

No. 22-5238(L), 22-5244, 22-5245, 22-5246

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MAINE LOBSTERMEN’S ASSOCIATION,
Plaintiff-Appellant,

STATE OF MAINE DEPARTMENT OF MARINE RESOURCES; MASSACHUSETTS
LOBSTERMEN’S ASSOCIATION; DISTRICT 4 LODGE OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKS; LOCAL LODGE 207,
Intervenors-Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, IN HER OFFICIAL CAPACITY
AS SECRETARY OF COMMERCE; JANET COIT, IN HER OFFICIAL CAPACITY AS
ASSISTANT ADMINISTRATOR FOR FISHERIES,
Defendants-Appellees,

CONSERVATION LAW FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY;
DEFENDERS OF WILDLIFE,
Intervenors-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 1:21-cv-02509-JEB

**APPELLANT-INTERVENOR MASSACHUSETTS LOBSTERMEN’S
ASSOCIATION’S RESPONSE TO DEFENDANTS-APPELLEES’ MOTION
FOR LEAVE TO FILE A MOTION TO DISMISS**

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are members of the MA bar and D.C Circuit
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Appellant-Intervenor Massachusetts Lobstermen's Association ("MALA") respectfully objects to Federal Defendants-Appellees, the National Marine Fisheries Service; Gina Raimondo, in her official capacity as Secretary of Commerce; and, Janet Coit, in her official capacity as Assistant Administrator for Fisheries (collectively "NMFS"), Motion for Leave to a Motion to Dismiss for lack of jurisdiction, filed on January 24, 2023.

In its motion, NMFS claims that the Consolidated Appropriations Act, 2023 (the "CAA") "obviated the requirement to take the further actions spelled out in the Conservation Framework" and "directed instead that the Service channel its efforts into the development of new gear technologies and a new rulemaking in December 2028." (Docket No. 1982941 ("Motion for Leave") at 1.) NMFS also described the CAA as "also authoriz[ing] appropriations of up to \$50,000,000 per year to facilitate the development of innovative gear technologies intended to reduce harms to right whales, and it instructed the Service to promulgate a new regulation by December 31, 2028 incorporating the use of those technologies." (*Id.* (citing 2028. Pub. L. No. 117-328, Div. JJ, Tit. I, § 101(a); 136 Stat. 4459, 6089-90 (2022).)

NMFS's Motion for Leave is misleading to this Court. In NMFS's original Notice of New Authorities, NMFS represented that they would "promulgate new regulations for the American lobster and Jonah crab fisheries consistent with the [MMPA] and [ESA] that take effect by December 31, 2028, utilizing *existing* and

innovative gear technologies, as appropriate.” [Dkt. # 241 in *Center For Biological Diversity et al v. Ross et al*, Civil Action No. 1:18-cv-00112, currently pending in the United States District Court for the District of Columbia (emphasis added).] Further, the CAA only requires NMFS to “incorporate” the innovate technologies into its regulations, it did not direct NFMS to promulgate new regulations incorporating the use of *only* the new technologies. Thus, to the extent that NMFS is claiming its motion to dismiss is necessary because its future regulations will not involve existing technologies, it has not established legitimate grounds for a motion to dismiss and the Motion for Leave should be denied.¹

Additionally, since Federal Defendant-Appellees filed their Motion for Leave, NMFS has promulgated a new emergency rule regulating the lobster and Jonah crab industry, relying on the same underlying skewed data used to support the Diagnostic Support Tool that provided the estimates for the challenged Biological Opinion, demonstrating that their representation that they will not be promulgating regulations from the underlying Conservation Framework was misleading at best.

For context, on March 1, 2022, NFMS issued an ““Emergency Closure for Lobster and Jonah Crab Trap/Pot Fishery Area Between Massachusetts Restricted

¹ MALA is not opposing NMFS’s motion for leave on the grounds that it is beyond the time frame established by Local Rule D.C. Circuit Rule 27(g)(1).

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'

87 FR 11590 at 11596.

To support the 2022 Wedge Closure, NMFS relied on data reflecting whale sightings on April 19, 2021, and April 28, 2021. 87 FR 11590. 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>).

NMFS stated that it was executing the 2022 Wedge Closure pursuant to its authority under the Marine Mammal Protection Act § 118(g) and that “[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. In determining that the 2022 Wedge Closure was necessary, NMFS relied on the DST, which suggested that a high enough volume of North Atlantic Right Whales would be in the Massachusetts Restricted Area (“MRA”) and Massachusetts Restricted Area North (“MRA North”) that buoys could cause entanglements. 87 FR 11590, 11594-95. The 2022 Wedge Closure lasted from April 1, 2022, to April 30, 2022. *Id.* at 11590. The waters reopened on May 1, 2022, and remained open until today, February 1, 2024.

On January 31, 2023, *a mere week* after representing to this Court that NMFS would not be issuing any additional regulations in accordance with the CAA, NMFS announced that it would be initiating a new closure to begin on February 1, 2023,

and ending on April 30, 2023 (“2023 Wedge Closure”). Officially titled the “Emergency Restricted Area for the Trap/Pot Fishery: Massachusetts Restricted Area Wedge”, the 2023 Wedge restricts the *identical* areas as the 2022 Wedge:

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'

FR Docket No. FR-230130-0030.

NMFS claimed it was able to promulgate the 2023 Wedge Closure under MMPA § 118(g), and used the same whale sighting data from April 19, 2021, and April 28, 2021, to support its need for closure (although it said the data was “qualitative” rather than “quantitative” this time). *Id.* at 12. Further, NMFS once again relied on the DST to support the closure, although it claimed it was using an “updated version” from the 2021 model, without explaining what new data it was

relying on to make it “updated.” *Id.* at 14. Indeed, despite saying the DST was a different model, NMFS admitted that it used “distribution data from 2010 through September 2020,” which was true for the DST that formed the Conservation Framework. *Id.*; *see also* 86 FR 51970. In fact, substantial portions of the explanatory materials for the 2023 Wedge Closure were identical to the 2022 Wedge Closure materials, such as:²

87 FR 11590	FR Docket No. FR-230130-0030
<p>The Atlantic Large Whale Take Reduction Plan (Plan) was originally developed pursuant to section 118 of the MMPA (16 U.S.C. 1387) to reduce mortality and serious injury of three stocks of large whales (fin, humpback, and North Atlantic right) incidental to Category I and II fisheries. Under the MMPA, a strategic stock of marine mammals is defined as a stock: (1) For which the level of direct human-caused</p>	<p>The Atlantic Large Whale Take Reduction Plan (“Plan” <i>or ALWTRP</i>) was originally developed pursuant to section 118 of the MMPA (16 U.S.C. 1387) to reduce mortality and serious injury of three stocks of large whales (fin, humpback, and North Atlantic right) incidental to certain Category I and II fisheries. Under the MMPA, a strategic stock of marine mammals is defined as a stock: (1) For which the</p>

² All changes between 87 FR 11590 and FR Docket No. FR-230130-0030 emphasized in the latter.

