

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN’S
ASSOCIATION, INC.
8 Otis Place
Scituate, MA 02066

Plaintiff,

v.

GINA RAIMONDO, *in her official capacity
as Secretary,*
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230,

JANET COIT, *in her official capacity as
Assistant Administrator,*
NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910,

NATIONAL MARINE FISHERIES
SERVICE,
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND OTHER RELIEF**

Plaintiff Massachusetts Lobstermen’s Association, Inc. (“MLA”), as and for its Complaint against Defendants Gina Raimondo, Janet Coit, and National Marine Fisheries Services, states and alleges as follows:

INTRODUCTION

1. The Massachusetts lobster industry is essential to Massachusetts's culture, heritage, identity, and economy.
2. The Massachusetts lobster industry is mostly comprised of small, family-owned businesses, and lobster fishing has offered a distinct way of life to generations of Massachusetts citizens.
3. The Massachusetts lobster fishery landed nearly \$120 million worth of American lobster each year (as of 2021), and participate in a culture promoting independence, self-reliance, and entrepreneurialism.
4. The impact of the Massachusetts lobster industry extends well beyond those that actually ply the seas fishing for the product and their families. The Massachusetts lobster industry supports local onshore businesses, including restaurants, lobster dealers, seafood processors, storage facilities, vessel repair yards, marinas, and tourist shops. Many small and family-owned shored-businesses rely on the lobster industry and the revenue they provide to stay afloat.
5. In recent years, many MLA members and lobstermen have also fished for Jonah Crab, a prey species that can be targeted with lobster fishing gear deployed from lobster vessels. Jonah Crab has become an important target species for Massachusetts fishers. The process of fishing for Jonah Crab is quite similar to lobstering.
6. The illegal "Emergency Closure for Trap/Pot Fisheries: Area Between Massachusetts State Waters and Federal Waters within the Massachusetts Restricted Area for February 1- April 30, 2023," which is the subject of this Complaint, has caused and continues to cause economic,

aesthetic, cultural, and procedural injury to MLA and its' members interests in the Massachusetts lobster fishery through the imposition of illegal closures to fishing grounds.

PARTIES

7. Plaintiff Massachusetts Lobstermen's Association, Inc. ("MLA") is a Massachusetts non-profit corporation dedicated to the preservation of a sustainable lobster resource, and the fishermen and communities that depend on the Massachusetts lobster fishery. MLA has proactively worked to develop, and consistently supported, including having its members serve on the Atlantic Large Whale Take Reduction Team ("ALTRT"), conservation measures for the North Atlantic Right Whale based on sound science.

8. MLA is a credible voice for the Massachusetts lobster fishery on marine resource management issues and is highly regarded by stakeholders in the health of Massachusetts marine and coastal resources.

9. MLA brings this lawsuit on behalf of its members, who currently fish and intend to continue to fish and keep their gear in the waters subject to the "Emergency Closure for Trap/Pot Fisheries: Area Between Massachusetts State Waters and Federal Waters within the Massachusetts Restricted Area for February 1- April 30, 2023" that is the subject of this Complaint.

10. MLA has been actively and diligently involved in efforts to protect the North Atlantic Right Whale population. For decades, MLA has been working with NMFS, the Massachusetts Department of Marine Fisheries, representatives of the environmental and scientific communities, and other stakeholders. MLA has been an industry leader in the development and implementation of practical management measures and harvesting practices that effectively minimize risk to North Atlantic Right Whales when they are present in waters fished by Massachusetts lobster industry participants.

11. MLA members fish in waters subject to NMFS's 2021 Atlantic Large Whale Take Reduction Plan amendments, which were "deemed sufficient to ensure that the continued Federal and State authorizations of the American lobster and Jonah crab fisheries are in full compliance" with the Endangered Species Act and Marine Mammal Protection Act by the Consolidated Appropriations Act of 2023, H.R. 2617.

12. MLA members who fish for, *inter alia*, lobster and Jonah crab have long recognized the importance of conservation of the North Atlantic Right Whale. MLA members have partnered with research organizations, industrial groups, and state and federal authorities to mitigate risk to the North Atlantic Right Whales, even where those measures have made fishing harder economically.

