

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

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

Plaintiffs,

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.

DECLARATION OF BETH CASONI

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**.
9. On February 1, 2023, I received an email from the Atlantic Large Whale Take Reduction Team at the Center for Coastal Studies. True and correct copies of that email and its attachment are appended herein as **Exhibits C and D**, respectively.
10. The email and its attachment indicated that the Center from Coastal Studies had performed an aerial study of the Massachusetts Bay on February 1, 2023 and had spotted

zero Right Whales, or any other large marine mammal, in the Massachusetts Bay, including in the area closed by the “emergency closure.”

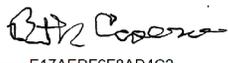
11. On September 18, 2023, I received notice that NMFS was planning to “finalize” the 2023 Wedge Closure, and caused a comment to be submitted on behalf of MLA. That comment is attached herein as **Exhibit E**.

12. On February 6, 2024, I received notice that NMFS has announced “Final Rule to Make Wedge a Permanent Part of the Massachusetts Restricted Area from February 1 to April 30.” That Final Rule is attached herein as **Exhibit F**.

13. On January 9, 2024, the Center for Coastal Studies conducted an aerial surveillance of the Wedge and sighted no Right Whales. A true and correct copy of that report is attached hereto as **Exhibit G**.

FURTHER YOUR DECLARANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 9th day of February, 2024 in the City of Marshfield, Commonwealth of Massachusetts.

DocuSigned by:

E17AEDF6F8AD4C2...
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](#)

[REDACTED]

[REDACTED]

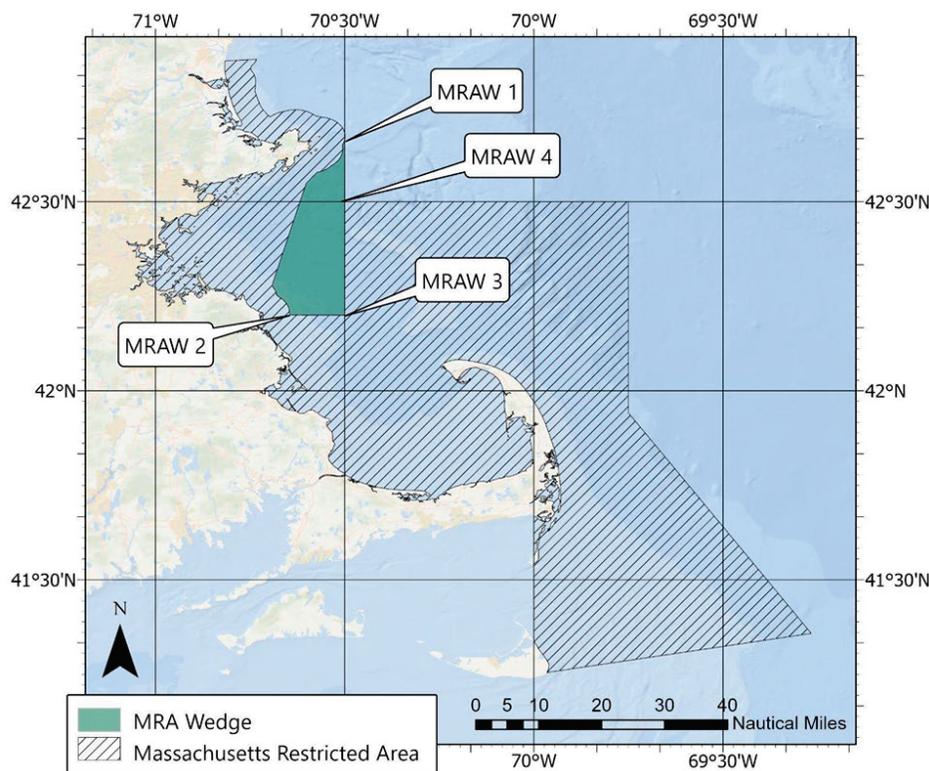
[REDACTED]

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.

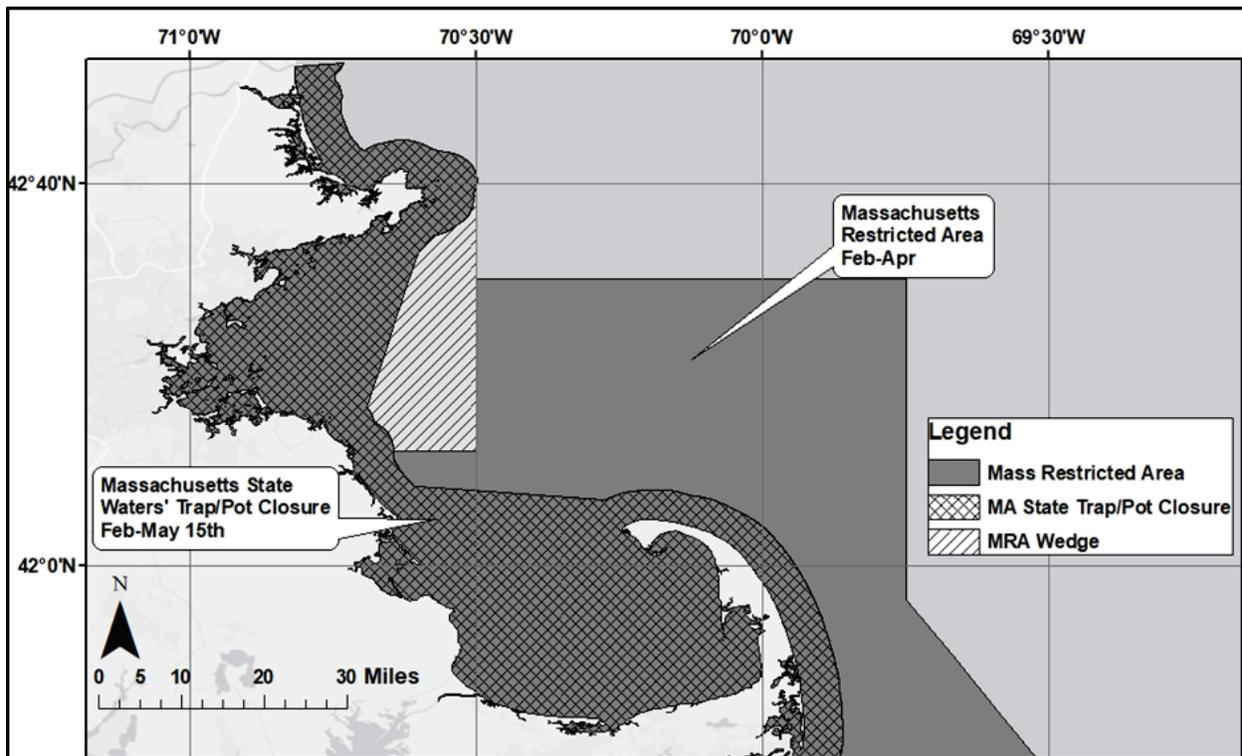


Figure 1. The Massachusetts Restricted Area and MRA Wedge*

*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.

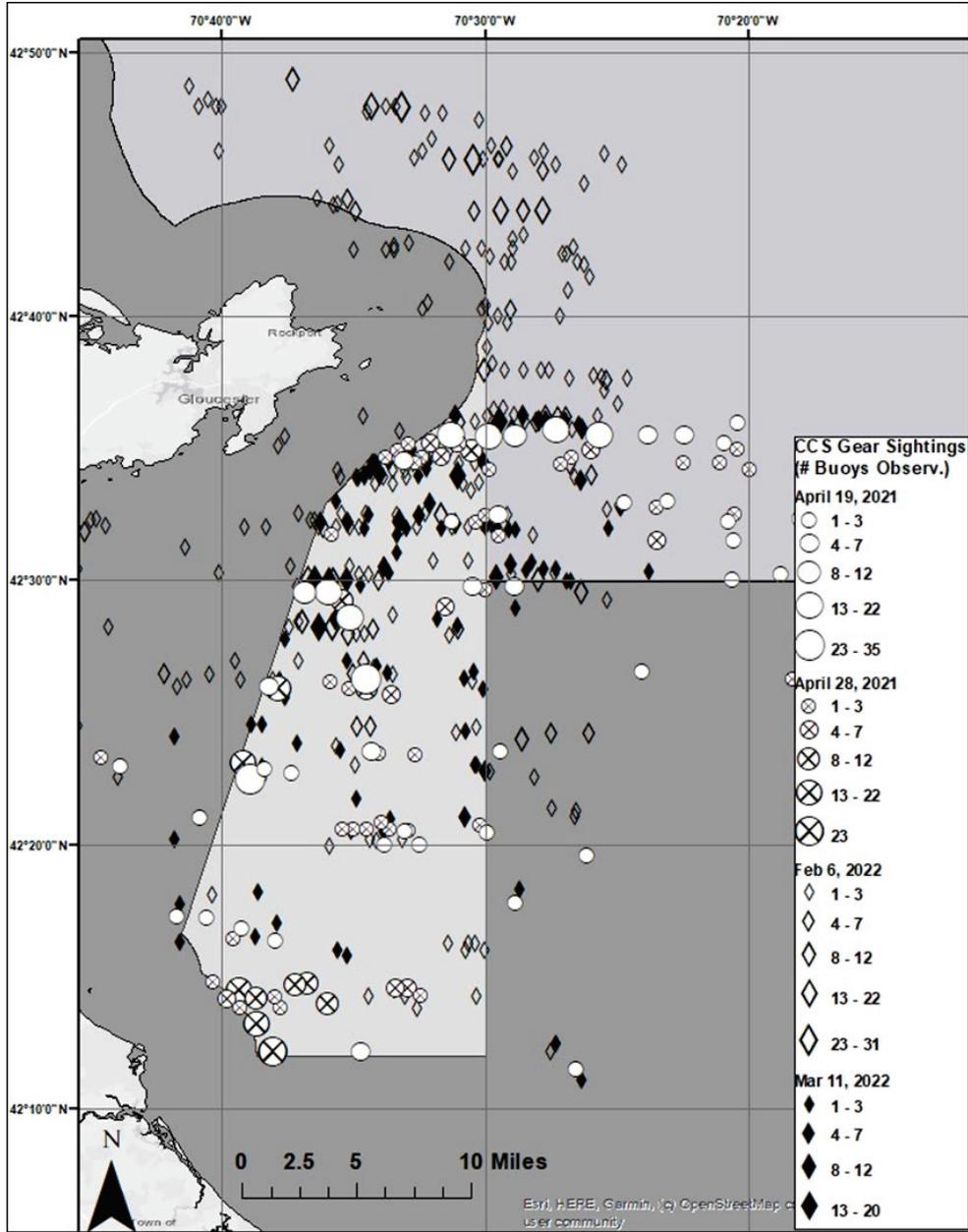


Figure 2. Gear sightings in the Massachusetts Restricted Area “Wedge”*

* 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.

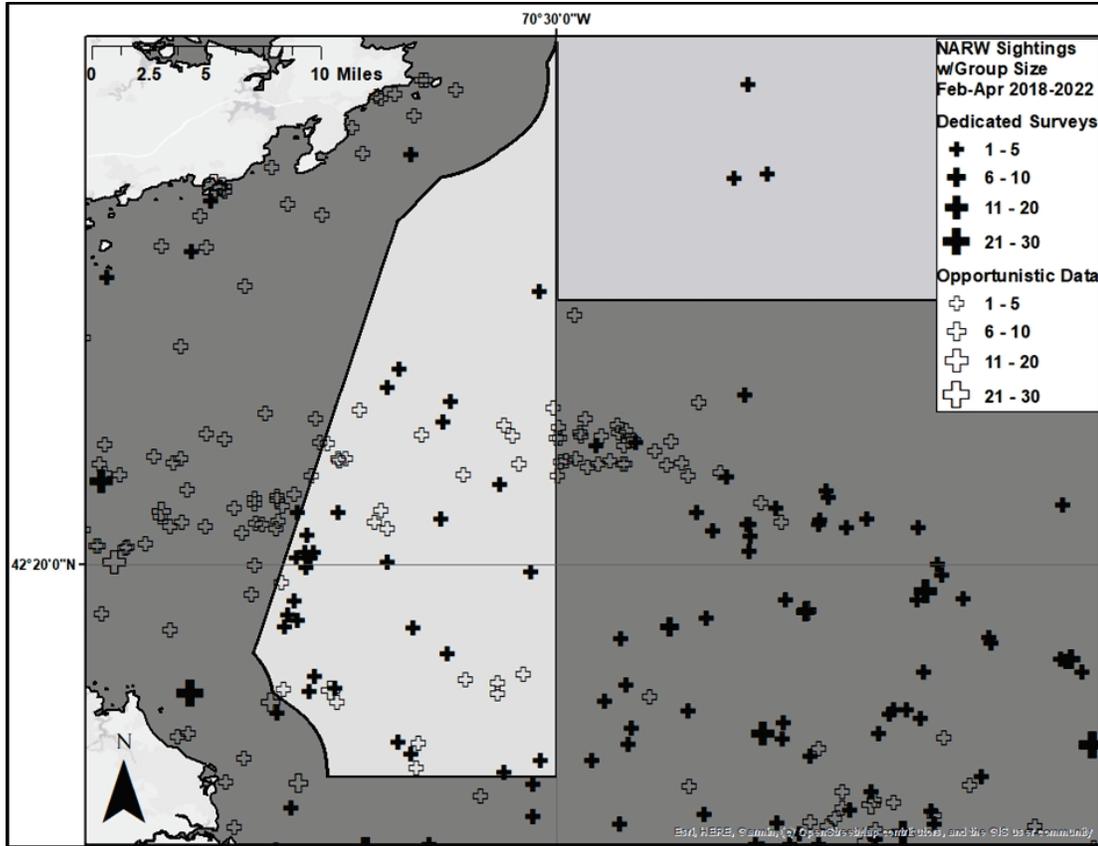


Figure 3. North Atlantic Right Whale sightings spanning February-April 2018-2022*

* 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.

References

- Hayes, S. H., E. Josephson, K. Maze-Foley, P. E. Rosel, and J. Wallace. 2022. US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2021. Northeast Fisheries Science Center, Woods Hole, MA.
- NMFS. 2019. Guidance on the Application of NEPA for Emergency Response Actions. Memo to National Environmental Policy Act (NEPA) Practitioners. September 23, 2019.
- NMFS. 2021b. Final Environmental Impact Statement, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule. NOAA, National Marine Fisheries Service, Greater Atlantic Regional Fisheries Office.
- NMFS. 2022. Environmental Assessment, Finding of No Significance, and Regulatory Impact Review for the 2022 Emergency Final Rule to Reduce Right Whale Interactions with Lobster and Jonah Crab Trap/Pot Gear. NOAA, National Marine Fisheries Service, Greater Atlantic Regional Fisheries Office.
- Pace, R.M., P.J. Corkeron, and S.D. Kraus. 2017. State-space mark-recapture estimates

reveal a recent decline in abundance of North Atlantic right whales. *Ecology and Evolution* 7:8730-8741.

Pace, R. M. 2021. Revisions and Further Evaluations of the Right Whale Abundance Model: Improvements for Hypothesis Testing. NOAA Technical Memorandum NMFS-NE-269. Northeast Fisheries Science Center, Woods Hole, MA.

Pace, R. M., R. Williams, S. D. Kraus, A. R. Knowlton, and H. M. Pettis. 2021. Cryptic mortality of North Atlantic right whales. *Conservation Science and Practice* 2021:e346.

Pettis, H. M., R. M. Pace, and P. K. Hamilton. 2022. North Atlantic Right Whale Consortium 2021 Annual Report Card. Report to the North Atlantic Right Whale Consortium.

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/trawl 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'

* * * * *

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Beth Casoni <beth.casoni@lobstermen.com>
Sent: Wednesday, February 1, 2023 5:29:22 PM
To: Sam Blatchley <sblatchley@ecklandblando.com>
Cc: Sooky Sawyer (MLA President) <sooky55@aol.com>
Subject: Fwd: 01Feb2023 CCS Right Whale Survey



Begin forwarded message:

From: CCS Right Whale <narw@coastalstudies.org>
Date: February 1, 2023 at 4:35:31 PM EST
To: Erin Burke <erin.burke@state.ma.us>, Dan McKiernan <dan.mckiernan@state.ma.us>
Subject: 01Feb2023 CCS Right Whale Survey

Please see attached PDF for details on today's right whale survey.
Zero right whales were observed.

Kind regards,

CCS Right Whale Team

--

These observations are considered preliminary pending detailed analysis and quality control. Please do not reproduce this information without the permission of CCS and DMF.