<p>mortality exceeds the Potential Biological Removal (PBR) level; (2) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act (ESA) of 1973 within the foreseeable future; or (3) which is listed as a threatened or endangered species under the ESA or is designated as depleted under the MMPA (16 U.S.C. 1362(19)). When incidental mortality or serious injury of marine mammals from commercial fishing exceeds a stock's PBR level, the MMPA directs NMFS to convene a take reduction team made up of stakeholders, including: representatives of Federal agencies; each coastal state which has fisheries which interact with the species or stock;</p>	<p>level of direct human-caused mortality exceeds the <i>PBR</i> level; (2) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the <i>ESA</i> within the foreseeable future; or (3) which is listed as a threatened or endangered species under the ESA or is designated as depleted under the MMPA (16 U.S.C. 1362(19)). When incidental mortality or serious injury of marine mammals from commercial fishing exceeds a stock's PBR level, the MMPA directs NMFS to convene a take reduction team of stakeholders <i>that includes the following</i>: Representatives of Federal agencies; each coastal state that has fisheries <i>interacting</i> with the species or stock; appropriate Regional Fishery Management Councils;</p>
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appropriate Management fisheries commissions, academic and scientific organizations; environmental groups; all commercial and recreational fisheries groups and gear types which incidentally take the species or stock; and, if relevant, Alaska Native organizations or Indian tribal organizations.	Regional Councils; interstate interstate fishery interstate fisheries commissions; academic and scientific organizations; environmental groups; all commercial and recreational fisheries groups <i>using</i> gear types that incidentally take the species or stock; and, if relevant, Alaska Native organizations or Indian tribal organizations.
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NMFS attempted to represent the 2023 Wedge Closure as a continuation of the 2022 Wedge Closure, although their own employee, Marisa Trego, Coordinator of the Atlantic Whale Take Reduction Team for the NMFS Great Atlantic Region, truthfully stated in a January 31, 2023 email explaining the 2023 Wedge Closure that NMFS “implemented a *similar* emergency rule in April 2022, and are doing so again at the request of the Commonwealth of Massachusetts.” (Declaration of Beth Casoni (“Casoni Decl.”), ¶ 6, Ex. A.)

To support its ability to promulgate the 2023 Wedge Closure, and without citing to any legislative history or other grounds of support, NMFS determined that

CAA § 101(b) “can only refer 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.” (Casoni Decl., ¶ 8, Ex. B.) NMFS doubled down on this assertion, further extrapolating that “the exception at § 101(b) is a specific reference to the 2022 emergency rule closing the MRA Wedge.” (Id.) There is no reference to the 2022 emergency rule closing the MRA Wedge anywhere in the CAA, let alone § 101. Notwithstanding, NMFS connected the non-existent dots to conclude 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” (*Id.*) (emphasis added). In other words, NMFS has concluded that, so long as an emergency exists, it can continue to issue emergency rules without falling afoul of the CAA.

Thus, despite representing to this Court that it would not promulgate new regulations pursuant to the Conservation Framework in dispute in this appeal because the CAA “obviated the requirement” to do so, NMFS issued a new regulation, aiming to achieve the same goals of the Conservation Framework, using the same DST tool as the one used in the Conservation Framework, under the guise of a new emergency rule. In other words, NMFS is issuing regulations pursuant to the Conservation Framework despite representing to this Court that it would not.

NMFS cannot have it both ways. Either it must stand by its representation to this Court that it is not promulgating new regulations pursuant to the Conservation Framework, and thus must withdraw its 2023 Wedge Closure, or it must withdraw its Motion for Leave in light of its changed posture that it will in fact be issuing new regulations.

Therefore, Appellant-Intervenor Massachusetts Lobstermen's Association respectfully requests this Court deny Federal Defendants-Appellee's Motion for Leave to File a Motion to Dismiss for lack of jurisdiction.

Dated: February 6, 2023

Respectfully submitted,

ECKLAND & BLANDO LLP

/s/ SAMUEL P. BLATCHLEY

Samuel P. Blatchley BBO# 670237

Robert T. Dube Jr.*

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*Supervised by principals of the firm who are members of the MA bar and D.C Circuit bar

Counsel for Appellant-Intervenor

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A)-(B) because this document contains less than 5,200 words and is less than 20 pages long.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Dated: February 6, 2023

/s/ _____
Samuel P. Blatchley

No. 22-5238(L), 22-5244, 22-5245, 22-5246

UNITED STATES COURT OF APPEALS
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MAINE LOBSTERMEN'S ASSOCIATION,

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NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, IN HER OFFICIAL CAPACITY
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ASSISTANT ADMINISTRATOR FOR FISHERIES,

Defendants-Appellees,

CONSERVATION LAW FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY;

DEFENDERS OF WILDLIFE,

Intervenors-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 1:21-cv-02509-JEB

DECLARATION OF BETH CASONI IN SUPPORT OF APPELLANT-
INTERVENOR MASSACHUSETTS LOBSTERMEN'S ASSOCIATION'S
OPPOSITION TO DEFENDANTS-APPELLEES' MOTION FOR LEAVE TO
FILE A MOTION TO DISMISS

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*Supervised by principals of the firm who
are members of the MA bar and D.C Circuit
bar

I, Beth Casoni, pursuant to 28 U.S.C. § 1746, do hereby state and declare as follows:

1. I am a resident of Marshfield, Massachusetts, and I am over 18 years of age.
2. I am the Executive Director and a member of the Massachusetts Lobstermen's Association, Inc. ("MLA").
3. The MLA was established in 1963 as a member-driven organization with the goal of maintaining both the lobstering industry and the lobsters themselves.
4. I assist the MLA in the tracking of changes in laws and regulations that affect our industry.
5. I am a current member of the Atlantic Large Whale Take Reduction Team.
6. On January 31, 2023, I received an email from the National Oceanic and Atmospheric Association ("NOAA") announcing an "emergency closure" of federal waters within the Massachusetts Restricted Area, a true and correct copy of which is appended herein as **Exhibit A**.
7. The email, which came from Atlantic Large Whale Take Reduction Team Coordinator Marisa Trego, contained a hyperlink directing me to the NOAA Fisheries website at <https://www.fisheries.noaa.gov/action/emergency-restricted-area-trap-pot-fishery-massachusetts-restricted-area-wedge>.
8. This website contained another link, under the heading "Federal Register," to the text of the emergency rule referenced in the aforementioned email. A true and

correct copy of the text of the emergency rule, found by clicking on the link at the above URL, is appended herein as **Exhibit B**.