13. Indeed, members of the MLA can proudly claim to be the first in the nation to close any waters to mitigate risk to North Atlantic Right Whales, including closure of all Massachusetts state waters from Monomoy north to the New Hampshire border from February 1 to May 15th with dynamic extension, closure of Massachusetts state waters gillnet fishing from January 1 to May 15 with dynamic extension, and closure of all Other Trap Pot fishing from December 15 through April 15.

14. MLA members can also proudly claim to be the first in the nation to universally adopt use of sinking ground rope, weak line, weak inserts, and other conservation measures, including instituting mandatory use of 75% weak rope in all lobster and Other Trap Fisheries, invention of their own weak insert device, known as the "South Shore Sleeve," and instituting a 50% trap reduction in Lobster Management Area Two implemented from 2016 and 2021.

15. MLA's leading from the front conservation and risk mitigation efforts have been successful as there is no evidence of any serious injuries or mortalities to North Atlantic Right Whales arising

from Massachusetts-licensed lobster fishing gear in recent history, making Massachusetts waters a veritable safe haven for the North Atlantic Right Whale.

16. MLA and its members derive economic, professional, aesthetic, and cultural benefits from the Massachusetts lobster and Jonah crab fishery. Defendants promulgation of the “Emergency Closure for Trap/Pot Fisheries: Area Between Massachusetts State Waters and Federal Waters within the Massachusetts Restricted Area for February 1- April 30, 2023,” which is the subject of this Complaint, has caused and continues to cause economic, aesthetic, cultural, and procedural injury to MLA and its’ members interests in the Massachusetts lobster fishery through the imposition of illegal closures to fishing grounds. MLA and MLA’s members’ injuries will be redressed by the relief they request, as that relief would undo the causes of those actual and threatened injuries. MLA and its members have no other adequate remedy at law.

17. Defendant Gina Raimondo is the Secretary of the U.S. Department of Commerce, and is sued in her official capacity. Secretary Raimondo directs all business of the Department of Commerce and is the official ultimately responsible under federal law for ensuring that the actions and decisions of the Department comply with all applicable laws and regulations.

18. Defendant Janet Coit is the Assistant Administrator of the National Oceanic and Atmospheric Administration Fisheries (“NOAA” or “NOAA Fisheries”) and is sued in her official capacity. Assistant Administrator Coit has responsibility for implementing and fulfilling the agency’s duties under the ESA and the MMPA, as well as the Consolidated Appropriations Act, 2023, H.R. 2617.

19. Defendant National Marine Fisheries Service (“NMFS”) is an agency within NOAA. NFMS is the agency to which the Secretary of Commerce has delegated the authority to implement

regulations regarding the ESA and the MMPA, as well as the Consolidated Appropriations Act, 2023, H.R. 2617.

JURISDICTION AND VENUE

20. The United States District Court for the District of D.C. has jurisdiction over this matter under 28 U.S.C. § 1331 because this case presents a federal question under the laws of the United States, including the Administrative Procedures Act and the Consolidated Appropriations Act, 2023, H.R. 2617. An actual justiciable controversy exists between Plaintiff and Defendants, and the request relief is proper under 5 U.S.C. §§ 701-706.

21. Venue is proper in the District of D.C. pursuant to 28 U.S.C. § 1391 as this action is brought against an agency of the United States and officers of the United States acting in their official capacity and the Defendants maintain offices in the District of Columbia.

LEGAL BACKGROUND

22. The Administrative Procedures Act (“APA”) governs judicial review of federal agency actions. 5 U.S.C. §§ 701-706.

23. Under the APA, courts “shall . . . hold unlawful and set aside agency action, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or made “without observed of procedure required by law.” *Id.* § 706(2)(A), (C), (D).

24. The Consolidated Appropriations Act of 2023, H.R. 2617, (“CAA”) included a mandate that the 2021 Atlantic Large Whale Take Reduction Plan (“ALWTRP”) amendments “shall be deemed sufficient to ensure that the continued Federal and State authorizations of the American

lobster and Jonah crab fisheries are in full compliance” with the Endangered Species Act and Marine Mammal Protection Act under December 31, 2028.

