposure to sunlight. As the rope loses strength over the fishing season, the risk of gear loss increases so weak inserts are the most practical and safe option for many Maine lobstermen.

Due to this concern, Maine lobstermen in collaboration with Maine DMR, developed an alternative method to weaken line by incorporating a manufactured weak link, which unlike weak rope, will not lose strength over the course of the fishing season.

There are currently two plastic weak links approved by NMFS (Seaside and Brooks Trap Mill), and a third (Planters Buoy Sticks) pending. As of this writing (according to the NMFS website), these are “available for ordering” but are not yet available for purchase at marine supply stores.

There is currently only one rope manufacturer (Rocky Mount Cordage Company) that is producing a NMFS approved twisted weak rope. Until early February, this rope was only available in red or red/white, a color that the Maine lobstermen have spent over a year removing from their ropes and replacing it with purple. This weak rope is available only through Ketchum Supply in New Bedford, MA. The company announced via Facebook on February 8 that a purple version of the rope is now available for ordering. According to Maine DMR, there is a 6-week lead time to get this rope in.


All weak insert options should be readily available for lobstermen to purchase. They should have the opportunity to rig a few endlines to identify which option will work best for their fishing operation. Weakening rope is a scary prospect for many lobstermen who fear that the rope will snap creating a safety hazard onboard, or that they lose gear. It is important to the success of their business and safety of the Captain and crew that gear for the upcoming season can be rigged with confidence. Presently, neither purple weak rope nor plastic weak links are available to purchase.

Of note, Maine DMR worked with Maine lobstermen to develop a readily accessible, low cost option to weaken their existing rope by incorporating specific knots into the line. Maine DMR identified specific knots that would meet the weak insert requirement and submitted these data to NMFS. However, NMFS has not yet approved any knots as weak insert options. The MLA strongly urges NMFS to approve knots that meet the weak insert standard to provide the Maine fleet with more flexibility and options to meet the weak insert requirement.

The Maine lobster fishery is ready and willing to comply with the weak insert requirements, but the fleet will not be able to comply by May 1 due to the lack of availability of weak rope and manufactured weak links. Additionally, a May 1 implementation will force the Maine lobster fishery to absorb significant and unnecessary compliance costs of \$7.3 million for federal gear marking – which the industry had no opportunity to provide comment on during rulemaking. We strongly urge you to delay implementation of these measure to July 1, 2022. We also urge you to approve the use of knots, per data submitted by Maine DMR, to provide fishermen additional options to comply with the weak rope regulations.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Patrice McCarron".

Patrice McCarron  
Executive Director

CC. Janet Coit, Assistant Administrator NOAA Fisheries  
Senator Susan Collins (via Cameron O'Brien)  
Senator Angus King (via Peter Benoit and Chris Rector)  
Representative Chellie Pingree (via Lisa Pabel)  
Representative Jared Golden (via Eric Kanter)  
Honorable Janet Mills, Governor of Maine (via Tom Abello)  
Patrick Keliher, Commissioner, Maine Dept of Marine Resources



# MAINE

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July 29, 2021 [MLA Handout submitted to OIRA/OMB](#)

MLA remains concerned with the assumptions in the underlying analysis of pending modifications to the right whale regulations that result in underweighting entanglement risk of Canadian fisheries while imposing new restrictions on the Maine lobster fishery unsupported by the evidence. MLA urges NMFS to fully account for observed trends in right whale deaths and to provide the Biden Administration with the best available science in support of comparable protections from Canada.

MLA requests three changes to NMFS's preferred alternative outlined in the FEIS in order to minimize the economic and operational impacts of the rule while maintaining necessary risk reductions.