FURTHER YOUR DECLARANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of February, 2023 in the City of Marshfield,

Commonwealth of Massachusetts.

/s/BETH CASONI
Beth Casoni

From: [Beth Casoni](#)
To: [Sam Blatchley \(MLAs ATTY\)](#)
Cc: [Sooky Sawyer](#)
Subject: FW: 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
Date: Tuesday, January 31, 2023 9:15:43 AM
Attachments: [image.png](#)

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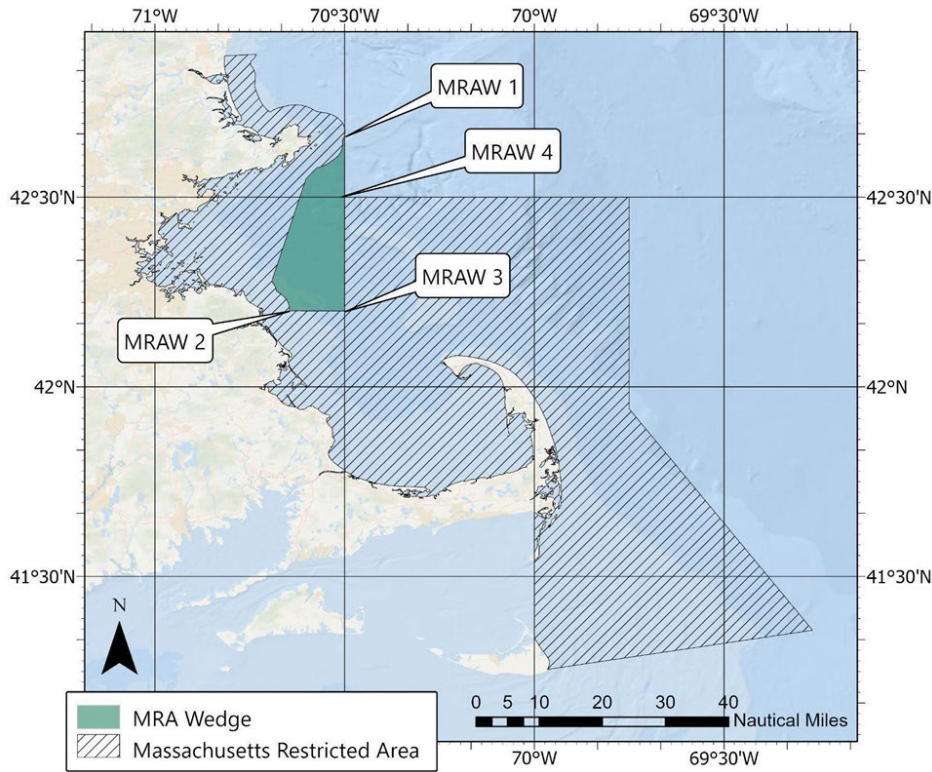
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From: kate.swails@noaa.gov <kate.swails@noaa.gov> **On Behalf Of** NMFS ALWTRT - NOAA Service Account
Sent: Tuesday, January 31, 2023 10:12 AM
Subject: Emergency Closure for Trap/Pot Fisheries: Area Between Massachusetts State Waters and Federal Waters within the Massachusetts Restricted Area for February 1- April 30, 2023

Hello Team,

NOAA Fisheries is announcing an [emergency closure](#) to buoy lines used in trap/pot gear in federal waters within the Massachusetts Restricted Area (see below). Trap/pot fishermen fishing in the federal waters within the Massachusetts Restricted Area must remove all trap/pot gear from this area, and may not reset trawls being actively fished, or set new trawls in this area for the period from February 1- April 30, 2023.





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'

This emergency rule addresses the risk created by this open wedge when large numbers of right whales are exiting Cape Cod Bay at the same time and place where fishermen are either fishing or may be staging their trap/pot fishing gear in preparation for the May 1 opening of federal waters in the Massachusetts Restricted Area. We implemented a similar emergency rule in April 2022, and are doing so again at the request of the Commonwealth of Massachusetts.

Thank you,
Marisa

--

Atlantic Large Whale Take Reduction Team
 Coordinator: Marisa Trego
 National Marine Fisheries Service Greater Atlantic Region
 55 Great Republic Drive
 Gloucester, MA 01930
[ALWTRP web page](#)

BILLING CODE 3510-22-P**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 229****[Docket No. FR-230130-0030]****RIN: 0648-BM05****Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations****AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.**ACTION:** Temporary rule; emergency final rule.**SUMMARY:** NMFS is extending a temporary emergency rule to prohibit trap/pot fishery buoy lines between federal and state waters within the Massachusetts Restricted Area (MRA) from February through April 2023 to reduce the incidental mortality and serious injury of North Atlantic right whales (*Eubalaena glacialis*) in commercial lobster and Jonah crab trap/pot fisheries. This emergency rule extension is necessary to reduce the risk of right whale mortality and serious injury caused by buoy lines in an area with a high co-occurrence of whales and buoy lines.**DATES:** Effective February 1, 2023 through April 30, 2023.**ADDRESSES:** Copies of the documents associated with this emergency rule are available at <https://www.fisheries.noaa.gov/alwtrp> or by emailing Marisa Trego at marisa.trego@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Marisa Trego, 978-282-8484,
marisa.trego@noaa.gov, Colleen Coogan, 978 281-9181, *colleen.coogan@noaa.gov*

SUPPLEMENTARY INFORMATION:

Table of Contents

Background

Justification for Emergency Action

Emergency Measures

Classification

References

Background

The North Atlantic right whale (*Eubalaena glacialis*, hereafter referred to as right whale) population has been in decline since 2010, with the most recent published estimate of right whale population size in 2019 at 368 whales (95 percent confidence interval: 356-378) with a strong male bias (Pace *et al.* 2017, Pace 2021). Data from 2020 and 2021 suggest the decline has continued and that fewer than 350 individuals remain (Pettis *et al.* 2022). The steep population decline is a result of high levels of human-caused mortality caused by entanglement in fishing gear and vessel strikes in both the U.S. and Canada. An Unusual Mortality Event was declared for the population in 2017, as a result of high rates of vessel strikes and entanglement in fishing gear. As of January 11, 2023, the Event includes 35 detected mortalities (17 in 2017, 3 in 2018, 10 in 2019, 2 in 2020, 2 in 2021, 0 in 2022, and, tentatively, 1 in 2023). In addition, 21 serious injuries were documented (2 in 2017, 5 in 2018, 1 in 2019, 4 in 2020, 5 in 2021, 4 in 2022, and, tentatively, 1 in 2023). Lastly, 37 morbidity (or sublethal injury or illness) cases were

documented (12 in 2017, 10 in 2018, 7 in 2019, 5 in 2020, 1 in 2021, and 2 in 2022); see: <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event>). Population models estimate that 64 percent of all mortalities are not observed and not accounted for in the right whale observed incident data (Pace 2021, Pace *et al.* 2021).