If you would like to be removed from future emails of this nature, please state your request in a reply to this email.

--

Right Whale Ecology Program
Center for Coastal Studies
5 Holway Avenue
Provincetown, MA 02657
(508) 487-3623 x119
www.coastalstudies.org

[RWEP Amazon Wish List](#)



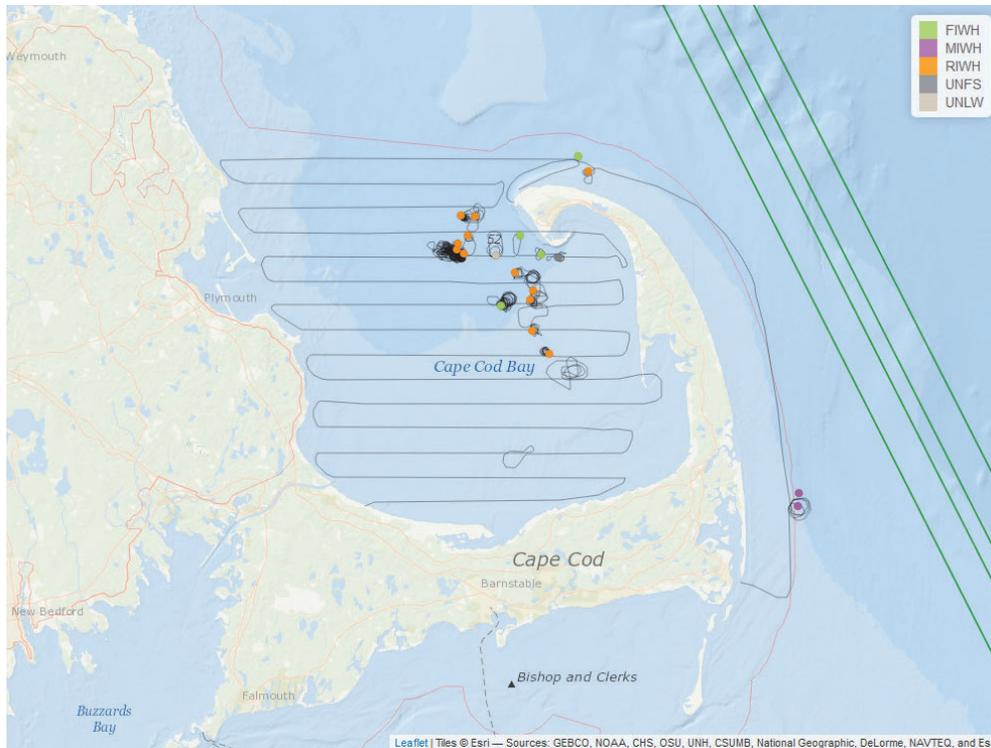
Center for Coastal Studies Provincetown

HIEBERT MARINE LABORATORY • 5 Holway Avenue • Provincetown, MA 02657
 tel (508) 487-3622/(508) 487-3623 fax (508) 487-4695

To: Dan McKiernan / Erin Burke
 Massachusetts Division of Marine Fisheries

From: Amy James
 Right Whale Ecology Program

Survey Date: 30 January 2023
Survey Number: CCS 982
Report Time: 30 January 2023 at 17:31



On Monday, 30 January 2023, the aerial team completed 16 track lines in Cape Cod Bay working from south to north. Beaufort ranged from 0 to 3, and weather ranged from haze to clear to gray. Survey effort was temporarily suspended to provide disentanglement support for the 2021 calf of #3720.

Table 1: Species Sighted

Species	Total Number	Species	Total Number
Atlantic White-Sided Dolphin	1	North Atlantic Right Whale	16
Fin Whale	4	Unidentified Fin or Sei Whale	1
Harbor Seal	1	Unidentified Large Whale	1
Minke Whale	2		

These observations are considered preliminary pending detailed analysis and quality control. Please do not reproduce this information without the permission of CCS and DMF.



Table 2: Right Whale Sighting Details

Date	Time (EST)	Latitude	Longitude	Number	Calves	Behavior
30-Jan-23	08:04:11	42.09550	-70.14317	1		
30-Jan-23	10:16:51	41.90950	-70.19750	1		Feeding
30-Jan-23	11:10:44	41.93300	-70.22033	1		
30-Jan-23	11:24:29	41.96433	-70.22350	1		
30-Jan-23	11:29:49	41.97350	-70.21867	1		
30-Jan-23	11:42:54	41.99267	-70.24367	1		
30-Jan-23	12:04:41	42.01133	-70.31383	1		Feeding, Entangled
30-Jan-23	13:24:27	42.01583	-70.32383	1		
30-Jan-23	13:43:49	42.02133	-70.32267	1		
30-Jan-23	14:39:21	42.02967	-70.30900	1		Feeding
30-Jan-23	15:05:11	42.04933	-70.29917	2		
30-Jan-23	15:06:33	42.05000	-70.31867	4		SAG

These observations are considered preliminary pending detailed analysis and quality control. Please do not reproduce this information without the permission of CCS and DMF.



Samuel P. Blatchley*

617.217.6936

sblatchley@ecklandblando.com

*Admitted to Practice in MA, ME, NY, & RI

October 17, 2023

Janet Coit – Assistant Administrator for Fisheries
National Marine Fisheries Services
1315 East-West Highway
Silver Spring, MD 20910

Re: Public Comment to NMFS re: Docket No. 230912-0217

Assistant Administrator Coit,

My law firm, Eckland & Blando LLP, represents the Massachusetts Lobstermen’s Association. I am writing this letter in response to NOAA’s proposed illegal permanent closure of the Massachusetts Restricted Area Wedge (“Wedge”). NOAA’s proposed permanent Wedge Closure is a clear violation of the Consolidated Appropriations Act of 2023 (“CAA”) § 101 and the D.C. Circuit’s recent decision in *Maine Lobstermen Association v. Raimondo*, 70 F.4th 582 (D.C. Circuit 2023). We expect, after you have reviewed this letter, NMFS will withdraw its planned illegal regulation.

The Proposed Rule is Illegal under the CAA

As you may recall, on March 1, 2022, NOAA, through 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 the Wedge. 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. The 2022 Wedge Closure lasted from April 1, 2022, to April 30, 2022. *Id.* at 11590. The waters reopened on May 1, 2022.

While this was ongoing, NOAA attempted to place severe and illegal restrictions on the lobster industry, justified by a 2021 Biological Opinion. These restrictions were challenged in *Maine Lobstermen’s Association, et al. v. NMFS, et al.*, No. 1:21-cv-02509-JEB (D.D.C. 2021). The District of D.C. issued an opinion ruling the 2021 Biological Opinion valid and enforcing the regulations against the lobster industry; that decision was appealed. The case recently resolved with the D.C. Circuit *Maine Lobstermen Association v. Raimondo*, 70 F.4th 582 (D.C. Circuit 2023) unanimously ruling that the 2021 Biological Opinion was illegal and invalid as overly harsh and burdensome on the lobster industry. Thus, any regulations promulgated on the



Public Comment to NMFS re: Docket No. 230912-0217

October 17, 2023

Page 2 of 6

basis of the 2021 Biological Opinion and the underlying science supporting it, such as the proposed permanent wedge closure, are also illegal.

In response to the District of D.C.'s order, on December 29, 2022, the Consolidated Appropriations Act, 2023, H.R. 2617 ("CAA") was signed into law by President Joseph R. Biden. (*Bill Signed: H.R. 2617, The White House, Dec. 29, 2022, <https://www.whitehouse.gov/briefing-room/legislation/2022/12/29/bill-signed-h-r-2617/>.*) 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 until December 31, 2028. H.R. 2617 §110(a). However, the CAA provided that § 110(a) "shall not apply to an existing emergency rule, or any action taken to extend or make final an emergency that is in place on the date of enactment of this Act, affecting lobster and Jonah crab." *Id.* § 101(b). Therefore, the CAA limited NMFS from issuing any new regulations except for extending or finalizing emergency rules in place as of December 29, 2023. *Id.*

Despite the 2022 Wedge Closure ending on May 1, 2022, on NMFS announced on January 31, 2023, 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. FR Docket No. FR-230130-0030. No doubt anticipating a challenge to its unlawful rulemaking, NMFS preemptively attempted to explain why it was allowed to issue the 2023 Wedge Closure despite the CAA explicitly banning it from issuing new rules. In effect, NMFS argued that the 2022 Wedge Closure, despite ending on May 1, 2022, never actually ended because the emergency situation for the North Atlantic Right Whale never ended, and thus the 2023 Wedge Closure was just an extension of the 2022 Wedge Closure.

To wit, NMFS asserted first that MMPA § 118(g)'s emergency rulemaking provision "allow[s] 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." FR Docket No. FR-230130-0030 at pdf pg. 9. It then stated 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.*". NMFS sought shelter in MMPA § 118(g) because it believed that this allows it to use CAA §101(b)'s emergency rule exception. It was wrong.

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.". 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." There is no reference to the 2022 emergency rule

Public Comment to NMFS re: Docket No. 230912-0217

October 17, 2023

Page 3 of 6

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 concluded that, so long as an emergency exists, it can continue to issue emergency rules without falling afoul of the CAA. This absurd contention is clearly illegal.

Statutory interpretation shows NMFS to be wrong. Beginning, as all statutory interpretation must, with the text, CAA § 101 specifically prohibits NMFS from promulgating new regulations regulating the lobster and Jonah crab industry until 2028. CAA § 101(a); *City of Clarksville v. FERC*, 888 F.3d 477, 482 (D.C. Cir. 2018) (“In addressing a question of statutory interpretation, we begin with the text.”). It then provides a narrow exception for “existing emergency rules” or “extensions” of the same that existed at the time of CAA’s passage. CAA § 101(b). Thus, NMFS may only issue a new regulation if it is an extension of an emergency rule that existed as of December 29, 2023. *Janko v. Gates*, 741 F.3d 136, 139–40 (D.C. Cir. 2014) (“Indeed, “[t]he preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’”).

It is unquestionable that the 2023 Wedge Closure is not an extension of the 2022 Wedge Closure. NMFS’s itself revealed this to be untrue when Ms. Trego stated that the 2023 Wedge Closure is “similar” to the 2022 Wedge Closure. Similar is not the same. *In re Sienega*, 18 F.4th 1164, 1169 (9th Cir. 2021) (“Similar does not mean the same.”); *United States v. Bezmalinovic*, No. S3 96 CR. 97 MGC, 1996 WL 737037, at *2 (S.D.N.Y. Dec. 26, 1996) (“It is true that ‘similar’ does not mean ‘the same.’”) (citing *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980)); *Hearts With Haiti, Inc. v. Kendrick*, No. 2:13-CV-00039-JAW, 2015 WL 3649592, at *8 (D. Me. June 9, 2015) (“Finally, ‘similar’ does not mean ‘the same.’”). CAA § 101(b) does not contain an exception for “similar” emergency rules, only for extensions of the exact same emergency rule. NMFS, by its own words, has admitted that the 2023 Wedge Closure is a different closure than the 2022 Wedge Closure, and thus the 2023 Wedge Closure violates the CAA.

Further, the 2022 Wedge Closure definitively ended on May 1, 2022, and federal waters were open until February 2023. This clear temporal break showed the 2023 Wedge Closure was not the same as the 2022 Wedge Closure. Once the expressly promulgated timeline of the emergency order expires, so too must the emergency rule. *See, e.g., Starbound, LLC v. Gutierrez*, No. C07-0910-JCC, 2008 WL 1752219, at *4 (W.D. Wash. Apr. 15, 2008) (acknowledging NMFS’s concession that an emergency rule’s effect only lasts as long as specified in the rule itself.) Indeed, NMFS expressly assumed the position that so long as the “emergency” which prompted the emergency rule continues to exist, then so too does the emergency rule. In so doing, NMFS has rewritten CAA § 101(b) to the following: “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.” And it is no surprise that NMFS would prefer that CAA § 101(b) had been written as such, given that the North Atlantic Right Whale has been an endangered species for fifty-three years, meaning that the alleged

Public Comment to NMFS re: Docket No. 230912-0217

October 17, 2023

Page 4 of 6

“emergency” has been ongoing for over five decades. (<https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#:~:text=North%20Atlantic%20right%20whales%20have,years%20has%20been%20below%20average.>)

If an extension of an emergency rule is predicated on the continued existence of the emergency, then NMFS will be empowered to “extend” its 2022 Wedge Closure through to 2028; indeed, nothing is stopping it from “extending” the 2022 Wedge Closure for 269 days each year, effectively shutting down the lobster industry. Thus, despite Congress’ clear mandate that NMFS stop regulating the lobster and Jonah crab industry for MMPA purposes until 2028, NMFS has effectively read the statute as allowing it to emergency regulate the lobster industry to its heart’s content, because it happened to issue a long-expired emergency rule in April 2022. But NMFS is not permitted to rewrite a plainly written statute to suit its whims. *Bostock v. Clayton Cnty., Georgia*, 207 L. Ed. 2d 218, 140 S. Ct. 1731, 1749 (2020) (“The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”) (citing *Carciere v. Salazar*, 555 U.S. 379, 387 (2009); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254 (1992); *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Doing so is arbitrary and capricious and grounds for the 2023 Wedge Closure to fail.

Knowing that it cannot stand on the actual wording of CAA § 101(b), NMFS hypothesized that Congress must have meant the 2022 Wedge Closure when referring to “emergency rule”.¹ Of course, NMFS cites no legislative history to support this position. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593, n. 10 (1980) (“But neither the language of the statute nor its legislative history supports either of these proposed readings of § [the statute]”); *Cf. Hays v. Leavitt*, 583 F. Supp. 2d 62, 72 (D.D.C. 2008), *aff’d sub nom. Hays v. Sebelius*, 589 F.3d 1279 (D.C. Cir. 2009) (“However, the legislative history does provide support for Hays’ construction of the statutory text.”). This is because it cannot. The only legislative history goes the exact opposite way, as the Honorable Senator Angus King specifically stated that the purpose of §101(a)-(b) is to “pause the economic death sentence” caused by the District of D.C.’s prior rulings and NMFS’s regulations against the lobster industry.” 168 Cong. Rec. S9591, S9607–08 (daily ed. Dec. 20, 2022).

¹ This ignores the actual context in which CAA §101 was passed. CAA § 101 was passed at a time when NMFS was seeking to promulgate regulations in accordance with the 2021 Biological Opinion it had produced, with those regulations seeking to reduce the alleged contribution of the lobster and Jonah crab pot fisheries to North Atlantic Right Whale mortalities from allegedly 7.57 to 2.69, then 2.61, then 1.04, and finally to 0.136. This prompted a flurry of litigation that warned that such regulations would obliterate the lobster industry. It is within that cauldron of concerns that Congress passed CAA § 101, declaring the lobster industry to be in compliance with the ESA and MMPA until 2028, to provide time to evaluate the use of existing gear technologies, for scientific research, and for the development of new technologies. CAA § 101(a)(1). Thus, the clear purpose of CAA § 101 was to limit NMFS’s ability to promulgate new regulations against the lobster industry under the MMPA and ESA. And this purpose is supported by the actual language of CAA § 101.

Public Comment to NMFS re: Docket No. 230912-0217

October 17, 2023

Page 5 of 6

Even if NMFS did have legislative history to support it, its construction of CAA § 110(a)-(b) ignored the reality that, if Congress meant the 2022 Wedge closure when it wrote “emergency rule,” it could have written so. But “Congress didn't choose those other words.” *Murphy v. Smith*, 138 S. Ct. 784, 787–88 (2018). “And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.” *Id.*; see also *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 17, 21 (D.D.C. 1993) (“a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation[.]”). As the United States Supreme Court cannot rewrite statutes passed by Congress, neither can NMFS. CAA § 101(b) makes mention only of emergency rules existing as of December 29, 2023, it makes no mention of the 2022 Wedge Closure and it is arbitrary and capricious for NMFS to rewrite CAA § 101(b) to fit what it assumes Congress must have meant.

In sum, NMFS’ attempt to issue the 2023 Wedge Closure was illegal. In fact, District of D.C. Judge Boasberg agreed, warning NMFS that he believed MLA was right on the legal argument that NMFS was not allowed to issue the 2023 Wedge Closure. (TRO Hr’g Tr. 30:6- 12 (“I think that the plaintiffs may well have a better argument on the merits than the government. It's a close question and one that I probably need to think about more. But in the time that I have had, I think that Mr. Cragg has probably got a better reading of the way -- a better interpretation of the exception.”)). Therefore, NMFS is on notice that a court of law has already said it is violating the law. Its efforts to double down on that illegality now can only be arbitrary and capricious.