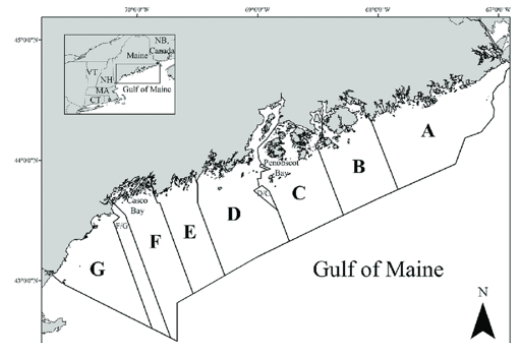
- Align the LMA1 seasonal restricted area with right whale sightings rather than zone lines.
- Adopt the gear marking system analyzed in the proposed rule.
- Clarify that future conservation equivalencies do not require public notice and comment.

### **1. The final rule should align the boundaries and timing of the LMA1 seasonal restricted area with right whale sightings or hot spots to avoid unnecessary adverse economic impacts.**

MLA is strongly opposed to the LMA 1 Seasonal Restricted Area. Because this de facto LMA1 closure was not presented for public review during the Take Reduction Team or scoping process for the DEIS, it has not been tailored to minimize economic impacts and maximize protection of whales. MLA supports Alternative 1-B in the Proposed Rule which would go into effect only if the rule's other protective measures are not sufficiently effective at reducing risk of entanglement. Alternative 1-B can be accommodated while also achieving the 60% risk reduction target because the FEIS preferred alternative achieves 68.8% to 72.7% risk reduction across the entire lobster fishery, with the LMA1 restricted area contributing 6% to 7%<sup>1</sup>.

Contrary to the assumptions of the Proposed Rule, many fishermen are unlikely to relocate gear to other, equally productive fishing grounds during the seasonal closure. The Maine Lobster Fishery is highly territorial and lobstermen fiercely protect productive fishing bottom.

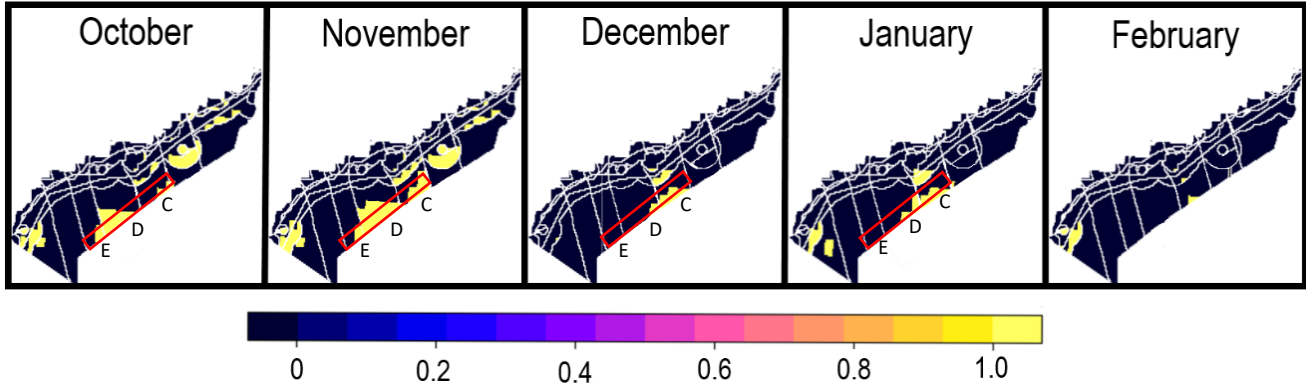
According to the analysis of hotspots used as the basis of this seasonal restricted area which spans Zones C, D and E, there are no hotspots in approximately half of the restricted area in December or January (Zone E and the western portion of Zone D). MLA requests NMFS remove these areas from the



<sup>1</sup> Lower bound 68.8% (65.9% to 70.2%) and Upper bound 72.7% (66.5% to 75.8%)



seasonal restricted area in the final rule. The MLA strongly urges NMFS to align the boundaries of the LMA1 restricted area to include only the hotspots rather than aligning the boundaries with Maine’s zone lines. Tailoring the seasonal restricted area to the hotspots will significantly reduce the size of the area in two of the four months and therefore adversely impact fewer fishermen and reduce the disruption to the entire Maine lobster fishery.