The North Atlantic right whale is listed as an endangered species under the Endangered Species Act (ESA), and considered a strategic stock under the Marine Mammal Protection Act (MMPA). NMFS is required by the MMPA to reduce mortality and serious injury incidental to commercial fishing to below a stock's potential biological removal (PBR) level. This is defined as the maximum number of animals that can be removed annually, while allowing a marine mammal stock to reach or maintain its optimal sustainable population level. PBR for the North Atlantic right whale population is 0.7 whales per year in the most recently published stock assessment report (Hayes *et al.* 2022). Between 2010 and 2021, there has not been one year where observed mortality and serious injury of right whales fell below a PBR of 0.7. With the total estimated mortality well above this number, additional measures are urgently needed to reduce the impact of U.S. Atlantic fisheries on right whales.

The Atlantic Large Whale Take Reduction Plan ("Plan" or ALWTRP) was originally developed pursuant to section 118 of the MMPA (16 U.S.C. 1387) to reduce mortality and serious injury of three stocks of large whales (fin, humpback, and North Atlantic right) incidental to certain Category I and II fisheries. Under the MMPA, a strategic stock of marine mammals is defined as a stock: (1) For which the level of direct human-caused mortality exceeds the PBR level; (2) which, based on the best available

scientific information, is declining and is likely to be listed as a threatened species under the ESA within the foreseeable future; or (3) which is listed as a threatened or endangered species under the ESA or is designated as depleted under the MMPA (16 U.S.C. 1362(19)). When incidental mortality or serious injury of marine mammals from commercial fishing exceeds a stock's PBR level, the MMPA directs NMFS to convene a take reduction team of stakeholders that includes the following: Representatives of Federal agencies; each coastal state that has fisheries interacting with the species or stock; appropriate Regional Fishery Management Councils; interstate fisheries commissions; academic and scientific organizations; environmental groups; all commercial and recreational fisheries groups using gear types that incidentally take the species or stock; and, if relevant, Alaska Native organizations or Indian tribal organizations.¹

The Atlantic Large Whale Take Reduction Team (ALWTRT) was established in 1996 and has 60 members, including approximately 22 trap/pot and gillnet fishermen or fishery representatives. The background for the take reduction planning process and initial development of the Plan is provided in the preambles to the proposed (62 FR 16519, April 7, 1997), interim final (62 FR 39157, July 22, 1997), and final (64 FR 7529, February 16, 1999) rules implementing the initial plan. The ALWTRT met and recommended modifications to the ALWTRP, implemented by NMFS through rulemaking, several times since 1997 in an ongoing effort to meet the MMPA take reduction goals.

Mortalities and serious injuries of right whales confirmed in U.S. fishing gear or

¹ There are no Alaska Native or Indian tribal organizations participating in fisheries managed under the Atlantic Large Whale Take Reduction Team.

first seen in U.S. waters with an entanglement continue at levels exceeding the right whale's PBR. NMFS informed the ALWTRT in late 2017 that it was necessary to reconvene to develop recommendations to reduce the impacts of U.S. commercial fisheries on large whales, with a focus on reducing risk to the declining North Atlantic right whale population. During an ALWTRT meeting in April 2019, the ALWTRT recommended a framework of measures to modify lobster and Jonah crab trap/pot trawls within the Northeast Region Trap/Pot Management Area (Northeast Region). The recommended measures intended to reduce risk of mortality and serious injury to right whales incidentally entangled in buoy lines in those fisheries by at least 60 percent. At that time, this was the best estimate of the minimum amount of risk necessary to get annual mortality and serious injury rates below PBR based on observed entanglements. NMFS published a Final Environmental Impact Statement (FEIS) on July 2, 2021 (86 FR 35288), with a 30-day comment period. The Record of Decision was signed on August 30, 2021, and the final rule was published on September 17, 2021 (86 FR 51970). The new rule was estimated to meet the minimum 60-percent reduction in risk recommended by the ALWTRT in 2019. Further detail on right whale population estimates, the stock's decline, changes in distribution and reproductive rates, as well as entanglement-related mortalities and serious injuries that have been documented in recent years can be found in Chapters 2 and 4 of the FEIS (NMFS 2021b) and the preamble to the 2021 final rule (86 FR 51970; September 17, 2021).

The 2021 final rule (86 FR 51970, September 17, 2021) left a critical gap in protection of right whales within the MRA, as suggested by sighting data that indicate a high risk of overlap between right whales and buoy lines. The 2021 expansion of the

geographic extent of the MRA, to include Massachusetts state waters north to the New Hampshire border (Figure 1) mirrored the Massachusetts 2021 modification of the state water closure (322 CMR 12.04(2)). The implementation of the MRA Expansion, allowed approximately 200 mi² (518 km²) of federal waters to remain open to trap/pot fishing between state and federal closures. This created the “MRA Wedge” (Figure 1). Center for Coastal Studies (CCS) survey data from 2021 and 2022 indicate that trap/pot gear was concentrated in the MRA Wedge during the closure period (Figure 2). Additionally, CCS and the Northeast Fisheries Science Center (NEFSC) observed right whales within this wedge alongside the presence of aggregated fishing gear during aerial surveys in April 2021, and March and April of 2022. In early 2022, NMFS received letters and emails from Massachusetts Division of Marine Fisheries (MA DMF), Stellwagen Bank National Marine Sanctuary, and non-governmental organizations expressing concerns about this gap in restricted waters and the heightened risk of entanglement for right whales. After reviewing available information and due to the high risk of entanglement in this relatively small area, NMFS issued an emergency rule prohibiting trap/pot fishery buoy lines between federal and state waters within the MRA for the month of April in 2022 (87 FR 11590; March 2, 2022).

On December 12, 2022, MA DMF requested that NMFS extend the MRA Wedge closure into 2023 and 2024, or until new long-term measures are implemented. On January 4, 2023, following the signing of the Consolidated Appropriations Act, MA DMF reiterated their concerns about the MRA Wedge and indicated full support for an annual closure of the area from February through May, or as long as the adjacent areas (i.e., Federal or state waters) remain closed. Further, on January 10, 2023, MA DMF

notified the fishing community of our intent to implement an emergency closure of the MRA Wedge imminently. The critical gap in protection for right whales persists seasonally for the period of February through April of this year; thus, this rule is an extension of the 2022 emergency rule.