The Proposed Rule is Illegal under *Maine Lobstermen Association v. Raimondo*, 70 F.4th 582 (D.C. Circuit 2023)

Further, this Proposed Rule cannot possibly be legal under *Maine Lobstermen Association v. Raimondo*, 70 F.4th 582 (D.C. Circuit 2023). As you are no doubt aware, the Court determined that NMFS was not allowed to use worst case scenarios, that the ESA does not permit a presumption in favor of endangered species, but rather requires outcomes reasonably certain to occur. The Court was especially harsh against NMFS arguments that because the ESA does not say how to handles uncertain data, it could use worst case scenarios. It said NMFS “legal reasoning was not just wrong; it was egregiously wrong”. *Id.* at 598. In other words, the Court completely rejected NMFS’ argument against worst case scenarios that forms the underlying basis for justifying this Proposed Rule.

In breaking down this argument, the Court noted that NFMS was “inconsistent” (a legally nice word for lying) about the facts. *Id.* at 597. First, it noted that NMFS had said repeatedly that nothing required it to use worst case scenarios, and then it suddenly decided that it had to use worst case scenarios. *Id.* Second, it noted NMFS relied on one line of legislative history not the actual text of the statute, and that was entirely unacceptable. *Id.* at 598. Third, it noted that the cases cited by NMFS do not actually support what NMFS claimed it did. *Id.* For these reasons, it found that NMFS acted arbitrary and capriciously such as to make the 2021 Biological Opinion illegal. *See generally, id.*

Public Comment to NMFS re: Docket No. 230912-0217

October 17, 2023

Page 6 of 6

The Court, attacking the idea it had to defer to agencies, noted that its first duty is to interpret the law, and it cannot uphold an agency action contrary to law. *Id.* at 596-97. Nothing in the ESA requires worst case scenarios, the Court determined, and thus, even though NMFS tried to claim that the Court had to defer on scientific questions (and that, it didn't really use worst case scenarios because the result would be the same), NMFS was wrong. *Id.* The Court also noted that NMFS completely failed to consider the severe economic damage that could befall the lobster industry, not consider the other worst-case scenario that none of the new technology it wants to mandate would actually help. *Id.* at 596. And yet, NMFS marches forward repeating the same mistake.

Finally, the Court determined that the error was not harmless because the use of worst-case scenarios tainted the entire Biological Opinion. It especially noted how absurd it was for NMFS to allocate entanglements 50/50, when substantially more entanglements occurred in Canada and the Canadian data was outdated. *Id.* at 601.

Despite the clear and complete rebuke by the D.C. Circuit, NMFS is proceeding with this Proposed Rule as if nothing has changed. But the D.C. Circuit has removed any doubt as to the validity of the science underlying NMFS' illegal actions and, as NMFS is relying on the same science here, its Proposed Rule is illegal, arbitrary, and capricious.

Conclusion

Because the 2023 Wedge Closure was illegal, the attempt to permanently close the Wedge is unquestionably illegal as well. Further, because NMFS cannot rely on the 2021 Biological Opinion, it has no scientific basis to issue the Wedge Closure.

Let me be clear. If NMFS proceeds with its efforts to issue a permanent Wedge Closure, we will sue them and we will win. NMFS is charging forward with a illegal proposed action and a court of law will hold NMFS to account. As such, we expect that you will withdraw this proposed illegal rule.

Your time and attention to this matter is appreciated.

Kindest regards,



Samuel P. Blatchley, Esq.

cc: Daniel Cragg, Esq.
Robby Dube, Esq.
Arthur Sawyer
Beth Casoni

a portion of the safety zone as listed in 33 CFR 165.T07–0806(a)(1), and the safety zones listed in (a)(2) and (a)(3) on February 2, 2024 through February 10, 2024, for the AXIOM–3 Commercial Crew mission reentry vehicle splashdown, and the associated recovery operations in the U.S. EEZ. These safety zones are located within the COTP Savannah Area of Responsibility (AOR) offshore of Jacksonville, Florida. The Coast Guard is activating these safety zones in order to protect vessels and waterway users from the potential hazards created by reentry vehicle splashdowns and recovery operations. In accordance with the general regulations in 33 CFR part 165, subpart C, no U.S.-flagged vessel may enter the safety zones unless authorized by the COTP Savannah or a designated representative except as provided in § 165.T07–0806(d)(3). All foreign-flagged vessels are encouraged to remain outside the safety zones.

There are two other safety zones listed in § 165.T07–0806(a)(2) through (a)(5), which are located within the COTP St. Petersburg and Jacksonville AORs, that are being simultaneously activated through separate notifications of enforcement of the regulation document issued under Docket Numbers USCG–2024–106, and USCG–2024–0085.¹

Twenty-four hours prior to the Axiom-3 recovery operations, the COTP Jacksonville, the COTP Savannah, the COTP St. Petersburg, or designated representative will inform the public that whether any of the five safety zones described in § 165.T07–0806, paragraph (a), will remain activated (subject to enforcement). If one of the safety zones described in § 165.T07–0806, paragraph (a), remains activated it will be enforced for four hours prior to the Axiom-3 splashdown and remain activated until announced by Broadcast Notice to Mariners on VHF–FM channel 16, and/or Marine Safety Information Bulletin (as appropriate) that the safety zone is no longer subject to enforcement. After the Axiom-3 reentry vehicle splashdown, the COTP or a designated representative will grant general permission to come no closer than 3 nautical miles of any reentry vehicle or space support vessel engaged in the recovery operations, within the activated safety zone described in § 165.T07–0806, paragraph (a). Once the reentry vehicle, and any personnel involved in reentry service, are removed from the water and secured onboard a

space support vessel, the COTP or designated representative will issue a Broadcast Notice to Mariners on VHF–FM channel 16 announcing the activated safety zone is no longer subject to enforcement. The recovery operations are expected to last approximately one hour.

The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

Dated: February 1, 2024.

Nathaniel L. Robinson,

Commander, U.S. Coast Guard, Captain of the Port Savannah.

[FR Doc. 2024–02404 Filed 2–6–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 240201–0032]

RIN 0648–BM31

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: Final rule.

SUMMARY: NMFS is amending the Atlantic Large Whale Take Reduction Plan (Plan) to expand the boundaries of the seasonal Massachusetts Restricted Area (MRA) to include the wedge between State and Federal waters known as the Massachusetts Restricted Area Wedge (MRA Wedge). The MRA Wedge was seasonally closed to trap/pot fishing gear by emergency rulemaking in 2022 and 2023 to prevent the immediate risk to the North Atlantic right whale (*Eubalaena glacialis*, right whale) of mortality and serious injury caused by entanglement in fixed-gear buoy lines. Substantial observational evidence has documented the consistent presence of right whales within the MRA Wedge from February through April and aerial surveys have similarly documented the presence of aggregated fixed gear in the MRA Wedge during this same time period. Due to the co-occurrence of whales and buoy lines, both in high densities in this area during the specified times of year, this entanglement risk is expected to recur annually. This action will address this

gap in protection between seasonally closed State and Federal waters and reduce the incidental mortality and serious injury of right whales, fin whales (*Balaenoptera physalus*), and humpback whales (*Megaptera novaeangliae*) in commercial trap/pot fisheries. There is a specific carve out for this rule in the Consolidated Appropriations Act, 2023 (CAA).

DATES: This rule is effective March 8, 2024.

ADDRESSES: Copies of this action, including the Final Environmental Assessment (EA) and the Regulatory Impact Review/Final Regulatory Flexibility Analysis (RIR/FRFA) prepared in support of this action, are available via the internet at <https://www.regulations.gov/> or by contacting Jennifer Goebel (see **FOR FURTHER INFORMATION CONTACT** below).

Several of the background documents for the Plan and the take reduction planning process can also be downloaded from the Plan website (<https://www.fisheries.noaa.gov/ALWTRP>). Information on the analytical tools used to support the development and analysis of the final regulations can be found in the EA and appendices. The complete text of current regulations implementing the Plan can be found in 50 CFR 229.32 or downloaded from the Plan’s website, along with outreach compliance guides to current regulations.

FOR FURTHER INFORMATION CONTACT: Jennifer Goebel, 978–281–9175, jennifer.goebel@noaa.gov, Colleen Coogan, 978–281–9181, colleen.coogan@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The right whale population has been in decline since 2010, with the most recent published estimate of right whale population size in 2022 at 356 whales (95 percent confidence interval: 346–363) (Linden 2023) with a strong male bias (Hayes *et al.* 2023, Pace *et al.* 2017, Pace 2021). The steep population decline is a result of high levels of human-caused mortality from entanglement in fishing gear and vessel strikes in both the United States and Canada. An Unusual Mortality Event (UME) was declared for the population in 2017, due to high rates of documented vessel strikes and entanglement in fishing gear. As of January 18, 2024, the UME includes 36 detected mortalities (17 in 2017, 3 in 2018, 10 in 2019, 2 in 2020, 2 in 2021, 0 in 2022, and 2 in 2023). In addition, 35 serious injuries were documented (6 in 2017, 6 in 2018, 3 in 2019, 6 in 2020,

¹ These notifications of enforcement of the regulation can be found at: <https://regulations.gov> by searching for docket number USCG–2024–0106, and USCG–2024–0085.

5 in 2021, 4 in 2022, 4 in 2023, and 1 in 2024). Lastly, 51 morbidity (or sublethal injury or illness) cases were documented (13 in 2017, 12 in 2018, 6 in 2019, 6 in 2020, 2 in 2021, 6 in 2022, and 6 in 2023). See <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>.

Documented mortalities and serious injuries represent a minimum; in some years population models estimate up to 64 percent of all mortalities are not seen and not accounted for in the right whale observed incident data (Pace *et al.* 2021, Pace *et al.* 2017).

The North Atlantic right whale is listed as an endangered species under the Endangered Species Act (ESA) and is 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. PBR is defined as "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population." In the most recently published stock assessment report (Hayes *et al.* 2023), PBR for the North Atlantic right whale population is 0.7 whales per year. Between 2010 and 2024, there has not been a single year where observed mortality and serious injury of right whales was below PBR. Moreover, total estimated mortality has been higher than observed mortality (Hayes *et al.* 2023, Linden 2023, Pace *et al.* 2021).

The Plan was implemented in 1997 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 for which at least one of the following is demonstrated: (1) the level of direct human-caused mortality exceeds the PBR level; (2) based on the best available scientific information, the stock is declining and is likely to be listed as a threatened species under the ESA within the foreseeable future; or (3) it 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)). The North Atlantic right whale is a strategic stock because the human-caused mortality exceeds the PBR level and because it is listed as endangered under the Endangered Species Act. 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 representatives of the following: 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 (Team) has 59 members, including 23 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 rule (62 FR 16519, April 7, 1997), interim final rule (62 FR 39157, July 22, 1997), and final rule (64 FR 7529, February 16, 1999) implementing the initial plan. The Team met and recommended modifications to the Plan, implemented by NMFS through rulemaking, several times since 1997 in an ongoing effort to meet the MMPA take reduction goals.

The most recent modification to the Plan was implemented by a final rule published on September 17, 2021 (86 FR 51970). Mortalities and serious injuries of right whales continue at levels exceeding the right whale's PBR. Additional data on right whale population estimates, including cryptic (unobserved) mortality (Linden 2023, Pace *et al.* 2021, Pace *et al.* 2017), the stock's decline, changes in distribution and reproductive rates, and entanglement-related mortalities and serious injuries that have been documented in recent years, can be found in Chapters 2 and 4 of the Final Environmental Impact Statement (NMFS 2021a) and the preamble to the 2021 rule (86 FR 51970, September 17, 2021).

The 2021 rule inadvertently left a critical gap in protection for right whales in waters adjacent to the MRA. Observational sightings from 2018 through 2023 provide empirical evidence of the high risk of overlap between right whales and buoy lines in this area (see figures 2 and 3 below). The 2021 rule expanded the geographic extent of the MRA under the Plan to

¹ There are no Alaska Native or Indian tribal organizations on the Atlantic Large Whale Take Reduction Team.

mirror the area included in the 2021 Massachusetts State Commercial Trap Gear Closure to Protect Right Whales (322 CMR 12.04(2), hereafter referred to as MA State Waters Trap/Pot Closure), which extended restrictions north to the New Hampshire border (figure 1). The MRA, as implemented under the Plan, is in place from February 1 through April 30, while the MA State Waters Trap/Pot Closure area is closed from February 1 through May 15, with the option to open early on April 30 or extend the closure in May depending on right whale sightings and copepod abundance. The implementation of the 2021 MRA expansion left open approximately 200 square miles (518 square kilometers) of Federal waters, called the MRA Wedge, nearly enclosed by State and Federal closures. In addition to gear normally fished in the MRA Wedge (figure 1) during these months, the State water closure caused gear aggregation in this area, necessitating a similar seasonal closure contemporaneous with the State and Federal closures in adjacent waters. Center for Coastal Studies (CCS) and the Northeast Fisheries Science Center (NEFSC) reported consistent observations of right whales within the MRA Wedge from February through April 2018–2023 (figure 3). Aerial surveys conducted by CCS in April 2021 and February and March of 2022 also documented the presence of aggregated fixed fishing gear in the MRA Wedge and in waters north of the MRA (figure 2). Though right whales and the associated entanglement risk are present annually in Federal waters adjacent to Massachusetts before and after the February 1 through April 30 MRA trap/pot closure period, the MRA Wedge poses an acute entanglement risk to right whales from February through April during the MRA closure.

In January 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 during the MRA closure period from February through April (see Appendix 3.1 in the associated EA for this action for Letters of Concern). After further reviewing available information and considering the high entanglement risk in this relatively small area, NMFS prepared and issued an emergency rule prohibiting trap/pot fishery buoy lines within the MRA Wedge for the month of April 2022 (87 FR 11590, March 2, 2022). Though the January 2022 letter

from MA DMF requested a closure to coincide with the MRA closure period, running from February through April, the emergency closure in the MRA Wedge was only implemented in April 2022 due to the months required to prepare a new emergency rule and EA (NMFS 2022) analyzing the potential economic and biological impacts of the closure.

In December 2022, the Team voted by majority on recommendations to further reduce right whale entanglement mortality and serious injury in U.S. commercial fisheries regulated under the Plan. Among the measures recommended was a spatially expanded MRA that would address the entanglement risk in the MRA Wedge and waters farther north, including Jeffreys Ledge. On December 12, 2022, MA DMF requested that NMFS extend the emergency MRA Wedge closure into 2023 and 2024, or until new long-term measures could be implemented. On January 4, 2023, following the signing of the Consolidated Appropriations Act, 2023 (CAA),² MA DMF reiterated its concerns about the unprotected waters of 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.

On January 31, 2023, NMFS announced an extension of the 2022 emergency rule closing the MRA Wedge to trap/pot fishing with buoy lines from February 1 to April 30 while adjacent Federal waters within the MRA were similarly restricted (88 FR 7362, February 3, 2023; NMFS 2023; see figure 1). On August 22, 2023, MA DMF again reiterated strong support for a permanent annual closure of the MRA Wedge from February through April due to “a level of entanglement risk that is troubling and begs for a permanent management solution.” MA DMF stated in a letter to NMFS that the “gap in the closure . . . created a refuge for fishers to place their gear, leading to extraordinarily high gear densities in the Wedge Area. DMF believes most gear in this area is infrequently hauled and largely being stored in this location” DMF also provided empirical gear and whale sightings data from 2021 through 2023 that demonstrated the high co-occurrence of gear and right whales.

North Atlantic right whales are known to aggregate in Cape Cod Bay in winter and spring to forage on copepods (Watkins and Schevill 1976, Mayo and Marx 1990, Mayo *et al.* 2018). The whales begin arriving in Cape Cod Bay and surrounding waters as early as December and typically leave the area during the month of May (Jacquet *et al.* 2007, Hlista *et al.* 2009, Pendleton *et al.* 2009, Plourde *et al.* 2019, Ganley *et al.* 2019). Abundance of right whales in Cape Cod Bay during winter and spring has increased over time, despite a declining population size, making protection of Cape Cod Bay and surrounding waters during their presence particularly important for population recovery (Ganley *et al.* 2019, Hudak *et al.* 2023). Ganley *et al.* (2019) found that sightings data do not accurately reflect peak whale presence due to diving behavior that reduces time

on the surface. Higher abundances occur in January through March than are detectable through simple whale counts or sightings per unit effort, and the time of peak abundance varies annually, sometimes occurring in March or April (Pendleton *et al.* 2022). Furthermore, right whale use of Cape Cod Bay has increased in recent years as spring temperatures warm up earlier in the year, suggesting that the time of peak abundance may continue to occur earlier in the year in the future due to climate change (Ganley *et al.* 2022).