**Figure 3.2:** A hotspot analysis of the first 50 percent of risk characterized in the right whale density model version eight for LMA 1 (Source: FEIS). Red outline added to show length of Zones C, D and E to reference LMA1 SRA.

**2. The gear marking system in the final EIS imposes new and significant costs. MLA supports the gear marking system in the proposed rule.**

The gear marking system for Maine in the final EIS preferred alternative was not discussed during scoping or included in the Proposed Rule or DEIS. The state of Maine worked with NMFS to proactively implement a new gear marking scheme in 2020 for Maine to satisfy the requirements of the Final Rule. Maine’s new gear marking system incorporates a removable green mark to uniquely identify gear fished in exempt versus non-exempt waters, while allowing gear to be shifted back and forth between these areas. The FEIS preferred alternative is a significant change from the proposed rule and would require many lobstermen who fish in both state and federal waters to maintain separate sets of uniquely marked vertical lines for gear fished in each area. The cost of additional marking required in federal waters has not been analyzed and would add substantial cost and time. Not only will fishermen need to purchase additional rope, but it will take considerable time to convert the gear. This will increase labor costs and opportunity cost of lost fishing days. For these reasons, MLA requests that NMFS finalize the gear marking system in the proposed rule.

**3. Clarify that conservation equivalencies do not need to be approved through public notice and comment.**

MLA appreciates that the final EIS preferred alternative includes many conservation equivalencies that are critical to the successful implementation of the whale rules in the Maine lobster fishery. However, the process for approving future equivalencies is not clear. MLA is committed to finding cost-effective approaches that reduce risk to right whales. A process that involves public notice and comment will unnecessarily consume Federal, state, and fishermen’s time and resources. Establishing a streamlined process for conservation equivalencies is critical to building the necessary support among affected fishermen. MLA requests that NMFS’ establish a review process for conservation equivalencies that does not require public notice and comment.



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July 28, 2021

Jennifer Anderson, Assistant Regional Administrator for Protected Resources  
NMFS, Greater Atlantic Regional Fisheries Office (GARFO)  
55 Great Republic Drive  
Gloucester, MA, 01930

Dear Ms. Anderson:

The Maine Lobstermen's Association (MLA) provides these written comments in response to the National Marine Fisheries Service's (NMFS) EIS No. 20210084, *Regulatory Impact Review and Final Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule (FEIS)*, published July 2, 2021.

The MLA was founded in 1954 and is the oldest and largest fishing industry association on the east coast. The MLA is committed to supporting both the continued viability of the Maine lobster fishery and the improvement of the health of North Atlantic right whales through management measures that accurately address documented risks to the right whale population based on the best available science. Maine lobstermen are world leaders in conservation and stewardship. We take pride in our longstanding sustainable fishing practices, which include over two decades of successful implementation of measures to protect right whales. Since NMFS formed the Atlantic Large Whale Take Reduction Team (TRT) in 1997, the MLA has been fully engaged in work to reduce the potential risks to right whales from entanglement in fishing gear.

The MLA remains concerned with the assumptions in the underlying analysis in the pending Risk Reduction Rule that result in underweighting entanglement risk of Canadian fisheries while imposing new restrictions on the Maine lobster fishery unsupported by the observed evidence of entanglements in Maine gear. MLA urges NMFS to fully account for observed trends in right whale deaths and to provide the Biden Administration with the best available science in support of comparable protections from Canada. NMFS has not adequately addressed these issues in the FEIS.<sup>1</sup>

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<sup>1</sup> The MLA identified an error on page 59 of the FEIS which states "According to incident data, 77 percent of all incidents (from 2010-2019) are a result of entanglement mortality and serious injury so we then assume 77 percent of 7.25 unknown or unobserved incidents were the result of an entanglement, or 5.6 per year." While the NMFS incident data shows that 77% (41 of 53) of all entanglements are from unknown sources, only 55% (53 of 96 cases) of all incidents are attributed to entanglement.