Justification for Emergency Action

At the time of the 2022 emergency action, NMFS had already begun the rulemaking process for a second round of modifications to the ALWTRP, because new population information indicated a need for further risk reduction to reduce mortality and serious injury of right whales below PBR in U.S. commercial fisheries. Concurrently, NMFS faced litigation on the 2021 Batched Fisheries Biological Opinion issued under the ESA and the 2021 amendment to the ALWTRP issued under the MMPA (86 FR 51970; September 17, 2021). On July 8, 2022, the District Court for the District of Columbia held that the 2021 final ALWTRP rule violated the MMPA for failing to include measures expected to reduce mortality and serious injury to below the PBR level within six months of implementation. (*Center for Biological Diversity, et al., v. Raimondo, et al.*, (Civ. No. 18-112 (D.D.C.))). As a result, on September 9, 2022, NMFS announced it was scoping in advance of additional rulemaking (87 FR 55405) to meet its MMPA mandate as described by the Court's decision. Then, on November 17, 2022, the Court ordered NMFS to promulgate a new MMPA compliant ALWTRP rule by December 9, 2024. (*Center for Biological Diversity, et al., v. Raimondo, et al.*, (Civ. No. 18-112 (D.D.C.))).

When the 2022 emergency rule was published, NMFS anticipated that the upcoming modifications to the ALWTRP would address the risk associated with the lack

of seasonal restrictions in the MRA Wedge. However, in light of the Court's decisions, an ALWTRP rule addressing the MRA Wedge area was not feasible by February 2023, given that the Court instructed NMFS to promulgate the ALWTRP amendment with measures necessary to meet the PBR level within 6 months of implementation and the ALWTRT had not completed deliberations on recommended measures until December 2, 2022. Accordingly, the risk associated with a lack of seasonal restrictions in the MRA Wedge could not be feasibly addressed by an ALWTRP amendment in time to mitigate an immediate and significant adverse impact to right whales in the MRA Wedge, while the MRA is closed in 2023.

On December 29, 2022, President Biden signed H.R. 2617, the Consolidated Appropriations Act, 2023 ("Consolidated Appropriations Act") into law. The Consolidated Appropriations Act establishes that from December 29, 2022, through December 31, 2028, NMFS' September 17, 2021, rule amending the ALWTRP, *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations*, 86 FR 51970 (September 17, 2021), "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 MMPA and the ESA. H.R. 2617-1631–H.R. 2617-1632 (Division JJ–North Atlantic Right Whales, Title I–North Atlantic Right Whales and Regulations, § 101(a)). The Consolidated Appropriations Act disrupts the Court's 2024 deadline and requires that NMFS promulgate new regulations for the American lobster and Jonah crab fisheries, consistent with the MMPA and ESA, to take effect by December 31, 2028. *Id.*

This emergency rule, however, is permitted pursuant to an exception at § 101(b),

stating that § 101(a) does 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.” This explicit exception in the Consolidated Appropriations Act can only refer to the 2022 MRA Wedge Rule, because that is the only emergency rulemaking implemented under the MMPA, ESA, or other relevant statutes, affecting lobster and Jonah crab, to occur in the past decade. The exception at § 101(b) is a specific reference to the 2022 emergency rule closing the MRA Wedge. If the exception did not cover an extension or finalization of the MRA Wedge Rule, the provision would have no purpose. Moreover, the emergency rulemaking provisions of MMPA Section 118(g) allow for extensions 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. Thus, 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. Here, the 2022 30-day emergency rule was not in effect longer than 270 days (the statute’s temporal limit), but the same conditions exist this year to warrant an extension. Section § 101(b) explains that NMFS may take any action, including this action, to extend the MRA Wedge closure. NMFS is extending the 2022 emergency rule into 2023 and also extending the duration of closure to February through April to match the broader closure of Federal waters in the MRA that left a spatial gap in protection between State and Federal waters and thereby addressing the emergency Congress intended that NMFS address during the 2023 fishing season. Therefore, this extension of the 2022 emergency rule into 2023 is justified, in part, as a consequence of changing circumstances following the 2022 emergency rule which put in place

"emergency measures in an area of anticipated acute risk of entanglement to the population while long-term measures are being developed" (87 FR 11591-92).

This extension of the 2022 emergency rule into 2023 is also justified based on the scientific evidence regarding right whale and gear locations. North Atlantic right whales are known to aggregate in Cape Cod Bay in winter and spring to forage on copepods (*Calanus spp.*). As this food source declines, right whale distribution accordingly shifts and increases the presence of right whales in the MRA Wedge as they leave the Bay. Federal waters reopen to trap/pot fishing in May, increasing the area available to fishermen and reducing the likelihood of high gear density from fishermen "storing" their gear in the MRA Wedge. Aerial surveys from 2021 and 2022 capturing gear sightings on specific days when surrounding waters of the MRA are closed to buoy lines, demonstrate the high risk of entanglement that right whales face while in or traversing the waters of the MRA Wedge (Figure 2). Additionally, sightings of right whales throughout the spring in the MRA Wedge and surrounding waters continue to demonstrate that whales are in the MRA Wedge or likely traveling through this gap in the MRA closure to feed in waters in and around Massachusetts Bay (Figure 3). Without restrictions in place in the MRA Wedge, gear may increase in this area as fishermen pushed out of surrounding waters move gear into this small open area and continue to actively fish. Gear may also increase if fishermen start bringing gear into the MRA Wedge anticipating the May 1 opening of Federal waters. The staging of gear in anticipation of Federal waters opening may be especially likely in April when whale sightings are still high. Given the high likelihood that endangered right whales are present throughout this area and in adjoining waters during February through April, the MRA Wedge poses a particularly high risk of

mortality or serious injury from entanglement in fishing gear. Accordingly, it is critical that this buoy line closure address the gap between State and Federal waters within the MRA Wedge during the MRA closure in Federal waters in 2023 to prevent the likelihood of an immediate and significant adverse impact on right whales in the MRA Wedge.