Detections of right whales in the MRA and surrounding waters from February through April demonstrate that whales continue to occupy and travel through the MRA Wedge to feed in waters in and around Massachusetts Bay (figure 3; also see figures 14–19 in the associated EA for this action). Though many right whales aggregate within Cape Cod Bay, they are highly mobile and are also detected visually or acoustically in and around Massachusetts Bay and the MRA Wedge, with a notable increase from February through April (Johnson *et al.* 2021). Dedicated survey data on right whale presence in February and March in Massachusetts Bay and the MRA Wedge likely underestimate the actual presence of right whales, given lower survey effort in the area north of Cape Cod Bay and variation in whale detection during these months (Ganley *et al.* 2019). As the right whale’s food source declines in April within Cape Cod Bay (Hlista *et al.* 2009; Ganley *et al.* 2019, Ganley *et al.* 2022, Hudak *et al.* 2023), right whale distribution accordingly shifts and the presence of right whales in the MRA Wedge increases as they leave Cape Cod Bay, contributing to a peak of sightings in Massachusetts Bay in April. It is critical that the MRA includes the MRA Wedge within the boundaries of the existing closure under the Plan to reduce mortalities and serious injuries from entanglements in buoy lines (figure 4).

BILLING CODE 3510–22–P

² The CAA at § 101(a) declares that “for the period beginning on the date of enactment of this Act and ending on December 31, 2028, the Final Rule amending the regulations implementing the Atlantic Large Whale Take Reduction Plan (86 FR 51970) 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 Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*) and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).” H.R. 2617–1631—H.R. 2617–1632, Division JJ—North Atlantic Right Whales, Title I—North Atlantic Right Whales and Regulations. However, CAA § 101(b) provides 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.” This rule falls under that exemption for the reasons explained in the Classification section.

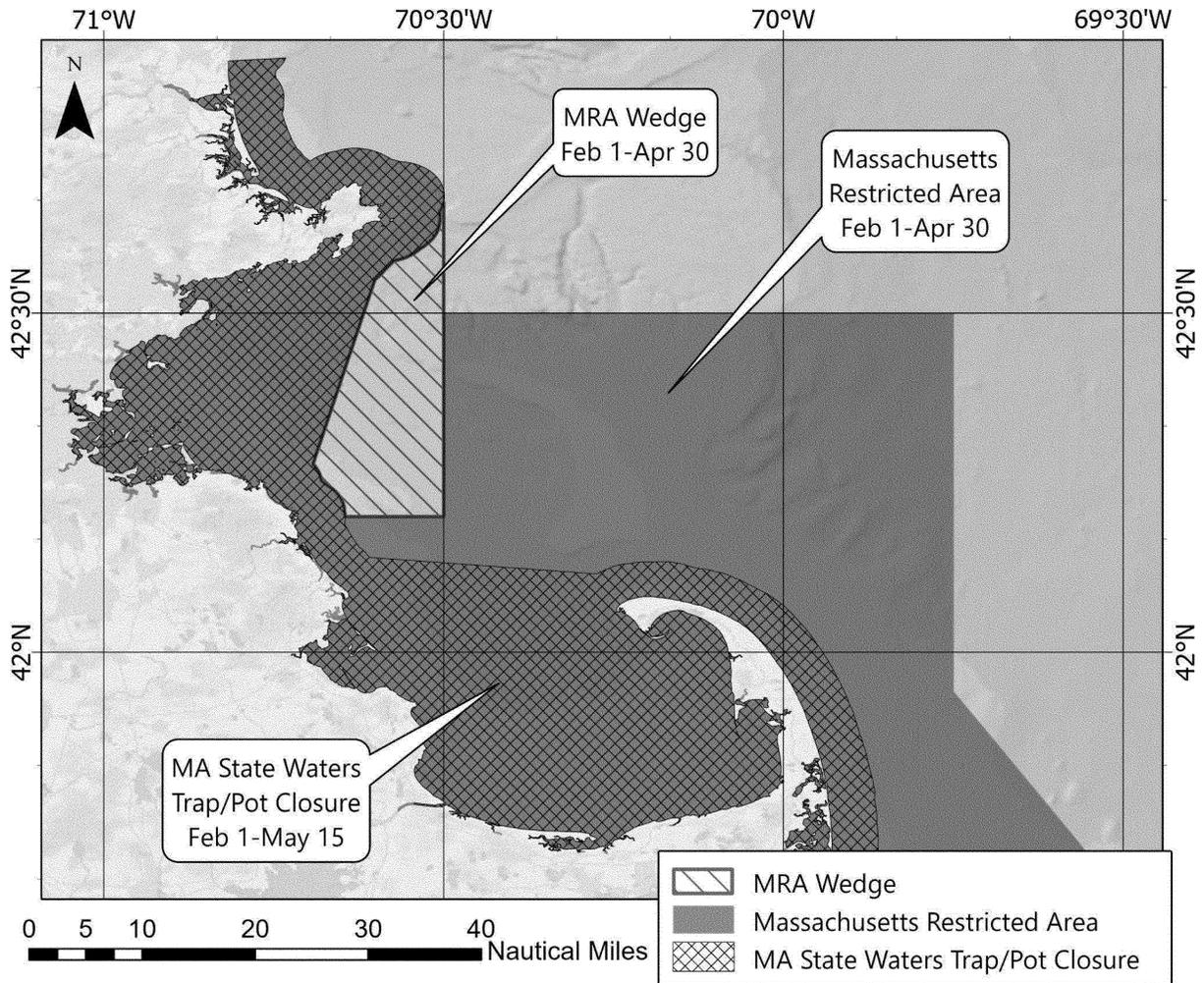


Figure 1 – Massachusetts Restricted Area, MRA Wedge, and MA State Waters Trap/Pot Closure Areas

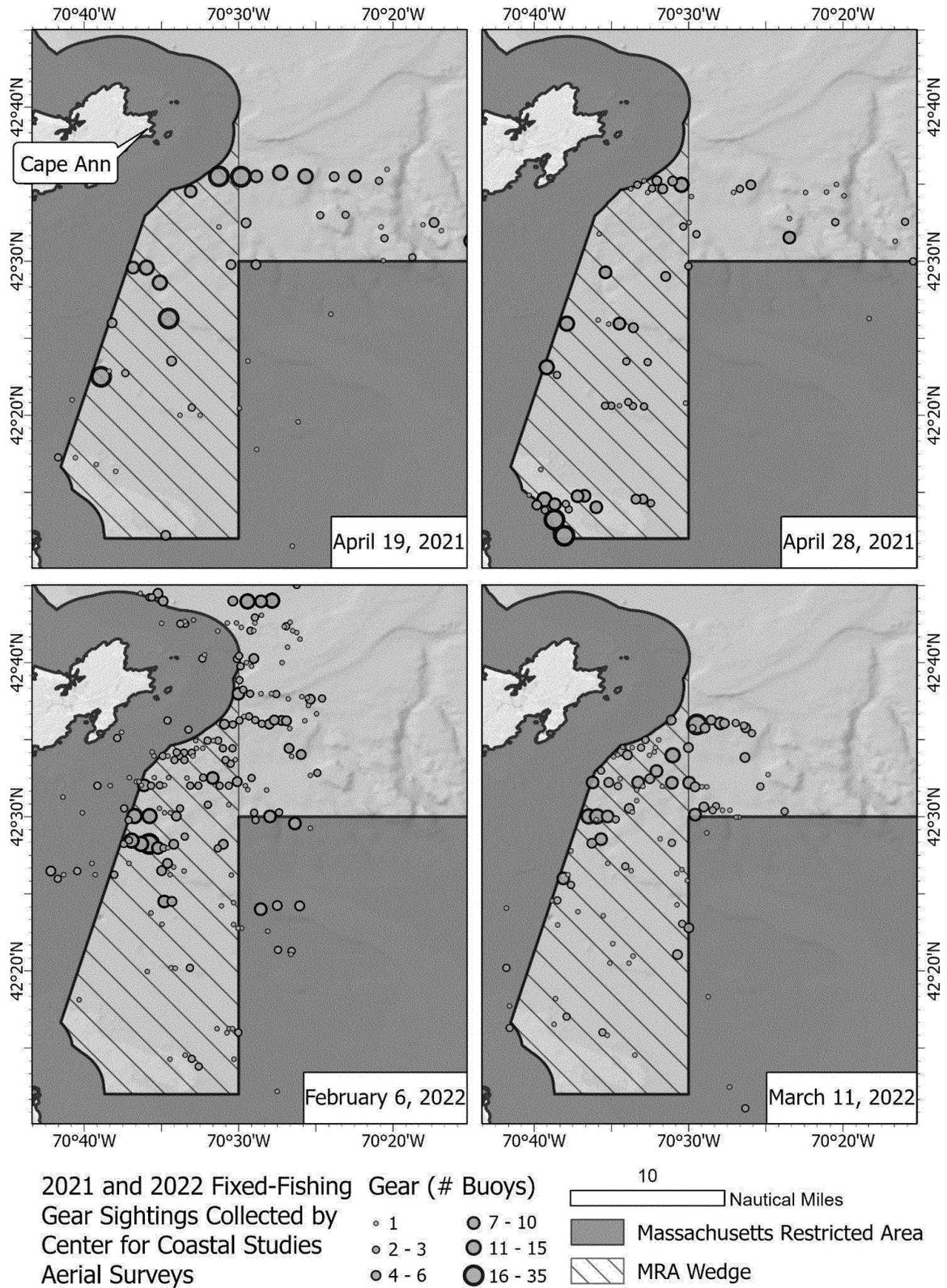


Figure 2 -- Fixed-Fishing Gear Observed by CCS Within Portions of the Massachusetts Restricted Area, MRA Wedge, and Other Adjacent Waters

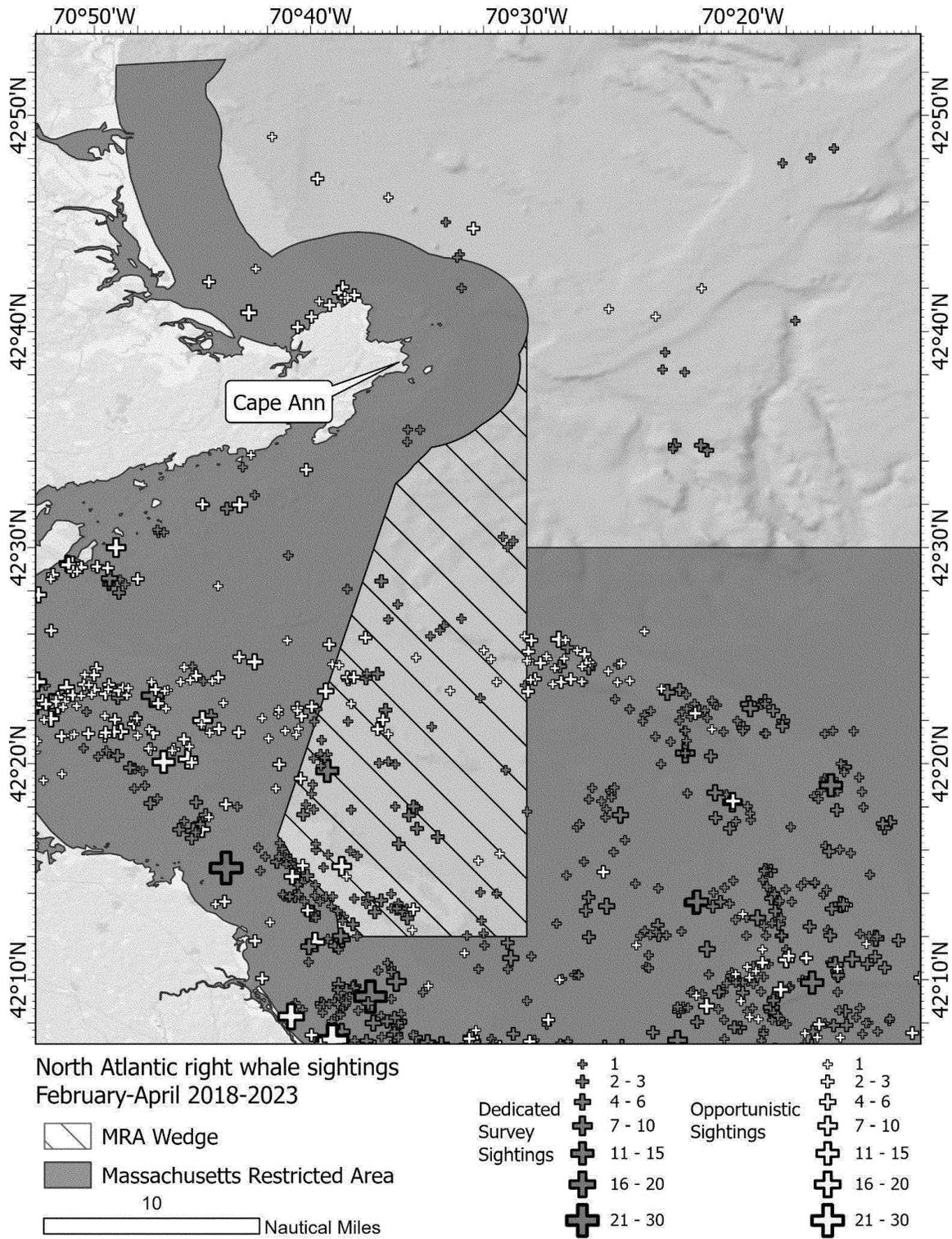


Figure 3 -- North Atlantic Right Whale Sightings Spanning February-April 2018-2023 in Portions of the Massachusetts Restricted Area, MRA Wedge, and Other Adjacent Waters

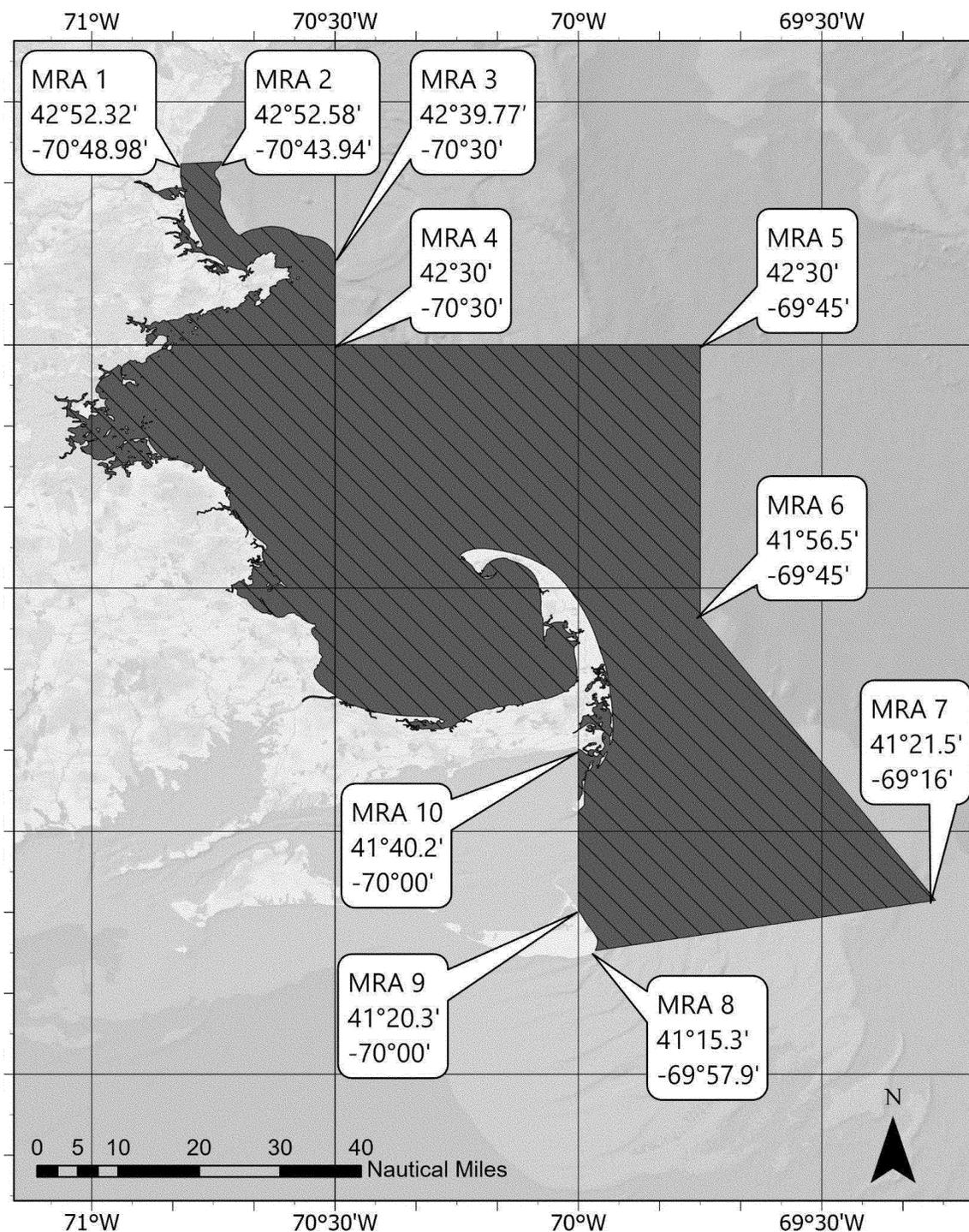


Figure 4 -- Coordinates for the Boundaries of the Massachusetts Restricted Area

BILLING CODE 3510-22-C

Changes to the Atlantic Large Whale Take Reduction Plan

This final rule expands the boundaries of the MRA, where the use of persistent trap/pot buoy lines are seasonally prohibited, to include the MRA Wedge (figure 4). This final rule closes this area during the existing MRA

closure season under the Plan from February 1 through April 30 (86 FR 51970, September 17, 2021) to reduce acute entanglement risk. As shown above in figures 2 and 3, empirical observations of right whales alongside fixed fishing gear observed in the MRA Wedge from February through April in the years 2018–2023, and the high density of right whales in nearby

adjacent waters, demonstrate the urgent need for the closure.