The MLA addresses three specific concerns with the Preferred Alternative for the final Risk Reduction Rule outlined in the FEIS.

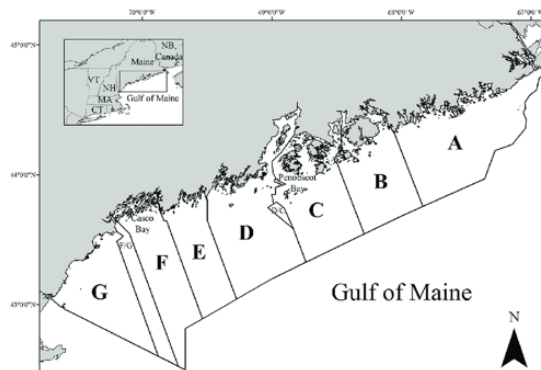
- 1. The boundaries and timing of the LMA1 Seasonal Restricted Area should be aligned with right whale sightings or hot spots to avoid unnecessary adverse economic impacts.**

MLA is strongly opposed to the LMA 1 Seasonal Restricted Area. Because this de facto LMA1 closure was not presented for public review during the Take Reduction Team or scoping process for the DEIS, it has not been tailored to minimize economic impacts and maximize protection of whales. MLA urges NMFS to reconsider Alternative 1-B in the Proposed Rule which would go into effect only if the rule's other protective measures are not sufficiently effective at reducing risk of entanglement. **Alternative 1-B can be accommodated while achieving the 60% risk reduction because the preferred alternative achieves 68.8% to 72.7% risk reduction across the entire lobster fishery, with the LMA1 restricted area contributing 6% to 7%.<sup>2</sup>**

Contrary to NMFS's assumptions, lobstermen will not be able to relocate gear to other, equally productive fishing grounds during the seasonal restricted area and they are unable to shift gear further offshore due to the boundary with Area 3. The Maine Lobster Fishery is highly territorial and lobstermen fiercely protect productive fishing bottom.

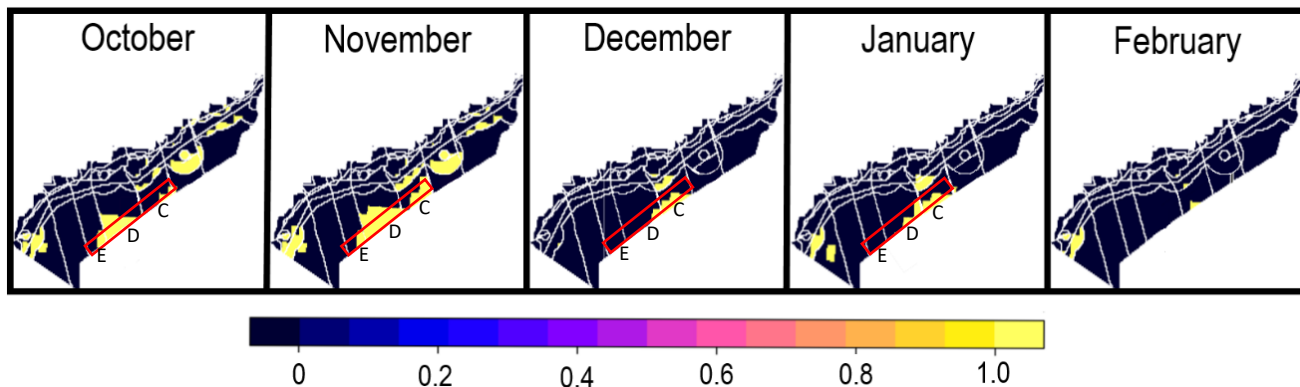
NMFS has not used an equal standard in establishing seasonal restricted areas in the preferred alternative. The Massachusetts Restricted Area and South Island Restricted Area were identified based on "areas and seasons where persistent aggregations of right whales appear to be seasonally predictable." By contrast, the LMA1 Restricted Area is based on a "co-occurrence hotspot analysis" to identify "regions where whales and buoy lines co-occurred more frequently and where measures might be targeted to achieve the target risk reduction." **The MLA urges NMFS not to close areas to fishing unless aggregations of right whales have been documented on a persistent basis.**