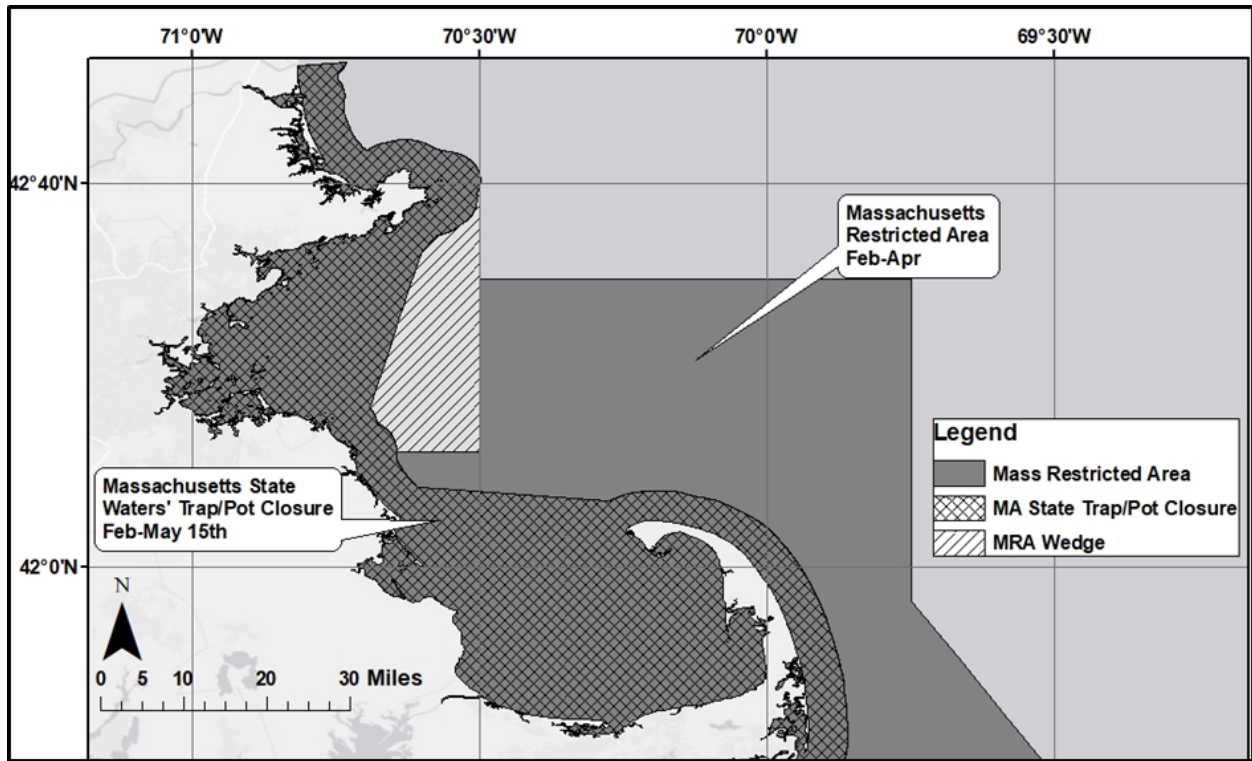


Figure 1. The Massachusetts Restricted Area and MRA Wedge*

*Massachusetts Restricted Area (MRA; dark gray), Massachusetts state waters (dark gray hatched), and MRA Wedge (pale gray hatched) are represented. MRA waters are closed to commercial trap gear from February-April. Massachusetts state regulations prohibit trap/pot fishing in any waters under the jurisdiction of the Commonwealth from February 1 through May 15, but can be extended past May 15 in the continued presence of North Atlantic Right whales or rescinded after April 30 in their absence.