To estimate the reduction of entanglement-related mortality and serious injury risk with the implementation of this final rule, we used the Large Whale Decision Support Tool (DST) version 4.1.0 created by NMFS' Northeast Fisheries Science Center to quantitatively evaluate

potential risk outcomes for relevant management actions. The DST incorporates a right whale habitat-based density model built by researchers at Duke University's Marine Geospatial Ecology Laboratory in the Nicholas School of the Environment (Version 12, released February 14, 2022; Roberts *et al.* 2016a, Roberts *et al.* 2016b, Roberts *et al.* 2020, Roberts *et al.* 2021, Roberts and Halpin 2022; referred to as the Duke University whale density model). The Duke University whale density model estimates the spatiotemporal distribution and density of right whales throughout the U.S. Atlantic based on observations of whales from standardized surveys from January 2010 through September 2020 and co-located oceanographic and habitat variables. As described below, the DST utilizes fishing gear data from 2010–2020. Efforts are underway to add additional years of data. The DST estimates that the MRA Wedge closure produces an approximately 1.8 to 2.3 percent reduction of risk of mortality or serious injury due to entanglement relative to all Northeast trap/pot fisheries. This is equivalent to a total risk reduction of approximately 13 to 16.5 percent for the trap/pot fisheries in Lobster Management Area 1 (LMA 1) Massachusetts waters, where the threat of entanglement is particularly high for right whales.

The best available scientific information demonstrates the need for this action. It also shows that the MRA Wedge closure will likely provide more protection for right whales than the DST estimates because the co-occurrence of right whales and buoy lines is likely higher than the DST estimates. First, the DST utilizes buoy line estimates from 2015–2018 (lobster and Jonah crab in State and Federal waters), 2010–2020 (other Federal trap/pot fisheries), and 2012–2019 (other trap/pot fisheries in State waters). The gap in right whale protections between State and Federal closed waters following the 2021 rule (86 FR 51970, September 17, 2021) likely pushed more gear into the MRA Wedge than the DST estimates, as fishermen moved gear from adjacent closed waters into open waters of the MRA Wedge.³ Visual observations of buoy lines in the MRA Wedge during 2021 and 2022, (see *e.g.*, figure 2) and correspondence with Massachusetts DMF (see *e.g.*, the letters from MA DMF, discussed above), further support this

³ NMFS also recognizes the reductions in buoy lines caused by the MRA Wedge emergency closures in April 2022 and February through April 2023.

conclusion in addition to the DST analysis.

Second, the Duke University whale density model estimates that approximately 0.04 right whales are likely present at any given time in the MRA Wedge throughout the month in February; approximately 1.4 in March; and approximately 3.3 in April (see Table 8 in the associated EA). However, recent right whale sightings data, not yet incorporated into the model, demonstrate a higher concentration of right whales than the Duke University whale density model. For example, on February 23, 2021, the NEFSC aerial survey team observed seven right whales inside the MRA Wedge. On April 8, 2021, a dedicated NEFSC aerial survey team observed 40 right whales in groups of up to 3 within the MRA Wedge. Later the same month, on April 28, 2021, the Center for Coastal Studies aerial survey team observed 19 right whales in the MRA Wedge. On March 7, 2022, NEFSC reported sighting three groups of three right whales (nine whales total) in the middle portion of the MRA Wedge around 42°20' North latitude. On April 14, 2023, five right whales (a group of four and one individual) were sighted in the southernmost portion of the MRA Wedge. Opportunistic sightings were also reported. On March 14, 2020, two groups of two and three right whales (five whales total) were reported in the middle portion of the MRA Wedge around 42°20' North latitude. On April 25, 2022, an opportunistic sighting of a group of seven right whales was reported in the southern portion of the MRA Wedge, off of North Scituate.

Additional data support the conclusion that there is a high concentration of right whales in the MRA Wedge. Figure 3 shows a high density of right whale sightings around the MRA Wedge; these whales likely enter or transit through the MRA Wedge. Acoustic detections of vocalizing right whales also confirm their presence in and around the MRA Wedge (see figures 15, 17, and 19 in the associated EA). Finally, right whale presence often goes undetected, and detectability can depend on whale behavioral states (transiting, feeding, socializing; Hain *et al.* 1999, Pendleton *et al.* 2009, Clark *et al.* 2010, Ganley *et al.* 2019, Ceballos *et al.* 2022). In summary, there is an acute entanglement risk that occurs annually because of the co-occurrence of buoy lines and right whales in the MRA Wedge if the area remains open to trap/pot fishing in February through April.

The economic impact on the lobster and Jonah crab trap/pot fishery of

adding the MRA Wedge to the MRA is estimated to be relatively small compared to the total value of the fishery. All impacted vessels remain authorized to fish trap/pot gear in the open waters of LMA 1, and elsewhere as permitted. We estimate that the MRA Wedge closure will impact between 26–31 vessels each month and that the annual costs, including gear transportation costs and lost revenue, range from \$339,000 to \$608,000, or \$1.7 million to \$3 million across 5 years. For this analysis, we evaluated two scenarios. We analyzed a reasonable scenario where half of the vessels would relocate their traps, and the other half would stop fishing.⁴ 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 range of cost estimates come from the range of lost revenue of the relocated vessels, and a range of gear relocation costs for all vessels. We calculated the number of vessels impacted using the average number of vessels fishing within the MRA Wedge for the months February, March, and April for each year from 2017 to 2021, according to Vessel Trip Report (VTR) data and adjusted based on the average percentage of LMA 1 lobster-only vessels required to provide VTR data in Massachusetts (41 percent). We also averaged landing values for the time period using landing pounds from VTR data and lobster prices in Massachusetts provided in dealer reports. For more details on the economic analyses, please see (1) the Classification section below; and (2) subsection 6.2 in the associated EA and RIR/FRFA for this final rule.

⁴ The best available data of trap/pot restricted areas show that removal of gear is more likely for nearshore areas, such as the MRA Wedge, where fishermen can have long transit distances to open areas, and because fishermen are also restricted in State waters. However, fishermen who fish in the MRA Wedge must have Federal permits, and so they would be able to move their fishing gear to open Federal waters in LMA 1 or elsewhere, as permitted. Discussions with Massachusetts fishermen in 2022 indicated that relocating gear outside the closure area is especially attractive in times of high lobster prices such as 2021 and the spring of 2022 (Mike Lane comments to the Team in January 2022, Robert Martin, pers. comm. 2022). Relocating gear is more likely for fishermen fishing out of the northern ports (*e.g.*, ports in Essex county), closer to open Federal waters. Fishermen fishing out of the more southern ports (*e.g.*, ports in Plymouth county) are more likely to remove their gear from the water. Based on Vessel Trip Report (VTR) data, transit distances to open waters, and the economics of the fishery, we determined that a 50/50 split between gear removal from the water and trap relocation served as a reasonable basis for our analysis. See RIR at section 5.4.4 for more details.

Comments and Responses

On September 18, 2023, we published the proposed rule to amend the Plan to expand the boundaries of the MRA to include the wedge between State and Federal waters known as the MRA Wedge, along with the draft EA. A 30-day public comment period began on September 18, 2023, and ended on October 18, 2023 (88 FR 63917, September 18, 2023). We reviewed and considered all written and oral public submissions received during the comment period. Comments on the proposed rule and draft EA were accepted as electronic submissions via *regulations.gov* on docket number NOAA–NMFS–2023–0083. We also accepted public comments at two in-person public hearings on September 26, 2023, in Gloucester, MA, and on September 28, 2023, in Buzzards Bay, MA.

A total of 26 individuals or groups submitted written comments through the *regulations.gov* comment portal, and 9 speakers submitted comments orally at the public hearings. One speaker submitted the same comment three times, at both public hearings, as well as through written comment. Two speakers submitted the same comments twice, at a public hearing and through a written comment. In total, we received comments from 31 unique commenters (individuals or groups). Of these 31 commenters, 7 were fishermen, 3 were fishing industry associations (2 commenters were members of the same organization, but their comments were different), 6 were other non-governmental organizations, 11 were other members of the public, 2 were State fishery resource managers, and 2 were Federal resource managers. Of the 31 commenters, 13 supported Alternative 1 (No Action), 9 supported Alternative 2 (Preferred), 8 supported Alternative 3, and 1 commenter did not express support for any alternative. Overall, 17 commenters supported taking action, while 13 did not.

We received several comments that were outside the scope of the current rulemaking, primarily related to offshore wind energy development and vessel strikes. NMFS recognizes that recovery of right whales depends on reducing multiple threats to the species across its range, in and beyond U.S. waters. Recovery priorities, efforts, and associated milestones, termed the North Atlantic Right Whale Road to Recovery, are detailed on the NMFS website (see <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale/road-recovery>).

NMFS undertook this final rule, as analyzed in the Final EA, through MMPA authority specific to incidental take in U.S. commercial fisheries. 16 U.S.C. 1387. Although right whales face threats in addition to commercial fishing, the Plan and the take reduction process focus on monitoring and managing incidental mortality and serious injury of marine mammals in U.S. commercial fisheries. Because comments related to offshore wind development and vessel strikes were outside the scope of this rulemaking, we forwarded these comments to the appropriate staff at NMFS but do not provide individual responses in this document. Below are responses to comments regarding the proposed rule.

Comment 1: Two fishermen stated that they had never seen right whales in this area while fishing; one noted that there is no whale sighting demarcation in the sightings figure (see figure 3 above) in his precise fishing location within the MRA Wedge. Both expressed skepticism about whether right whales use the MRA Wedge.

Response: As noted above and in the EA, visual detections confirm right whale presence in and around Massachusetts Bay and the MRA Wedge, with a substantial presence from February through April (Johnson *et al.* 2021, survey results from February–April 2018–2023 depicted in figure 3). Sighting locations are specific to when the whale was observed and are an empirical confirmation of presence at a point in time. It is also well-documented that the whales are highly mobile, within and between foraging and breeding areas (Mate *et al.* 1997, Slay and Kraus 1997, Baumgartner *et al.* 2017)). Accordingly, protective areas encompass waters between sighting locations. Acoustic detections of vocalizing right whales also confirm their presence in and around the MRA Wedge (see figures 15, 17, and 19 in the associated EA). Because there have been instances of acoustic detections of vocalizing whales that were undocumented by concurrent aerial surveillance (Murray *et al.* 2022), acoustic data collection is an important supplement to the visual sightings data.

Comment 2: One commenter stated that, although whales may use the area, fishermen have been fishing in this area long before the right whale population started to decline, and therefore any population decline was not related to fishing gear in this area.

Response: NMFS is required to meet the mandates of the MMPA. While co-occurrence of fishing gear and right whales in the MRA Wedge is not new, several changes in recent years have

contributed to the need for this closure. First, decline in the right whale population size has reduced the PBR level for the species. Between the 2018 and 2021 Stock Assessment Reports, PBR for North Atlantic right whales declined from 0.9 per year to 0.7 per year (Hayes *et al.* 2019; Hayes *et al.* 2022), and, in the most recently published stock assessment report, PBR stands at merely 0.7 whales per year (Hayes *et al.* 2023).

Second, increased right whale habitat use and fishing gear density in Massachusetts and Cape Cod Bays since 2015 has heightened the risk of right whale mortality and serious injury from entanglement in commercial fishing gear in this area. In the years since the 2015 implementation of the original MRA closure, right whale seasonal habitat use increased in State and Federal waters inside and immediately outside of Cape Cod Bay, particularly in Massachusetts Bay, including the MRA Wedge (Johnson *et al.* 2021). As explained above and as identified by MA DMF, the 2021 closure of adjacent State waters likely increased the density of gear in the MRA Wedge during the MRA closure period. Observational sightings of whales and gear during surveys conducted from 2018 through 2023 provide empirical evidence of the high risk of overlap between right whales and buoy lines in this area (see figures 2 and 3 above). Recent circumstances and events have increased the risk of lethal entanglement in the MRA Wedge and have exacerbated the adverse population level consequences of any such an entanglement.

Comment 3: Several commenters suggested that the risk to right whales in the MRA Wedge may be underestimated by the DST.

Response: The DST may underestimate risk in the MRA Wedge during February through April. The most current whale habitat density model provided by Duke University (Version 12, released February 14, 2022; Roberts *et al.* 2016a, Roberts *et al.* 2016b, Roberts *et al.* 2020, Roberts *et al.* 2021, Roberts and Halpin 2022), has not yet incorporated certain empirical data such as dedicated survey sightings from October 2020 to present, nor does it include empirical acoustic and opportunistic right whale detections. These empirical data provide support for the right whale distribution indicated by the Duke University whale density model.

Using the current Duke University whale density model, the DST estimates that risk reduction associated with a MRA Wedge closure is substantial.

Recent changes to ocean circulation patterns are causing changes to prey distribution (Record 2019a, Record 2019b), and empirical observations, both visual and acoustic, demonstrate that the waters off Massachusetts are increasingly used seasonally by more right whales. Recent monitoring has also confirmed an increase in seasonal whale presence in Federal waters near Cape Cod Bay, including in the MRA Wedge. The DST provides a reasonable comparison of the relative risk reduction among action and non-action alternatives and a reasonable estimate of the overall risk reduction for each alternative. NMFS considered the empirical evidence showing greater seasonal right whale presence in the MRA Wedge than predicted by the Duke University whale density model. NMFS also considered that buoy-line density would likely be higher in the MRA Wedge than DST estimates. Recent empirical data of right whales and buoy-lines provide the first line of evidence justifying this rulemaking; the DST estimates, which incorporate the Duke University whale density model, provide a strong secondary and supporting line of evidence. Both lines of evidence are the best scientific information available.

Comment 4: One commenter suggested that NMFS was relying on outdated data by using the DST to support adding the MRA Wedge to the MRA, stating that NMFS's final rulemaking should explain why whale distribution data for the past 3 years (2020–2023) were not included in its analysis, and suggesting that NMFS is not using the best scientific data available.

Response: We used the most recent whale distribution data from a variety of sources, including dedicated surveys, acoustic detections, opportunistic sightings, and the Duke University whale habitat model. Although the DST does not utilize whale distribution data after September 2020, NMFS considered whale distribution data from 2010–2023. As noted in the response to Comment 3 and elsewhere, the rule utilizes the best available scientific information, including recent right whale distribution data from 2020–2023. For example, we considered empirical sightings up through the present, including acoustic and observational sightings data from 2018–2023. For a more detailed explanation of the data used as well as the application of the DST model and the data it contains, please see subsections 3.2 and 6.2 in the associated EA.