25. The CAA requires NMFS to “promulgate new regulations for the American lobster and Jonah crab fisheries consistent with the [MMPA] and the [ESA] that take effect by December 31, 2028, utilizing existing and innovative gear technologies, as appropriate[.]” CAA § 101(a)(1).

26. However, the CAA also provided that the provisions of subsection(a) “shall not apply to an existing emergency rule, or any action taken to extend or make final an emergency rule that is in place on the date of enactment of this Act, affecting lobster and Jonah crab.” *Id.* § 101(b).

STATEMENT OF FACTS

27. On March 1, 2022, NMFS issued an “Emergency Closure for Lobster and Jonah Crab Trap/Pot Fishery Area Between Massachusetts Restricted Area and Massachusetts Restricted Area North for April 2022” (“2022 Wedge Closure”) for federal waters in the following coordinates:

MRA Wedge Area Coordinates		
Point	Lat	Long
MRAW1	42°39.77'	70°30'
MRAW2	42°12'	70°38.69'
MRAW3	42°12'	70°30'
MRAW4	42°30'	70°30'
MRAW1	42°39.77'	70°30'

28. The 2022 Wedge Closure lasted from April 1, 2022, to April 30, 2022. In explaining its closure, NMFS stated that:

This emergency closure is being put in place to protect right whales exiting Cape Cod Bay from becoming entangled in the dense aggregations of gear that were observed in this area in April 2021. Implementing an emergency restriction to fishing with buoy lines in this area will address a critical gap in protection where there is a particularly high chance of entanglement that was not addressed in recent modifications to the Atlantic Large Whale Take Reduction Plan, while long term measures are being developed.

See (<https://www.fisheries.noaa.gov/bulletin/emergency-closure-lobster-and-jonah-crab-trap-pot-fishery-area-between-massachusetts>).

29. NMFS indicated that it was seeking the closure pursuant to the Marine Mammal Protection Act § 118(g) and that the “[i]mplementing an emergency restriction to fishing with buoy lines in this area will address a critical gap in an area with a particularly high chance of entanglement in 2022 that was not address in recent modifications to the ALWTRP while long-term measures are being developed.” (*See* <https://www.fisheries.noaa.gov/action/emergency-closure-lobster-and-jonah-crab-trap-pot-fishery-area-between-massachusetts>); 50 C.F.R. 229.

30. NMFS determined that the closure was necessary because the Decision Support Tool, a statistical model NMFS developed as part of the ALWTRP (and that is being challenged in *Maine Lobstermen Association, et al. v. NMFS, et al.*, USCA Case #22-5238 (D.C. Circuit 2022)), suggested that a high enough volume of Right Whales would be in the MRA and MRA North that buoys could cause entanglements.

31. Prior to the 2022 Closure, the waters were open from January 1, 2022, to March 31, 2022.

32. The 2022 Wedge Closure ended on May 1, 2022, and federal waters remained open for the remainder of 2022.

33. In *Maine Lobstermen Association*, NMFS recently filed a Motion to Dismiss the Appeal (Doc. # 1982942) on the grounds that the appeal was moot as NMFS would not be issuing any regulations from the ALWTRP.

34. On January 31, 2023, after the passage of the CAA, NMFS announced at FR-230130-0030 that it would be initiating a new closure, to begin on February 1, 2023, and ending on April 30, 2023 (“2023 Wedge Closure”).

35. Upon information and belief, NMFS announcement of the 2023 Wedge Closure did not occur until on or about January 31, 2023 at 10:12 AM EDT or less than fourteen (14) hours before the 2023 Wedge Closure would become effective. (“NMFS’s Announcement”)

36. NMFS Announcement at the eleventh hour gave affected MLA members with gear in the Wedge Closure area no effective chance to comply with the 2023 Wedge Closure.

37. The 2023 Wedge Closure, titled “Emergency Closure for Trap/Pot Fisheries: Area Between Massachusetts State Waters and Federal Waters within the Massachusetts Restricted Area for February 1- April 30, 2023” claims to be an extension of the 2022 Wedge Closure.