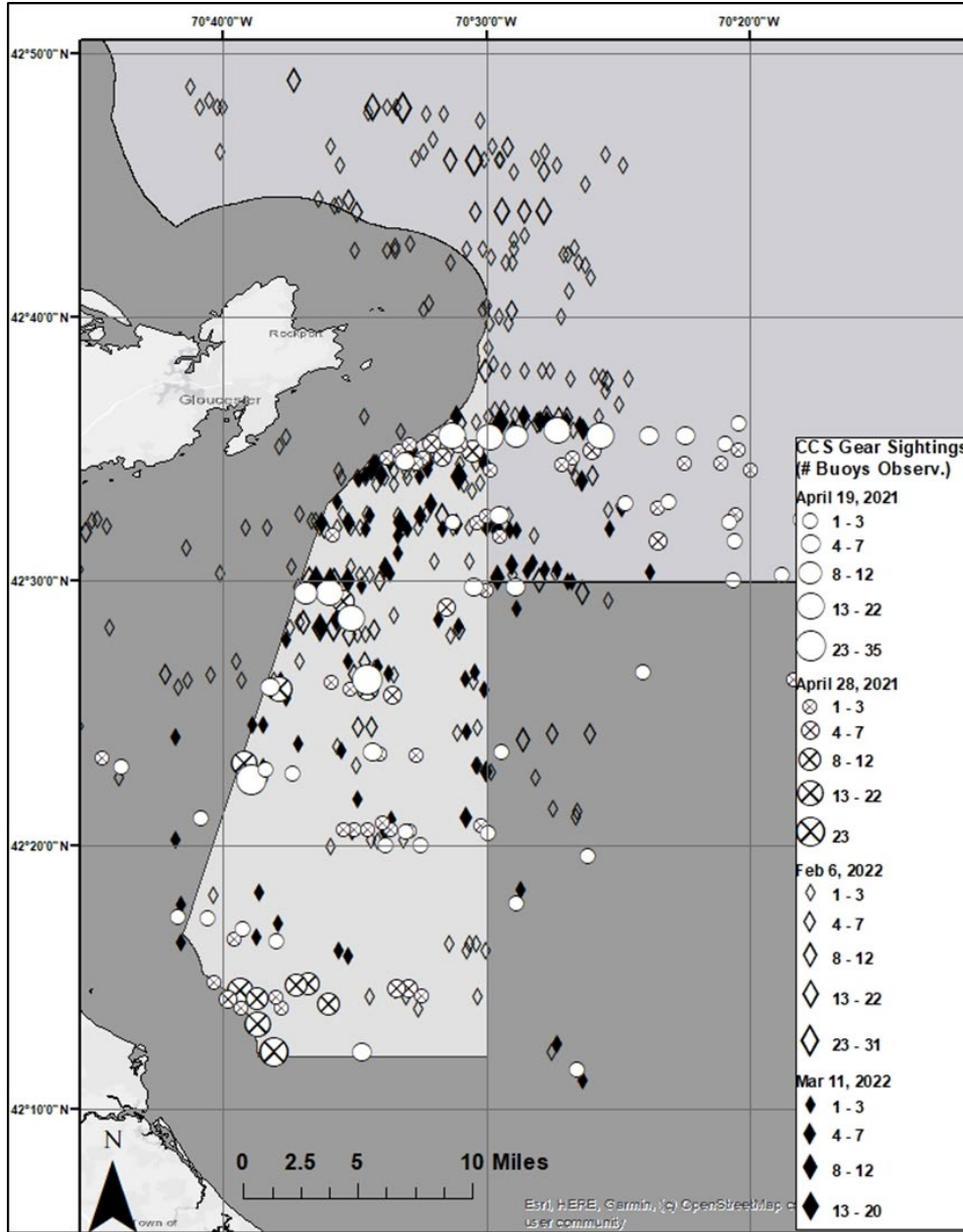


Figure 2. Gear sightings in the Massachusetts Restricted Area “Wedge”*

* The Massachusetts Restricted Area “Wedge” closed by this rule is represented in pale gray. Fishing gear observed by the Center for Coastal Studies (CCS) on April 19, 2021 (white circles), April 28, 2021 (encircled “x”), February 6, 2022 (open diamonds), and March 11, 2022 (black diamonds), were selected as representative snapshots of fishing gear present in survey areas. Surveys concentrate on Cape Cod Bay; surveyors rarely fly north of mid Cape Ann, offshore Rockport, MA. These maps are used for qualitative not quantitative comparison, and differ from Decision Support Tool data.

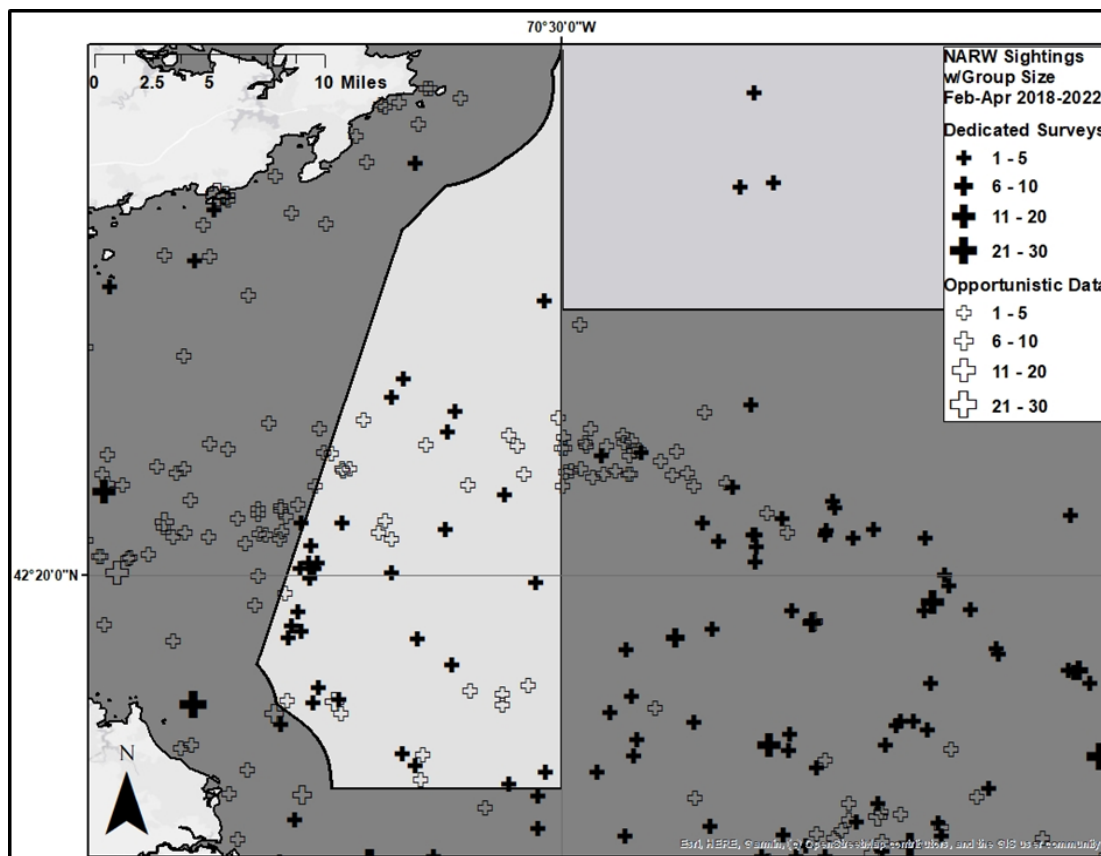


Figure 3. North Atlantic Right Whale sightings spanning February-April 2018-2022*

* North Atlantic Right Whale sightings spanning February-April 2018-2022 in the closed area (pale gray) are represented below. The black crosses are sightings observed during dedicated Northeast Fisheries Science center (NEFSC) and Center for Coastal Studies (CCS) aerial surveys and dedicated NEFSC, CCS, and Stellwagen Bay National Marine Sanctuary shipboard surveys. The open crosses represent sightings opportunistically observed from various platforms.

Emergency Measures

This emergency rule implements a fishery closure in the waters nearly circumscribed by federal and state waters of the MRA, where the use of persistent trap/pot buoy lines is prohibited seasonally (Figure 1). This closure period aligns with the existing MRA closure season for Federal waters, as of February 1 and continues through April 30 (322 CMR 12.04(2)). 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 (NMFS 2021b). The area restricted by this emergency rule includes approximately 200 mi² (518 km²), representing about 1.9 to 2.4 percent reduction of the total trap/pot entanglement risk in the Northeast. This amounts to a 13.2 to 16.6 percent reduction of the total risk of trap/pot fisheries in LMA 1 adjacent to Massachusetts where the threat of entanglement is particularly high for right whales.

The DST used to estimate risk reduction of the emergency closure relies on whale distribution data from 2010 through September 2020 and line estimates from recent years before the new boundaries of the MRA and the new Massachusetts State Water closure were implemented (2015-2018 for lobster, 2010-2020 for other federal trap/pot fisheries, and 2012-2019 for other trap/pot fisheries in state waters). These data likely underestimate the risk reduction according to 2018-2022 right whale sightings (Figure 3). The 2021 restrictions may have also pushed more gear into this area. Furthermore, the right whale habitat density model produced by Duke University and used within the DST estimates that up to 5 whales total are likely to be present in this locality throughout the time frame, but sighting data collected during February-April 2018-2022 indicate that in

2022 there may be more right whales in the area than the model predicts (Figure 3).

Given the empirical evidence collected in 2018-2022, it is likely that the risk reduction estimated in this small area may have even greater value to the right whale population than the DST estimates.