Comment 5: One commenter suggested that NMFS should evaluate

whether the 2021 rule and the 2022 and 2023 emergency rules have been effective in reducing risk outcomes for right whales over the past 2 years before implementing the MRA Wedge as an amendment to the Plan.

Response: As set forth in the Plan's Monitoring Strategy (NERO PRD 2012), we review the Plan's effectiveness and compliance with it annually, through a variety of reports, summaries, and Team meetings. We conduct biological analyses, including evaluating large whale population trends, entanglement events, mortality/serious injury, frequency of reported entanglement events, and data on large whale scarification; disentanglement and gear analyses, including evaluating large whale stranding response, disentanglement response, and collection and identification of recovered gear; and oceanographic and fisheries-based analyses, including evaluating effects of oceanographic trends and commercial fisheries regulation on large whale species. As part of our annual monitoring efforts, we also review fishing industry analyses, including observer data on commercial gear and fishing effort; conduct analysis of law enforcement activities, including collaborating/communicating with law enforcement partners, funding of joint enforcement agreements, and conducting targeted special operations patrols; and undertake analysis of education and outreach activities, including quantifying outreach efforts to the public, evaluating effectiveness of industry liaisons, and evaluating effectiveness of outreach to State and local law enforcement partners. These efforts are shared with the Team every year.

As noted in the Monitoring Strategy, evaluating the effectiveness of the Plan and its components presents several unique challenges, including limited data pertaining to large whale fishery interactions. Large whale entanglements are typically not observed or documented by fishery observers or other sources. Scarring reports indicate that right whales sometimes become entangled but then shed the gear without human intervention, thus, even when serious injuries and mortalities are observed with evidence of entanglement, there is no gear remaining. Furthermore, in most of the limited number of observed entanglement cases with gear still present, fishing gear cannot be removed, and when gear is removed, it can rarely be attributed to a particular gear type, component, fishery, or geographic region due to lack of distinctive marks

that would identify the source of the gear (see subsection 5.1.1 in the associated EA).

Nevertheless, the 2022 emergency closure and its extension in 2023 had their intended effect of separating whales from risk during the closure period. Substantial risk reduction is evident, given that vertical buoy lines were not present in the MRA Wedge in April 2022 and February through April 2023—months when large groups of right whales were observed in the area in recent years (including, among other sightings, single day observations of 40 right whales on April 28, 2021 and 9 whales on March 7, 2022). The present rulemaking is therefore necessary to address present and future risk in the MRA Wedge. NMFS reasonably anticipates that the MRA Wedge closure will immediately address entanglement risk from static vertical lines. Removing static vertical lines from the MRA Wedge at the time of year when there is documented high presence of right whales decreases the risk of right whale entanglement. NMFS will continue to consider and address new information as it comes to light.

Comment 6: During the two public hearings in September 2023, several fishermen raised concerns about landings being impacted by the potential crowding effects outside the MRA Wedge closure, especially in late April before Federal waters reopen.

Response: It is unlikely that this closure will affect trap catches due to crowding during the months of February, March, and April, when fishing effort is relatively low, or as compared to summer and fall months when fishing effort is higher. We examined the VTR data from 2019 to 2023 and found decreased effort in April 2022 and increased effort in April 2023 outside the MRA Wedge within one nautical mile (nmi; 1.85 kilometers) to the east of the MRA Wedge closure, an area referred to as the Wedge Buffer Zone (see figure 5),⁵ when compared to 2019 and 2021.⁶ Throughout the years 2019 to 2023, the total reported number of active vessels in the Wedge Buffer Zone in April remained relatively low

⁵ Because the minimum trawl length in LMA 1 in the area 3–6 nmi (5.6–11 km) offshore is 10–15 traps, which is approximately a trawl length of 1 nmi (1.9 km), if a fisherman is relocating traps just outside the MRA Wedge to have easy access to the area when it opens, the Wedge Buffer Zone is the most likely area (1 nmi [1.9 km] next to the MRA Wedge) for these traps to be placed.

⁶ During 2020, the pandemic year, most vessels did not fish regularly in the spring. Therefore, we did not consider 2020 data to be representative or informative.

when compared to other months (see footnote 4).

BILLING CODE 3510-22-P

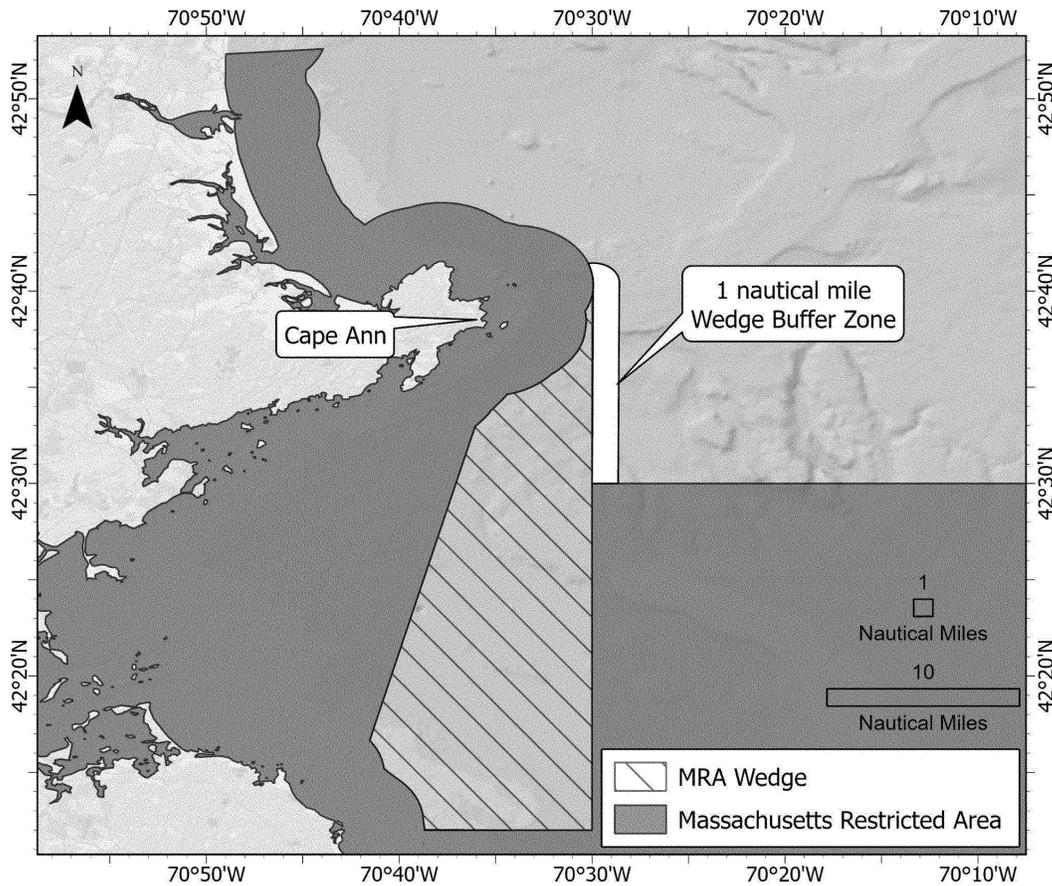


Figure 5. One nautical mile Wedge Buffer Zone to the east of the MRA Wedge.

BILLING CODE 3510-22-C

In April 2022, the MRA Wedge was closed for the first time under the emergency rule (87 FR 11590, March 2, 2022). VTR data showed only one vessel in the Wedge Buffer Zone, and the total number of traps fished increased slightly, relative to reported effort in March 2022, but decreased when compared to April 2019 and 2021. In 2023, the MRA Wedge was closed under the emergency rule (88 FR 7362, February 3, 2023) from February 1 to April 30, 2023. During the emergency closures, crowding was not evident. There were few vessels observed in the Wedge Buffer Zone in the VTR data (one vessel in February, two vessels in March and April 2023). The total number of trips and the total number of traps fished increased significantly, but those increased trips were from the same fisherman who had been fishing in the Wedge Buffer Zone before April 2023.

While VTR data represent a subset of effort, comparing VTR data shows some

interannual variability, but does not demonstrate enough displaced effort to cause substantial crowding and reduce catch values due to the closure. Effort that may have moved was still well below the effort that is sustained across LMA 1 Massachusetts waters during the times of year, such as late summer, when more fishermen are actively fishing. Given the low fishing effort in the Wedge Buffer Zone during the emergency closures, NMFS reasonably expects that the fishing effort in other nearby and adjacent waters will be similarly low during the permanent seasonal closure. Accordingly, we do not anticipate effects to landings from crowding outside the MRA Wedge closure.

Comment 7: The MRA Wedge will make it harder for fishermen to get fishing crew to help with harvesting without the option for year-round employment. Temporary or seasonal fishing crew are harder to find.

Response: We recognize that in the past few seasons, the fishing industry, like other employers, experienced labor shortages. Based on a research study by the Society of Human Resource Management (SHRM 2021), nearly 9 in 10 of the organizations surveyed said they were finding it difficult to fill certain open positions—especially those at entry level—and nearly 7 in 10 organizations believe that the expanded COVID-19 unemployment benefits contributed to this difficulty.

Crew on lobster boats are usually paid based on the harvest, so their income is unstable, especially during the winter/spring season when there are more severe weather days and lower catch rates. We understand from scoping meetings and public hearings that if lobster vessels are unable to secure year-round crew at the beginning of the year, they might have to offer higher pay to get crew when peak season starts. Lobster boats without extra crew would likely fish fewer traps and trawls, or

may make fewer hauls per trip; therefore, they might experience some catch reduction and lower revenue.

As the pandemic has eased, the labor market has gradually returned to normal. For example, according to the Bureau of Labor Statistics, the Massachusetts unemployment rate dropped from 17 percent in April 2020 to 3 percent in April 2023. With the labor market stabilizing, we do not anticipate that this rule will have a substantial impact on the availability of labor. NMFS will continue to consider new information that becomes available.

Comment 8: In many places where affected fishermen reside, there is very little opportunity to make income by other means, so the MRA Wedge closure will hurt fishermen economically.

Response: NMFS has considered the reliance of impacted communities on lobster fishing and alternative employment opportunities; please see section 6 of the associated EA and section 5 of the RIR for our detailed analyses. In summary, the Massachusetts counties that are home to the affected fishing ports have varying levels of reliance on lobster fishing. All offer other fishery and employment opportunities for any crew or vessel operators impacted by the expansion of the MRA closure area. We note that we considered but did not select a more expansive rulemaking (see Alternative 3 in the associated EA), because of, among other reasons, its potential adverse economic effects on fishermen. The present rule reasonably balances right whale protections with economic impacts.

Comment 9: One commenter requested as much notice as possible regarding permanent rulemaking on this matter to provide sufficient time for the fishing industry to prepare.

Response: We recognize the importance of providing sufficient time for the fishing industry to prepare for regulatory changes. Accordingly, NMFS is providing 30 days' notice before the final rule becomes effective, to allow regulated entities to come into compliance. This will provide the fishing industry with sufficient time to attain compliance by, for example, relocating trap/pot gear from the MRA Wedge to dry storage or to waters open to trap/pot fishing.

Comment 10: One commenter voiced support for implementation of Alternative 2 (this rule) for the years 2024 through 2028, with the understanding that NMFS would thereafter implement amendments to the Plan in accordance with the CAA.

Response: Subject to new data or circumstances, the MRA Wedge

addition to the MRA closure is a permanent rulemaking, effective March 8, 2024. NMFS will comply with the CAA to the full extent of the law.

Comment 11: Several commenters stated their position that this regulation is not allowed under the CAA. Specifically, one or more commenters said that the language of the CAA prohibits any additional rulemaking that affects the Northeast lobster/Jonah crab fishery through the end of 2028; that Congress did not grant NMFS the power to transform, or make final, the emergency rule closing the MRA Wedge into a permanent rule; and that the 2023 MRA Wedge Closure is not an extension of the 2022 MRA Wedge Closure, and therefore was not permissible under the CAA.

Response: These comments misunderstand the CAA. NMFS is promulgating this rule pursuant to MMPA section 118. And as explained in the regulation's Classification section, this rule falls under the CAA's § 101(b) exemption.

Section 101(a) of the CAA established that from December 29, 2022, through December 31, 2028, NMFS' 2021 rule "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)). Section 101(a) of the CAA also requires NMFS to promulgate new lobster and Jonah crab regulations, consistent with the MMPA and ESA, that take effect by December 31, 2028. *Id.* at § 101(a)(2). In § 101(b) of the CAA, however, Congress explained that § 101(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."

Under § 101(b), NMFS may use its existing rulemaking authority under the MMPA to close the MRA Wedge. Rather than "misstating" § 101(b), as one commenter argued, NMFS is adhering to the text of § 101(b) and its surrounding context because this regulation "make[s] final" the 2022 emergency rule. As described in the regulation's Background and Classification sections, the 2022 emergency rule is the only "emergency rule" that § 101(b) could refer to, and it was "in place on the date of enactment of the CAA," given the continuing emergency and NMFS' authority under the MMPA to extend that rule at the time of the CAA's enactment. NMFS does not believe, as

some commenters seem to suggest, that "in place" means "in effect." That reading would mean the § 101(b) exemption has no effect—it had no effect when the CAA was enacted, and it would never have any legal effect, since the commenters do not identify any other emergency rule that Congress could reasonably have been referencing in § 101(b) (and there is none for the reasons explained below). As explained in the Classification section below, NMFS declines to adopt a reading of the statute that would render § 101(b) meaningless surplusage.

For further explanation that is responsive to these comments, please see the regulation's Background and Classification sections.

Comment 12: Two commenters claimed that the proposed rule was illegal under *Maine Lobstermen's Association v. Raimondo*, 70 F.4th 582 (D.C. Circuit 2023) (*MLA*), stating that the Court determined that the underlying science supporting the 2021 rule, and by extension this regulation, was invalid based on the Agency's consideration of a "worst-case scenario" in the development of the 2021 Batched Fisheries Biological Opinion (2021 BiOp, NMFS 2021b).

Response: These comments misunderstand *MLA*. The *MLA* ruling addressed an ESA Section 7 formal consultation (2021 BiOp) conducted by NMFS regarding Federal authorization of the lobster fishery. By contrast, the 2021 rule underwent a separate and distinct ESA Section 7 informal consultation, and this regulation falls under the informal consultation for the 2021 rule. As explained below in the Classification section, this regulation is simply not "promulgated on the basis of the 2021 Biological Opinion," as one commenter suggests.

Moreover, the 2021 rule and this regulation are promulgated under the MMPA, not the ESA. The *MLA* court did not analyze the legal standards set forth in the MMPA. While the court vacated the 2021 BiOp, the panel explained, "we are not convinced the error claimed by the lobstermen is fatal to the [2021 rule]." *MLA* at 601. In any event, this regulation applies the best available scientific information including recent observational and acoustic detections of right whales; does not consider worst-case scenarios; and is supported by its own administrative record.

Comment 13: One commenter argued that NMFS was "on notice that a court of law has already said it is violating the law," relying on statements that D.C. District Court Chief Judge Boasberg made during a February 16, 2023 hearing on a motion for a Temporary

Restraining Order in *Massachusetts Lobstermen's Association, Inc. v. NMFS*, No. 1:23-cv-00293 (D.D.C.), which challenged the 2023 emergency rule extension (*i.e.*, 88 FR 7362). In particular, the commenter quoted the following statement: "I think that the plaintiffs may well have a better argument on the merits than the government. It's a close question and one that I probably need to think about more. But in the time that I have had, I think that Mr. Cragg has probably got a better reading of the way—a better interpretation of the exception."

Response: Far from "saying" [NMFS] is violating" the CAA, the court made clear that it was not deciding the correct interpretation of the CAA at that hearing. Even the statement quoted by the commenter includes the caveat that "[i]t's a close question and one that [the judge] probably need[s] to think about more." The court ultimately denied Plaintiff's Motion for a Temporary Restraining Order on other grounds, and the case was dismissed without briefing or ruling on the merits. In any event, we carefully considered these statements and determined that the present rulemaking complies with all applicable laws.

Comment 14: One commenter asserted that the 2023 MRA Wedge closure was illegal and, therefore, this regulation is illegal.

Response: We dispute this characterization of the 2023 MRA Wedge closure. Independently, as described in the Classification section below, we determined that the present rulemaking complies with all applicable laws.

Comment 15: One commenter stated that this rulemaking is occurring outside of the traditional Take Reduction Team process.