According to the hotspot analysis presented in the FEIS for the LMA1 Restricted Area which spans Zones C, D and E (see Figure 3.2 of the final EIS), there are no hotspots in approximately half of the restricted area in December or January (Zone E and the western portion of Zone D). **MLA requests NMFS remove these areas from the seasonal restricted area in the final rule.** The MLA strongly urges NMFS to align the boundaries of the LMA1 restricted area to include only the hotspots rather than aligning the boundaries with Maine's zone



<sup>2</sup> Lower bound 68.8% (65.9% to 70.2%) and Upper bound 72.7% (66.5% to 75.8%)

lines. Tailoring the seasonal restricted area to the hotspots will significantly reduce the size of the area in two of the four months and therefore adversely impact fewer fishermen and reduce the disruption to the entire Maine lobster fishery.



**Figure 3.2:** A hotspot analysis of the first 50 percent of risk characterized in the right whale density model version eight for LMA 1 (Source: FEIS). Red outline added to show length of Zones C, D and E to reference LMA1 SRA.

**2. NMFS should adopt the gear marking system in the Proposed Rule to avoid imposing new and significant costs.**

The gear marking system for Maine in the FEIS preferred alternative was not discussed during scoping or included in the Proposed Rule or DEIS. The state of Maine worked with NMFS to proactively implement a new gear marking system in 2020 to satisfy the requirements of the Final Rule. Maine's new gear marking system incorporate a removable green mark to uniquely mark gear fished in exempt versus non-exempt waters, while allowing gear to be shifted back and forth between these areas. This has been fully implemented in the Maine lobster fishery.

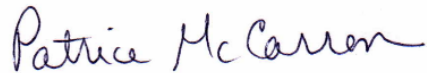
The FEIS preferred alternative changes the gear marking areas for Maine from exempt and non-exempt waters to one that differentiates fishing activity in state versus federal waters. It eliminates Maine's single 6" removable green mark for non-exempt waters and instead requires the addition of four 12" green marks for gear fished in federal waters. This change is significant and would require lobstermen who fish in both state and federal waters to maintain two sets of uniquely marked vertical lines for gear fished in each area. This additional marking in federal waters has not been analyzed and would add substantial cost and time. Not only will fishermen need to purchase significant amounts of additional rope, but it will take considerable time to convert the gear. This will increase labor cost and opportunity cost of lost fishing days. For these reasons, **MLA requests that NMFS adopt the gear marking system in the proposed rule for Maine.**

**3. Clarify that conservation equivalencies do not need to be approved through public notice and comment.**

MLA appreciates that the FEIS preferred alternative includes many conservation equivalencies that are critical to the successful implementation of the whale rules in the Maine lobster fishery. However, the process for approving future equivalencies is not clear. MLA is committed to finding cost-effective approaches that reduce risk to right whales. As the whale rules evolve, future conservation equivalencies may ensure the continued successful implementation of whale protections while minimizing economic, safety and operational hardship. Establishing a streamlined process for conservation equivalencies is critical to building the necessary support among affected fishermen and avoiding unnecessary burdens on Federal, state, and fishermen's time and resources. **MLA requests that NMFS establish a review process for conservation equivalencies that does not require public notice and comment.**

Thank you for your consideration of MLA's comments. The MLA remains committed to working with NMFS and other stakeholders to support the recovery of right whales.

Sincerely,

A handwritten signature in blue ink that reads "Patrice McCarron". The signature is written in a cursive, flowing style.

Patrice McCarron  
Executive Director

cc. Senator Susan Collins (via Cameron O'Brien)  
Senator Angus King (via Peter Benoit)  
Representative Chellie Pingree (via Lisa Pahel and Rhiannon Hampson)  
Representative Jared Golden (via Eric Kanter and Morgan Urquhart)  
Patrick Keliher, Commissioner, Maine Dept of Marine Resources