The economic impact of a February-April closure to the lobster and Jonah crab trap/pot fishery is estimated to be small relative to the total value of the fishery. It is estimated to impact between 26-31 vessels in a given month and the total costs including gear transportation costs and lost revenue range from \$338,804 - \$608,346. For this analysis, we evaluated two scenarios for the economic impacts on lobster vessels. We assume half of the vessels would relocate their traps, and the other half would stop fishing. For vessels that stop fishing, the cost differences include lost revenue, gear relocation costs, and saved operating costs from not fishing. The lower and higher end of cost estimates come from the range of lost revenue of the relocated vessels, and a range of gear relocation costs for all vessels. The number of vessels impacted was calculated from the average number of vessels fishing within the MRA Wedge in a given month from 2017 to 2021 according to Vessel Trip Report (VTR) data, and was adjusted based on the average percentage of Lobster Management Area 1 lobster-only vessels required to provide VTR data in Massachusetts (41 percent). Landing values were similarly averaged for the time period using landing pounds from VTR data and lobster prices in Massachusetts from dealer reports.

Classification

The NMFS Assistant Administrator has determined that this emergency rule is consistent with the ALWTRP, with the emergency rulemaking authority under MMPA

section 118(g), and with other applicable laws including the Consolidated Appropriations Act, 2023. H.R. 2617-1631–H.R. 2617-1632 (Division JJ–North Atlantic Right Whales, Title I–North Atlantic Right Whales and Regulations).

The Office of Management and Budget has waived review of this emergency rule under Executive Order 12866. NMFS has prepared a regulatory impact review.

This emergency final rule is exempt from the procedures of the Regulatory Flexibility Act because the rule will not include prior notice or an opportunity for public comment.

This emergency final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

This emergency rule falls within the scope of the analysis conducted in the informal ESA consultation, *Endangered Species Act section 7 consultation on the implementation of the Atlantic Large Whale Take Reduction Plan (May 25, 2021)*, a separate consultation is not required for this action. The emergency rule modifies a separate action independent from the *2021 Endangered Species Act Section 7 Consultation on the: (a) Authorization of the American Lobster, Atlantic Bluefish, Atlantic Deep-Sea Red Crab, Mackerel/Squid/Butterfish, Monkfish, Northeast Multispecies, Northeast Skate Complex, Spiny Dogfish, Summer Flounder/Scup/Black Sea Bass, and Jonah Crab Fisheries and (b) Implementation of the New England Fishery Management Council’s Omnibus Essential Fish Habitat Amendment 2 (“2021 BiOp”)*. The emergency rule was not developed during the fisheries consultation process that culminated in the 2021 BiOp and it satisfies its ESA and MMPA requirements through consultation that was entirely distinct from the 2021 BiOp. The emergency rule is not

associated with the 2021 BiOp, and was not analyzed under the 2021 BiOp, nor does the 2021 BiOp provide ESA or MMPA coverage for the emergency rule.

Pursuant to 5 U.S.C. 553(b)(3)(B) and (d)(3) the Assistant Administrator for Fisheries finds good cause to waive notice and public comment, and the 30 day delay in rule effectiveness. Right whale distribution data identify risk in unrestricted waters encapsulated on three sides by the expanded MRA while seasonal restrictions are in place from February through April in surrounding waters, as noted in the *Justification for Emergency Action* section above. While publication of this rule will implement this closure immediately, the fishing community was notified on January 10, 2023, of the anticipated closure of the MRA Wedge by the Massachusetts Division of Marine Fisheries, which fully supports this closure. This notification provides time for fishermen to comply with the emergency restrictions by removing or relocating their gear from the MRA Wedge before the seasonal closure is effective.

In summary, this emergency action is necessary to prevent entanglements of right whales in an area of elevated risk in Massachusetts Bay in February through April of 2023, while seasonal restrictions are in place in nearby Federal waters. Providing prior notice through proposed rulemaking and public comment period in the normal rulemaking process, or providing a delay in effective date, would delay implementation of time sensitive emergency measures necessary to prevent incidental mortality and serious injury of right whales that would likely have an immediate and significant adverse impact on the species. Providing notice and comment or a delay in effective date would prevent NMFS from meeting its obligations to protect right whales from entanglements in the MRA Wedge, in contravention of the MMPA and ESA, because

such a delay would inhibit NMFS' ability to stave off an imminent risk to right whales. Similarly, providing notice and comment or a delay in effective date would harm the public by preventing NMFS' from immediately addressing this emergency. The emergency will not be adequately addressed if the action is delayed. For the reasons outlined above, NMFS finds it impracticable and contrary to the public interest to provide prior notice and public comment on these emergency measures. For the same reasons, NMFS finds good cause to waive the delay in the effective date of this rule.

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List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential business information, Endangered Species, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: January 30, 2023.

Samuel D. Rauch, III

Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 229 is amended as follows:

**PART 229--AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE
MARINE MAMMAL PROTECTION ACT OF 1972**

1. The authority citation for 50 CFR part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*; § 229.32(f) also issued under 16 U.S.C. 1531
et seq.

2. In § 229.32, add paragraph (c)(3)(iv) to read as follows:

§ 229.32 Atlantic large whale take reduction plan regulations.

* * * * *

(c) * * *

(3) * * *

(iv) ***Massachusetts Restricted Area Emergency Extension.*** During the period from February 1, 2023 through April 30, 2023, the Massachusetts Restricted Area defined in paragraph (c)(3)(i) of this section is extended from the Massachusetts state waters boundary at MRAW1 to MRAW2 (also MRA3 in Table 11 to paragraph (c)(3)(i)), then it is bounded by a rhumb line connecting points MRAW2 to MRAW3 (MRA4), and then bounded by a rhumb line connecting points MRAW3 through MRAW4 (MRA5) back to MRAW1, in the order detailed in Table 11.1 to paragraph (c)(3)(iv); From February 1, 2023 through April 30, 2023, it is prohibited to fish with, set, or possess trap/pot gear in the area in this paragraph (c)(3)(iv) of this section unless it is fished without buoy lines or with buoy lines that are stored on the bottom until remotely released for hauling, or buoy lines that are stowed in accordance with § 229.2. Authorizations for fishing without buoy lines must be obtained if such fishing would not

be in accordance with surface marking requirements of §§ 697.21 and 648.84 of this title or other applicable fishery management regulations. The minimum number of trap/rawl gear configuration requirements specified in paragraph (c)(2)(iv) of this section remain in effect unless an exemption to those requirements is authorized.

Table 11.1 to (c)(3)(iv)

Point	Lat	Long
MRAW1	42° 39.77'	70° 30'
MRAW2 (MRA3)	42°12'	70° 38.69'
MRAW3 (MRA4)	42° 12'	70° 30'
MRAW4 (MRA5)	42° 30'	70° 30'
MRAW1	42° 39.77'	70° 30'

* * * * *