Response: The commenter is incorrect; this rulemaking was conducted within the Take Reduction Team process. In January 2022, NMFS received letters and emails from MA DMF, Stellwagen Bank National Marine Sanctuary, and non-governmental organizations expressing concerns about the gap in restricted waters and the heightened risk of entanglement for right whales during the annual MRA closure period from February through April. We brought these letters, and the underlying information, to the Team's attention later that same month, in a January 2022 Team webinar. State, academic, and non-governmental organizations expressed support for including the MRA Wedge in a future Plan amendment, while Massachusetts fishing representatives expressed concerns about economic impacts

during a season when effort is generally low and price is sometimes high. The Team discussed the MRA Wedge closure as a future possible Plan amendment and determined it was worth considering for expedited rulemaking, due to its potential for significant risk reduction. In December 2022, a majority of Team members voted in favor of recommending several suites of measures that included expanding the MRA closure to include the MRA Wedge and waters farther north, including Jeffreys Ledge. NMFS considered the Team's December 2022 non-consensus recommendations, and, as the agency ultimately responsible for ensuring that the requirements of the MMPA are met, decided to move forward with promulgating this permanent rule and has explained its reasoning for the present rulemaking.

Comment 16: One commenter noted that Alternative 2 could incentivize lobstermen to stage their trap/pot gear just north of the MRA Wedge during the month of April while waiting for the MRA to reopen on May 1. The commenter suggested that NMFS revise the wet storage regulation to require gear to be hauled out of the water at least once every 14 days. The commenter proposed that staging gear just outside of the restricted areas should be closely monitored and addressed if necessary. Another commenter noted that wherever lines are drawn in the ocean, there will be gear piling up outside those lines.

Response: We recognize that some fishermen may wish to "stage" their gear outside the closures, particularly in April, ahead of the May 1 opening of the MRA. It is possible that a change in current regulations requiring gear to be hauled and reset every 14 days, rather than every 30 days, might encourage the removal of gear to reduce the need for offshore trips during winter months. However, such a change was not considered in the proposed rule or analyzed in the draft EA. Accordingly, it is not being considered for inclusion in this rulemaking. In addition, MA DMF explains that gear in the MRA Wedge is infrequently hauled and is largely used for wet storage, presumably due to the inconvenience of hauling gear on land and, in some cases, the lack of storage areas on land. (See Appendix 3.1 in the associated EA for Letters of Concern). To address this issue, we recommend that fishermen and industry organizations work with partners to locate areas where gear can be stored on land during the seasonal closure.

Comment 17: One commenter questioned whether commercial fishing is any more detrimental to whale

populations than commercial shipping, now that weak rope and weak link requirements have been implemented.

Response: Weak rope and weak links provide risk reduction benefits to right whales because they may allow adult right whales to break the lines during an entanglement, reducing the severity of entanglement events. However, further protective measures are needed because weak rope and weak links do not reduce the number of entanglements, nor do they protect right whale calves and young right whales that are not strong enough to break free of these lines before mortalities and serious injuries occur. To further reduce mortalities and serious injuries, we have determined that closures are necessary in areas where there is a high co-occurrence of right whales and vertical lines. Without a closure, entanglement risk is high in the MRA Wedge from February through April, when right whales are present in the area in high numbers.

As the commenter notes, vessel strike risk continues to be of concern. The best available scientific information demonstrates that reduction of both entanglements and vessel strikes is necessary for recovery of the North Atlantic right whale population throughout its range, including in the United States and Canada (Runge *et al.* 2023). Commercial shipping activities are outside of the scope of this rulemaking.

Comment 18: Several commenters noted that the continued threat posed by the overlap between dense accumulations of gear within the MRA Wedge or along the MRA Wedge borders (fencing) and right whale aggregations requires a permanent management solution rather than consecutive emergency actions.

Response: With respect to waters within the MRA Wedge, this regulation provides a permanent management solution. With respect to open waters just outside the MRA Wedge, we assessed the risk of gear accumulation, known as a fencing or "curtain effect," in which fishermen displaced by the MRA Wedge closure will instead choose to set their gear along the perimeter of the closure boundary, in an area referred to as the Wedge Buffer Zone (figure 5). As discussed in response to Comment 6, we did this by examining Federal VTR data from 2019 to 2023 to identify trends in fishing effort outside of the MRA Wedge following the 2022 and 2023 emergency closures. The data show that there was not displaced effort sufficient to cause a curtain effect in the Wedge Buffer Zone following the closed periods in 2022 and 2023 (see subsection 6.2.4 in the associated EA).

Nevertheless, not all gear stored in the Wedge Buffer Zone is captured by VTR data; more observational data are needed to evaluate the extent of wet storage in this area. Still, relative to the fishing effort that occurs during more active fishing months such as late summer, the amount of gear displaced is low and unlikely to create a substantial curtain. At this time, the risk of a curtain effect from the MRA Wedge closure is outweighed by the high entanglement risk within the MRA Wedge waters from February through April each year if it remains open during the MRA closure period.

Comment 19: Seven commenters expressed support for Alternative 3, citing: (1) the need for aggressive action to achieve the MMPA goals of reducing incidental mortality and serious injury to below the PBR level; (2) additional incentive for fishermen to remove non-actively fished gear from the water and store the gear on land, as opposed to wet storage in the ocean; (3) concern that Alternative 2 would likely lead to pot/trap gear movement north from the MRA Wedge to other areas where right, humpback, and fin whales historically have been sighted; and (4) the fact that coverage of the entirety of the Stellwagen Bank National Marine Sanctuary would provide consistency with the aims of the Stellwagen Bank National Marine Sanctuary Final Management Plan.

Response: As the commenters noted, Alternative 3 would have greater risk reduction benefits for right whales, and potentially also for fin and humpback whales, as gear removal reduces risk of entanglements. However, Alternative 2 provides a reasonable balance between risk reduction and economic impacts as it will substantially reduce the risk of right whale entanglement during a critical time period, while displacing few fishermen overall and allowing fishermen to continue fishing during that time in areas with less risk. This rulemaking does not specifically target fin and humpback whales. Nevertheless, NMFS concluded that this regulation may benefit fin and humpback whales after considering their known distributions and likely effects on gear movement (see subsection 6.2 in the associated EA and subsection 5.4 of the associated RIR/FRFA). NMFS does not anticipate that this regulation will meaningfully increase entanglement risk to right, humpback, and fin whales in areas outside the MRA and MRA Wedge.

With respect to the Stellwagen Bank National Marine Sanctuary, NMFS refers the commenter to the U.S. Congress's mandate in CAA § 101.

Comment 20: One commenter supported Alternative 3, noting that the difference in economic impacts is relatively small (*i.e.*, the compliance cost for Alternative 2 is \$400 per vessel, compared with \$2,000 per vessel for Alternative 3). However, the risk reduction is higher for Alternative 3 than Alternative 2.

Response: The difference in per-vessel compliance costs between Alternative 2 and Alternative 3 is material. And although the overall risk reduction for Alternative 3 is higher than for Alternative 2, the cost for each percentage of risk reduction is higher for Alternative 3 (approximately \$30,000–\$48,000 per percentage point of risk reduction) than for Alternative 2 (approximately \$22,000–\$40,000 per percentage point of risk reduction). In other words, Alternative 3 costs more for each percentage of benefit for right whales. While information is not available to conduct a full benefit-cost analysis (see subsection 5.4 of the associated RIR), the cost for each percent of risk reduction provides a useful comparison.

Comment 21: A few commenters suggested that we expand the MRA Wedge to apply to all fixed-gear fisheries.

Response: This rulemaking is limited to trap/pot fishing, the fishery operations that deploy approximately 93 percent of all the buoy lines in U.S. waters (NMFS 2021a) and represent the vast majority of entanglement risk to right whales in the MRA Wedge. Other fixed-gear fisheries were not considered for restrictions in the proposed rule so their inclusion in this final rule is not proper. NMFS is currently working to address the risks posed by other fixed-gear fisheries by considering potential new regulations for non-lobster and Jonah crab fisheries, based on the Team's December 2022 recommendations. Those considerations are ongoing.

Changes From the Proposed Rule

There are no changes to the final rule.

Classification

The NMFS Assistant Administrator has determined that the final rule is consistent with the Plan, with the rulemaking authority under MMPA section 118(f), and with other applicable laws including the Administrative Procedure Act and the CAA, 2023 (H.R. 2617–1631—H.R. 2617–1632, Division JJ—North Atlantic Right Whales, Title I—North Atlantic Right Whales and Regulations).

Consolidated Appropriations Act

On December 29, 2022, President Biden signed H.R. 2617, the CAA, into law. Section 101(a) of the CAA establishes that from December 29, 2022, through December 31, 2028, NMFS' September 17, 2021 rule amending the Plan, Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, published at 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 CAA requires NMFS to promulgate new lobster and Jonah crab regulations, consistent with the MMPA and ESA, that take effect by December 31, 2028. *Id.* at § 101(a)(2). Notwithstanding these directions, § 101(b) of the CAA provides that § 101(a) shall not apply to "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 final rule complies with CAA § 101(b). The "emergency rule" in § 101(b)'s express exception must refer to the 2022 MRA Wedge rule, 87 FR 11590 (March 2, 2022), because there is no other "emergency rule" to which Congress could have been referring. Moreover, the 2022 emergency rule was "in place" within the meaning of that phrase under § 101(b) at the time of the CAA's enactment on December 29, 2022, thereby satisfying the conditions for the § 101(b) exception.

There is no other "emergency rule" that § 101(b)'s exception could cover because the 2022 emergency rule is the only emergency rulemaking implemented in the past decade under the MMPA, ESA, or any other relevant statutes affecting the lobster and Jonah crab fisheries. Congress would not reasonably have expected NMFS to issue another emergency rule when it was enacting the CAA, or in the short time between when Congress passed and the President signed the CAA, which would have been insufficient time for emergency rulemaking. That is particularly the case because § 101(b) contemplates that NMFS may "extend" or "make final" an emergency rule that is in place at the time of the CAA's enactment, which indicates that Congress was referring to an emergency

rule that it had notice of, rather than the possibility of a new hypothetical rule.

The 2022 emergency rule was also “in place on the date of enactment of” the CAA within the meaning of that phrase in § 101(b). Although the 2022 emergency rule’s seasonal closure was effective from April 1, 2022, through April 30, 2022, the state of emergency necessitating the rule continued, and NMFS was authorized under MMPA § 118(g) to extend that rule at the time of the CAA’s enactment. The 2022 emergency rule closed the MRA Wedge for 30 days under MMPA § 118(g)(3). After that 30-day closure, NMFS retained authority to extend the 2022 emergency rule for 90 additional days under MMPA § 118(g)(4), which allows an extension of an emergency rule where “incidental mortality and serious injury of marine mammals in a commercial fishery is continuing to have an immediate and significant adverse impact on a stock or species.” That was the case at the time of the CAA’s enactment because, after the 2022 emergency rule was no longer in effect, right whales continued to occupy and travel through the MRA Wedge annually during February through April, while trap/pot fishermen also continued to fish and stage gear there at great risk of causing incidental mortality or serious injury by entanglement. The MMPA does not require that emergency rule extensions are coterminous in time with the original emergency rule.⁷ Accordingly, because NMFS was authorized to extend the rule under MMPA § 118(g)(4), the 2022 emergency rule was “in place” within the meaning of the CAA at the time of its enactment, even though the seasonal closure required by that rule was no longer in effect. If Congress intended to limit CAA § 101(b) to an emergency rule that was “in effect” on the date of the CAA’s enactment, Congress could have used that language.

Any other reading of the statute would deprive the § 101(b) exception of

any legal effect. Commenters objecting to NMFS’s reading of the CAA did not identify any other emergency rule to which § 101(b) could reasonably refer, and as explained above, there is no other emergency rule that could be subject to § 101(b). NMFS declines to adopt a reading of the statute that would render § 101(b)—one of only two subsections in § 101 of the CAA—meaningless.

Based on the foregoing reading of the CAA, NMFS “extend[ed]” the 2022 emergency rule, CAA § 101(b), the following year by closing the MRA Wedge from February 1, 2023 through April 30, 2023 to match the broader closure of Federal waters in the MRA. This rule seeks to “make final,” CAA § 101(b), the 2022 emergency rule by incorporating the MRA Wedge into the larger MRA boundaries. The final rule is based on the scientific evidence demonstrating the annual recurrence of high entanglement risk in the MRA Wedge—*i.e.*, direct observations of right whales and extensive fishing gear occupying the MRA Wedge annually from February through April—and the supporting DST analysis. The final rule would therefore “make final” the MRA Wedge closure under the Plan, in accordance with the MMPA and CAA.

National Environmental Policy Act

NMFS prepared a Final EA for this rule that discusses the potential impacts to the environment of changes to the Plan. In addition to the status quo (Alternative 1), two alternatives are analyzed: Alternative 2 (preferred and the basis of this rule) and Alternative 3. Alternative 1 (No Action) would maintain the status quo as implemented in 2021. Alternative 2 (Preferred Alternative) would add the MRA Wedge, approximately 200 square miles (518 square kilometers) of Federal waters adjacent to the existing MRA, to the MRA during the current closure period of February 1 through April 30. (We note that, in 2024, the MRA Wedge closure will occur after February 1, due to the 30-day delay in effectiveness after publication, to provide adequate notice.) Alternative 3 would add approximately 1,297 square miles (3,359 square kilometers) to the MRA and extend the northern MRA boundaries up to the New Hampshire border during the same time period.

Alternative 2 is estimated to reduce risk of mortality or serious injury from entanglement in trap/pot gear in the Northeast by approximately 1.8 to 2.3 percent. Alternative 3 is estimated to reduce risk by 3.1 to 5.3 percent. The difference in impact between the two alternatives is even greater when

considering local risk in the area in LMA 1 Massachusetts waters, an area with particularly high entanglement risk during the MRA closure months (13 to 16.5 percent risk reduction under Alternative 2, compared to 22.6 to 38.3 percent under Alternative 3). Overall, the economic impacts of Alternative 2 result in an estimated total annual cost (including lost revenue) of \$339,000 to \$608,000, with approximately 26 to 31 affected vessels, or \$1.7 million to \$3 million over 5 years. Alternative 3 is estimated to impact 53 to 66 vessels for an estimated annual cost (including lost revenue) of \$898,000 to \$1,453,000 and an estimated total 5-year cost of \$4.5 million to \$7.3 million. The social and economic impacts on the human community would decrease year by year as fishermen adapt to the restricted area. A copy of the EA is available in the docket or from NMFS (see **ADDRESSES**).

Executive Order 12866—Regulatory Planning and Review

This final rule has been determined to be not significant for the purposes of Executive Order 12866. NMFS has prepared a regulatory impact review.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires agencies to assess the economic impacts of their regulations on small entities. The objective of the RFA is to consider the impacts of a rulemaking on small entities, and the capacity of those affected by regulations to bear the direct and indirect costs of regulation. We prepared a final regulatory flexibility analysis (FRFA) in support of this action, as required by section 603 of the RFA. The FRFA describes the economic impact this final rule will have on small entities. Although we analyzed an alternative that would close a larger area and result in greater risk reduction (see Alternative 3 in the associated EA), twice as many small entities would have been affected and each risk reduction unit would cost 19 to 32 percent more than the alternative implemented under this final rule. While the risk reduction estimate for this alternative was higher, it was not selected due to, among other reasons, its economic effects on fishermen. The present rule reasonably balances right whale protections with economic impacts. A description of the action, why it is being considered, and its legal basis are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of this analysis is available in the docket or from NMFS (see **ADDRESSES**), and a summary follows.

⁷ NMFS does not, however, retain extension authority *ad infinitum*. For example, if the extension is unreasonably attenuated from the original emergency rule, an extension is improper. In contrast, the 2023 emergency rule extension was a single extension that immediately followed the original 2022 emergency rule during the subsequent migration season, while all other material features of the ongoing emergency remained constant. Moreover, the ongoing emergency was seasonal, given the timing of right whale migrations in and around the MRA Wedge and the timing of the MRA closure in adjacent waters. The 2023 emergency rule extension was, accordingly, seasonally consecutive with the 2022 emergency rule. Under the emergency rulemaking’s applicable facts and circumstances, NMFS properly utilized MMPA § 118(g)(4), given the close nexus between the 2022 emergency rule and its 2023 emergency rule extension.