38. However, in a January 31, 2023 email from Marisa Trego, Coordinator of the Atlantic Whale Take Reduction Team for the NMFS Great Atlantic Region, Ms. Trego stated that NMFS “implemented a *similar* emergency rule in April 2022, and are doing so again at the request of the Commonwealth of Massachusetts.” (Exhibit X.)

39. Further in its January 2023 ALTWRP Update, NMFS stated “We recently announced an Emergency Rule to restrict buoy lines of the MRA Wedge closure *again* this year from February through April.” (Exhibit X at 1.)

40. The 2023 Wedge Closure included the exact same areas as the 2022 Wedge Closure following areas:

MRA Wedge Area Coordinates		
Point	Lat	Long

MRAW1	42°39.77'	70°30'
MRAW2	42°12'	70°38.69'
MRAW3	42°12'	70°30'
MRAW4	42°30'	70°30'
MRAW1	42°39.77'	70°30'

41. NMFS claimed that it was able to implement the 2023 Wedge Closure under the MMPA and because the CAA §101(b) provides an exception for emergency rules.

42. Without citing to any Congressional history or other grounds of support, NMFS determined that CAA § 101(b) “can refer only to the 2022 MRA Wedge Rule, because that is the only emergency rulemaking implemented under the MMPA, ESA, and other relevant statutes, affecting lobster and Jonah crab, to occur in the past decade.” (Exhibit X at 9.)

43. Despite CAA § 101(b) not referring to the 2022 Wedge Closure in any way, NMFS further extrapolated that “the exception at § 101(b) is a specific reference to the 2022 emergency rule closing the MRA Wedge.” (Exhibit X at 9.)

44. Indeed, giving away the game, NMFS asserts, again without citing to any supporting precedent, that “the emergency rulemaking provisions of MMPA [§] 118(g) allow for an extension of existing emergency rules when conditions warrant, and the statutory language does not require an extension to follow immediately upon the expiration of the *original* emergency action.” (Exhibit X at 9.)

45. NMFS thus interpreted the language of CAA § 101(b) to mean that “the continued existence of the emergency, *as opposed to the operability of the emergency rule*, is what matters for an extension of an emergency rule”

46. NMFS then asserted that “the 2022 30-day emergency rule [2022 Wedge Closure] was not in effect longer than 270 days (the statute’s temporal limit), *but the same conditions exist this year to warrant an extension.*”

47. In its explanatory materials regarding the 2023 Wedge Closure, many portions copied word for word from the 2022 Wedge Closure explanatory materials, NMFS further stated that “risk reduction and change in right whale co-occurrence were calculated for this emergency measure using the Decision Support Tool (DST) version 4.1.0, which is an updated version of the model that was used in the 2021 FEIS.”

48. The DST is a statistical modeling tool that was created and relied on data used to support the 2021 Biological Opinion that is being challenged in *Maine Lobstermen’s Association*.

49. Despite saying the DST was a different model, NMFS admitted in its own material that it used “distribution data from 2010 through September 2020” which was true for the DST in the 2021 Biological Opinion.

50. NMFS claimed that the “emergency rule was not developed during the fisheries consultation process that culminated in the 2021 BiOp” and that the emergency rule is “not associated with the 2021 BiOp, and was not analyzed under the 2021 BiOp” despite using the same underlying science and data in the DST for the emergency rule as for the 2021 BiOp.

51. NMFS is attempting to obscure its reliance on the same underlying data and science because it knows that it is not permitted to promulgate new regulations for the lobster and Jonah

crab fishery under the CAA, and thus has to make it seem like this is a new process, while simultaneously presenting it as an extension.

52. Prior to issuing the 2023 Wedge Closure, NMFS did not engage in any notice and comment period regarding the 2023 Wedge Closure.