The FRFA analysis estimates that 1,273 distinct entities had at least one LMA 1 Federal lobster permit in 2021, and 39 distinct entities were in other trap/pot fisheries. All of them are small entities with annual landings value below \$11 million. While considering the compliance costs for the small entities, it is worth noting that the vast majority of the regulated entities are located far away from the MRA Wedge so that it would not be economically feasible to travel to this area to fish. Therefore, this final rule would directly affect relatively few entities that actually fished with vertical lines in the MRA Wedge within the past five seasons (2017–2021). Alternative 2 would affect 26 to 31 entities, with the estimated annual compliance costs ranging from \$339,000 to \$608,000. The estimated cost for each entity ranges from \$9,500 to \$19,100. Alternative 3 would affect 53 to 66 entities, and the estimated annual compliance costs range from \$898,000 to \$1,453,000. The estimated cost for each entity ranges from \$9,900 to \$20,500.

Paperwork Reduction Act

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

Endangered Species Act

NMFS completed an ESA Section 7 consultation on the implementation of the Plan on July 15, 1997, and concluded that the action was not likely to adversely affect any ESA-listed species under NMFS' jurisdiction. Five subsequent consultations were conducted in 2004, 2008, 2014, 2015, and 2021, when NMFS amended the Plan. This final rule falls within the scope of the analysis conducted in the informal ESA Section 7 consultation on the implementation of the Plan (May 25, 2021), and a separate consultation is not required for this action. NMFS, as both the action agency and the consulting agency, reviewed the changes and determined that the measures as revised through this rulemaking would not affect ESA-listed species under NMFS' jurisdiction in a manner that had not been previously considered.

This final rule is a separate action independent from the 2021 ESA 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; NMFS 2021b). The final rule was not developed during the fisheries consultation process that culminated in the 2021 BiOp, and the final rule satisfies the ESA and MMPA requirements through a consultation that was entirely distinct from the 2021 BiOp. The final rule is not associated with the 2021 BiOp and was not analyzed under the 2021 BiOp, nor does the 2021 BiOp provide ESA coverage for the final rule.

References

- Baumgartner, M.F., F.W. Wenzel, N. S.J. Lysiak and M.R. Patrician. 2017. North Atlantic right whale foraging ecology and its role in human-caused mortality. *Mar Ecol Prog Ser* 581:165–181.
- Ganley, L., S. Brault, and C. Mayo. 2019. What we see is not what there is: Estimating North Atlantic right whale *Eubalaena glacialis* local abundance. *Endangered Species Research*, 38, 101–113.
- Ganley, L.C., J. Byrnes, D.E. Pendleton, C.A. Mayo, K.D. Friedland, J.V. Redfern, J.T. Turner, and S. Brault. 2022. Effects of changing temperature phenology on the abundance of a critically endangered baleen whale. *Global Ecology and Conservation* 38:e02193.
- Hayes, S.H., E. Josephson, K. Maze-Foley, J. McCordic, P.E. Rosel, and J. Wallace. 2023. US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2022. Northeast Fisheries Science Center, Woods Hole, MA.
- Hayes, S.A., E. Josephson, K. Maze-Foley and P.E. Rosel. 2019. US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments—2018. Page 306.
- Hayes, S.A., E. Josephson, K. Maze-Foley, P.E. Rosel, and J. Wallace. 2022. US Atlantic and Gulf of Mexico Marine Mammal Stock Assessments—2021. Page 387.
- Hlista B.L., H.M. Sosik, L.V. Martin Traykovski, R.D. Kenney, M.J. Moore. 2009. Seasonal and interannual correlations between right-whale distribution and calving success and chlorophyll concentrations in the Gulf of Maine, USA. *Mar Ecol Prog Ser* 394:289–302.
- Hudak, C., K. Stamieszkin, and C.A. Mayo. 2023. North Atlantic right whale (*Eubalaena glacialis*) prey selection in Cape Cod Bay. *Endangered Species Research*. 51: 15–29.
- Jaquet, N., C.A. Mayo, D. Osterberg, C.L. Browning, and M.K. Marx. 2007. Surveillance, Monitoring, and Management of North Atlantic Right Whales in Cape Cod Bay and Adjacent Waters—2007: Final Report. Provincetown Center for Coastal Studies, 260 pp.
- Johnson, H., D. Morrison, and C. Taggart C. 2021. WhaleMap: a tool to collate and display whale survey results in near real-time. *Journal of Open Source Software*. 6(62): 3094.
- Linden, D.W. 2023. Population size estimation of North Atlantic right whales from 1990–2022. US Dept Commer Northeast Fish Sci Tech Memo 314. 14 p. <https://www.fisheries.noaa.gov/s3/2023-10/TM314-508-0.pdf>.
- Mate, B.R., S. Nieuwkirk and S.D. Kraus. 1997. Satellite-monitored movements of the northern right whale. *Journal of Wildlife Management* 61: 1393–1405.
- Mayo, C.A., and M.K. Marx. 1990. Surface behavior of the North Atlantic right whale, *Eubalaena glacialis*, and associated zooplankton characteristics. *Canadian Journal of Zoology*. 68:2
- Mayo, C.A., L. Ganley, C.A. Hudak, S. Brault, M.K. Marx, E. Burke, and M.W. Brown. 2018. Distribution, demography, and behavior of North Atlantic right whales (*Eubalaena glacialis*) in Cape Cod Bay, Massachusetts, 1998–2013: Right Whales in Cape Cod Bay. *Marine Mammal Science*. 34:979–996.
- NERO PRD NOAA Fisheries Service Northeast Region Protected Resources Division. 2012. Atlantic Large Whale Take Reduction Plan Monitoring Strategy. Page 22. <https://www.fisheries.noaa.gov/s3/2023-11/5a-ALWTRP-Monitoring-Strategy.pdf>.
- NMFS. 2021a. Final Environmental Impact Statement, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis for Amending the Atlantic Large Whale Take Reduction Plan: Risk Reduction Rule. NOAA, National Marine Fisheries Service, Greater Atlantic Regional Fisheries Office.
- NMFS. 2021b. 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 Fisheries Management Council's Omnibus Essential Fish Habitat Amendment 2. NMFS GARFO May 28, 2021.
- NMFS. 2022. Environmental Assessment, Finding of No Significance, and Regulatory Impact Review for the 2022 Emergency Final Rule to Reduce Right Whale Interactions with Lobster and Jonah Crab Trap/Pot Gear. NOAA, National Marine Fisheries Service, Greater Atlantic Regional Fisheries Office.
- NMFS. 2023. Environmental Assessment, Finding of No Significance, and Regulatory Impact Review for the 2023 Emergency Final Rule to Reduce Right Whale Interactions with Lobster and Jonah Crab Trap/Pot Gear. NOAA, National Marine Fisheries Service, Greater Atlantic Regional Fisheries Office.
- Pace, R.M., P.J. Corkeron, and S.D. Kraus. 2017. State-space mark-recapture estimates reveal a recent decline in abundance of North Atlantic right

whales. *Ecology and Evolution* 7:8730–8741.

Pace, R.M. 2021. Revisions and Further Evaluations of the Right Whale Abundance Model: Improvements for Hypothesis Testing. NOAA Technical Memorandum NMFS–NE–269. Northeast Fisheries Science Center, Woods Hole, MA.

Pace, R.M., R. Williams, S.D. Kraus, A.R. Knowlton, and H.M. Pettis. 2021. Cryptic mortality of North Atlantic right whales. *Conservation Science and Practice* 2021:e346.

Pendleton, D., A. Pershing, M. Brown, C. Mayo, R. Kenney, N. Record, and T. Cole. 2009. Regional-scale mean copepod concentration indicates relative abundance of North Atlantic right whales. *Marine Ecology Progress Series*, 378, 211–225.

Pendleton, D.E., M.W. Tingley, L.C. Ganley, K.D. Friedland, C. Mayo, M.W. Brown, B.E. McKenna, A. Jordaan, and M.D. Staudinger. 2022. Decadal-scale phenology and seasonal climate drivers of migratory baleen whales in a rapidly warming marine ecosystem. *Global Change Biology*, 28(16), 4989–5005.

Plourde, S., C. Lehoux, C.L. Johnson, G. Perrin, and V. Lesage. 2019. North Atlantic right whale (*Eubalaena glacialis*) and its food: (I) a spatial climatology of *Calanus* biomass and potential foraging habitats in Canadian waters. *Journal of Plankton Research* 41(5): 667–685.

Record, N.R., J. Runge, D. Pendleton, W. Balch, K. Davies, A. Pershing, C. Johnson, K. Stamieszkin, R. Ji, Z. Feng, S. Kraus, R. Kenney, C. Hudak, C. Mayo, C. Chen, J. Salisbury, and C. Thompson. 2019a. Rapid Climate-Driven Circulation Changes Threaten Conservation of Endangered North Atlantic Right Whales. *Oceanography*. 32.

Record, N.R., W.M. Balch, and K. Stamieszkin. 2019b. Century-scale changes in phytoplankton phenology in the Gulf of Maine. *PeerJ*. 7:e6735.

Roberts, J.J., B.D. Best, L. Mannocci, E. Fujioka, P.N. Halpin, D.L. Palka, L.P. Garrison, K.D. Mullin, T.V.N. Cole, C.B. Khan, W.A. McLellan, D.A. Pabst, and G.G. Lockhart. 2016a. Habitat-based cetacean density models for the U.S. Atlantic and Gulf of Mexico. *Scientific Reports* 6:22615.

Roberts J.J., L. Mannocci, and P.N. Halpin. 2016b. Final Project Report: Marine Species Density Data Gap Assessments and Update for the AFTT Study Area, 2015–2016 (Base Year). Document version 1.0. Report prepared for Naval Facilities Engineering Command, Atlantic by the Duke University Marine Geospatial Ecology Lab, Durham, NC.

Roberts J.J. and P.N. Halpin. 2022. North Atlantic right whale v12 model overview. Duke University Marine Geospatial Ecology Lab, Durham, NC.

Roberts J.J., R.S. Schick, P.N. Halpin. 2020. Final Project Report: Marine Species Density Data Gap Assessments and Update for the AFTT Study Area, 2018–2020 (Option Year 3). Document version

1.4. Report prepared for Naval Facilities Engineering Command, Atlantic by the Duke University Marine Geospatial Ecology Lab, Durham, NC.

Roberts J.J., R.S. Schick, and P.N. Halpin. 2021. Final Project Report: Marine Species Density Data Gap Assessments and Update for the AFTT Study Area, 2020 (Option Year 4). Document version 2.2. Report prepared for Naval Facilities Engineering Command, Atlantic by the Duke University Marine Geospatial Ecology Lab, Durham, NC.

Runge, M.C., D.W. Linden, J.A. Hostetler, D.L. Borggaard, L.P. Garrison, A.R. Knowlton, V. Lesage, R. Williams, R.M. Pace III. 2023. A management-focused population viability analysis for North Atlantic right whales. US Dept Commer Northeast Fish Sci Cent Tech Memo 307. 93 p.

SHRM. 2021. The COVID–19 Labor Shortage: Exploring the disconnect between businesses and unemployed Americans. Online Report accessed on Nov 20, 2023.

Slay, C. K. and S.D. Kraus. 1997. Right whale satellite tagging and habitat use patterns in the coastal waters of the southeastern United States. Final Report to the National Marine Fisheries Service, Charleston, South Carolina. 24 pg.

Watkins, W.A., and W.E. Schevill. 1976. Right whale feeding and baleen rattle. *Journal of Mammalogy*. 57:58–66.

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: February 1, 2024.

Samuel D. Rauch, III,
Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 229 as follows:

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

■ 1. The authority citation for 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. Amend § 229.32 by revising paragraph (c)(3)(i) to read as follows:

§ 229.32 Atlantic large whale take reduction plan regulations.

* * * * *
(c) * * *
(3) * * *

(i) *Area.* The Massachusetts Restricted Area is bounded landward by the Massachusetts shoreline, from points

MRA1 through MRA3 bounded seaward by the designated Massachusetts State waters boundary, and then bounded by a rhumb line connecting points MRA3 through MRA10 in order as detailed in table 11 to this paragraph (c)(3)(i);

TABLE 11 TO PARAGRAPH (c)(3)(i)

Point	N Lat.	W Long.
MRA1	42°52.32'	70°48.98'
MRA2	42°52.58'	70°43.94'
MRA3	42°39.77'	70°30'
MRA4	42°30'	70°30'
MRA5	42°30'	69°45'
MRA6	41°56.5'	69°45'
MRA7	41°21.5'	69°16'
MRA8	41°15.3'	69°57.9'
MRA9	41°20.3'	70°00'
MRA10	41°40.2'	70°00'

* * * * *
[FR Doc. 2024–02438 Filed 2–6–24; 8:45 am]
BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306–0065; RTID 0648–XD706]

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pollock in the Bering Sea and Aleutian Islands

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amounts of the Aleut Corporation and the Community Development Quota (CDQ) pollock directed fishing allowance (DFA) from the Aleutian Islands subarea to the Bering Sea subarea. This action is necessary to provide the opportunity for the harvest of the 2024 total allowable catch (TAC) of pollock, consistent with the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI).

DATES: Effective 1200 hours, Alaska local time (A.l.t.), February 7, 2024, through 2400 hours, A.l.t., December 31, 2024.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone



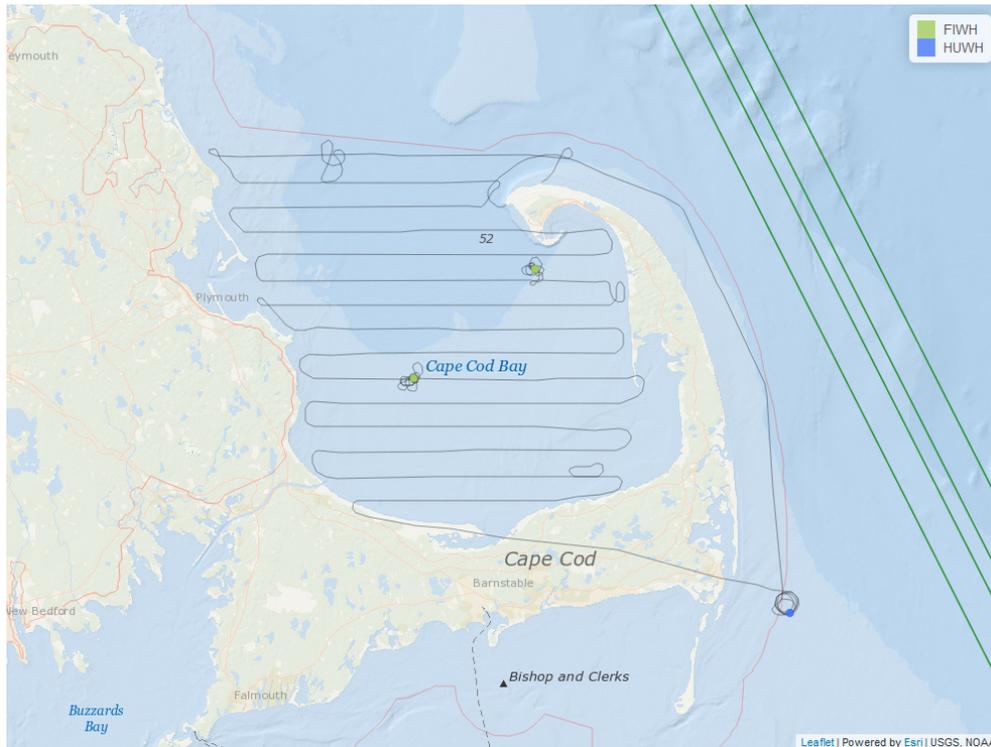
Center for Coastal Studies Provincetown

HIEBERT MARINE LABORATORY • 5 Holway Avenue • Provincetown, MA 02657
 tel (508) 487-3622/(508) 487-3623 fax (508) 487-4695

To: Dan McKiernan / Erin Burke
 Massachusetts Division of Marine Fisheries

From: Ashley Millan Ambert
 Right Whale Ecology Program

Survey Date: 09 January 2024
Survey Number: CCS 1019
Report Time: 09 January 2024 at 14:44



On Tuesday, 09 January 2024, the aerial team completed 16 track lines in Cape Cod Bay working from south to north. Beaufort ranged from 1 to 4, and weather was gray.

Table 1: Species Sighted

Species	Total Number
Common Dolphin	4
Fin Whale	2
Humpback Whale	1
Unidentified Dolphin/Porpoise	2

Table 2: Right Whale Sighting Details

Date	Time (EST)	Latitude	Longitude	Number
No right whales sighted				

These observations are considered preliminary pending detailed analysis and quality control. Please do not reproduce this information without the permission of CCS and DMF.