53. Federal waters were open from May 1, 2022, until the 2023 Wedge Closure.

COUNT I

Violation of the APA and CAA – Illegal Wedge Closure

54. Plaintiff re-alleges and incorporates, as if fully set forth herein, the foregoing paragraphs.

55. NMFS's 2023 Wedge Closure is a final agency action within the meaning of the APA.

56. NMFS's 2023 Wedge Closure violates the APA and CAA because, despite NMFS unsupported contentions to the contrary, it is not an extension of an emergency rule existing at the time of the CAA's passage, but rather is a new regulation or administrative action to bring the lobster industry into compliance with the ESA and MMPA, despite the CAA mandating that the lobster industry is in full compliance with the ESA and MMPA and precluding the issuance of new regulations until December 31, 2028.

57. CAA § 101(b) only exempts extensions of existing emergency rules, but, because the 2022 Wedge Closure ended on May 1, 2022, the 2022 emergency rule expired on that date and there was no existing emergency rule in existence on February 1, 2023 for NMFS to extend.

58. Further, NMFS's reliance on almost verbatim language and reliance on the DST which used the same science and data as used for the 2022 Wedge Closure demonstrates this is nothing more than a repeated, but new, rule from the last emergency closure.

59. Therefore, NMFS's 2023 Wedge Closure is arbitrary, capricious, an abuse of discretion, and not in accordance with the CAA, in violation of the APA. 5 U.S.C. § 706(2)(A).

COUNT II

Violation of the APA – Failure to Engage in Notice and Comment Rulemaking

60. Plaintiff re-alleges and incorporates, as if fully set forth herein, the foregoing paragraphs.
61. The APA mandates that federal agencies engage in notice and comment rulemaking prior to issuing new regulations. 5 U.S.C. § 553.
62. The 2023 Wedge Closure is not a mere policy statement, but instead is a new regulatory action that required notice and comment rulemaking.
63. There is no good cause reason for NMFS to not have engaged in notice and comment rulemaking, especially given that it apparently anticipated issuing this closure again and only gave fishermen a single day to comply.
64. Failure to engage in notice and comment rulemaking mandates vacatur of NMFS's 2023 Wedge Closure.
65. Therefore, NMFS 2023 Wedge Closure must be vacated and NMFS must be required to engage in new rulemaking with notice and comment in compliance with the APA.

COUNT III

Violation of the APA – Failure to Engage in Reasonable Cost Analysis

66. Plaintiff re-alleges and incorporates, as if fully set forth herein, the foregoing paragraphs.
67. The APA and accompanying regulations mandate that federal agencies engage in a financial analysis of any financial impact of a proposed new rule or emergency rule.
68. NMFS engaged in only a perfunctory financial analysis failing to address the full and reasonably foreseeable financial impact of the 2023 Wedge Closure.
69. NMFS significantly underestimated the financial costs to MLA members and lobstermen, failed to use the most up to date scientific and commercially reasonable financial data, and

unreasonably estimated the number of MLA members and lobstermen who would fish in different waters and/or not fish as a result of the 2023 Wedge Closure.

70. The final financial impact that NMFS determined to result from the 2023 Wedge Closure drastically underestimates the true financial impact that will be suffered by MLA members and lobsterman as a result of the 2023 Wedge Closure.

71. Therefore, NMFS's 2023 Wedge Closure is arbitrary, capricious, an abuse of discretion, in violation of the APA and accompanying regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for Judgment as follows:

1. Declare that NMFS's 2023 Wedge Closure is arbitrary, capricious, an abuse of discretion, and not in accordance with the law, in violation of the APA;
2. Declare that NMFS's 2023 Wedge Closure is in violation of the Consolidation Appropriations Act of 2022, H.R. 2617, § 101(a);
3. Restrain and Enjoin NMFS from enacting and enforcing the 2023 Wedge Closure and beyond;
4. Mandate that NMFS conduct a proper financial impact analysis of the 2023 Wedge Closure in compliance with the APA and accompanying regulations;
5. Issue a stay, pursuant to 5 U.S.C. § 705, of the 2023 Wedge Closure;
6. For all expenses, costs and disbursements, and reasonable attorney's fees as allowed by law; and,
7. Such other and further relief the Court deems just and equitable.

ECKLAND & BLANDO LLP

Dated: February 1, 2023

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*Admission to District of D.C. pending

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2023, I electronically filed the within document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Samuel P. Blatchley
Samuel Blatchley, Esq. (#MA0039)