

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, INC.,

Plaintiff,

v.

GINA RAIMONDO, in her official capacity
as Secretary, U.S. Department of Commerce,
et al.,

Defendants.

Civil Action No. 1:24-cv-10332

Hon. William G. Young

DECLARATION OF DANIEL J. MCKIERNAN

I, Daniel J. McKiernan, declare and state as follows:

1. I am the Director of the Division of Marine Fisheries (“DMF”) within the Massachusetts Department of Fish and Game. I became Acting Director of DMF on November 1, 2019, and was appointed Director in May 2020. As Director, I oversee the activities of DMF, which has the comprehensive authority and responsibility under M.G.L. c. 130 for the regulation, management, and protection of the Commonwealth’s commercial and recreational marine fisheries resources. I am aware of the Massachusetts Lobstermen’s Association’s challenge in the above-captioned action to the final rule closing certain federal waters, called the “Wedge,” to lobster and Jonah crab fisheries. *See* 89 Fed. Reg. 8333 (Feb. 7, 2024). I submit this declaration in support of the Massachusetts Division of Marine Fisheries as amicus curiae in support of the Defendants’ Opposition to Motion for Temporary Restraining Order, Preliminary Injunction, and Stay.
2. Massachusetts coastal waters have unique importance as critical habitat for the North Atlantic Right Whale (“Right Whale”). Right Whales are one of the most endangered

large whales in the world with fewer than 360 individuals remaining in the population, including only approximately 70 reproductive females.

3. Accordingly, Massachusetts has undertaken multiple conservation measures to protect Right Whales, including closing certain state waters to lobster pot fishing from February 1 through May 15, each year with a dynamic closure depending on the presence of Right Whales, banning all vertical buoy rope greater than 3/8" diameter in the commercial lobster pot fishery, and requiring all state licensed fixed gear commercial fishers to use weak rope or weak contrivances in vertical buoy rope. In addition, DMF administers a comprehensive Right Whale monitoring program, described further in paragraph 16, below, and a comprehensive fishery reporting program.
4. Of particular concern here is the coordination of federal and state rule-making regarding the closure of federal and state waters to lobster trap fishing to reduce the seasonal entanglement risk for Right Whales. After both DMF and the National Marine Fisheries Service ("NMFS") (also known as NOAA Fisheries) enacted separate closures of state and federal waters, respectively, a gap of federal waters remained open to trap gear fishing even when adjacent waters were closed. This gap is an area known as the Massachusetts Restricted Area Wedge ("Wedge"), which encompasses approximately 200 square miles of water. The evolution of the rule-making resulting in this gap is discussed in my letter to Michael Pentony, Regional Administrator NOAA Fisheries Greater Atlantic Regional Fisheries Office dated January 7, 2022 ("January 7, 2022, Letter"), attached hereto as Ex. A.
5. The Wedge borders Cape Cod Bay and Massachusetts Bay, which see the highest concentrations of Right Whales anywhere along their range from Florida to the Canadian

Maritimes. Right Whales are seasonally present in the Wedge as they migrate into and then out of Cape Cod Bay and Massachusetts Bay from roughly February through early May where they feed on abundant zooplankton. Allowing lobster trap gear rigged with vertical buoy rope in Cape Cod Bay and Massachusetts Bay during this time of year exposes Right Whales to an increased risk of entanglement that can lead to serious injury and mortality.

6. Leaving the Wedge open increases the risk of entanglement in this area, as discussed further below in Paragraph 8. DMF-funded aerial surveys have identified this area as a location of co-occurrence of Right Whales and vertical buoy rope in 2021 (when the Wedge was open) and 2022 (when the Wedge was closed for less than the three-month period). When the Wedge has remained open, commercial lobster fishers either left gear in this area or relocated gear to this area when other areas were closed instead of bringing the gear ashore. The Wedge also provides a place for aggregation of gear while fishers wait for adjacent waters to open at the same time as Right Whales are migrating through the area.
7. I first brought DMF's concern over this issue to NMFS's attention in the January 7, 2022 Letter (Ex. A). In particular, Figure 4 in the January 7, 2022 Letter (duplicated below) shows the co-occurrence of Right Whale sightings and gear present in April and May 2021, especially in the southwest corner of the Wedge. This issue is critical to DMF because DMF is and has been at the forefront of Right Whale protection. In light of the historical and anticipated presence of Right Whales in the Wedge, as noted in Paragraph 10 below, potentially opening the Wedge to trap pot fishing from February 1 through April 30 each year risks undermining the DMF's conservation efforts because the Wedge

is entirely off the Massachusetts coast and the vast majority of lobster fishing there is done by Massachusetts-based vessels.

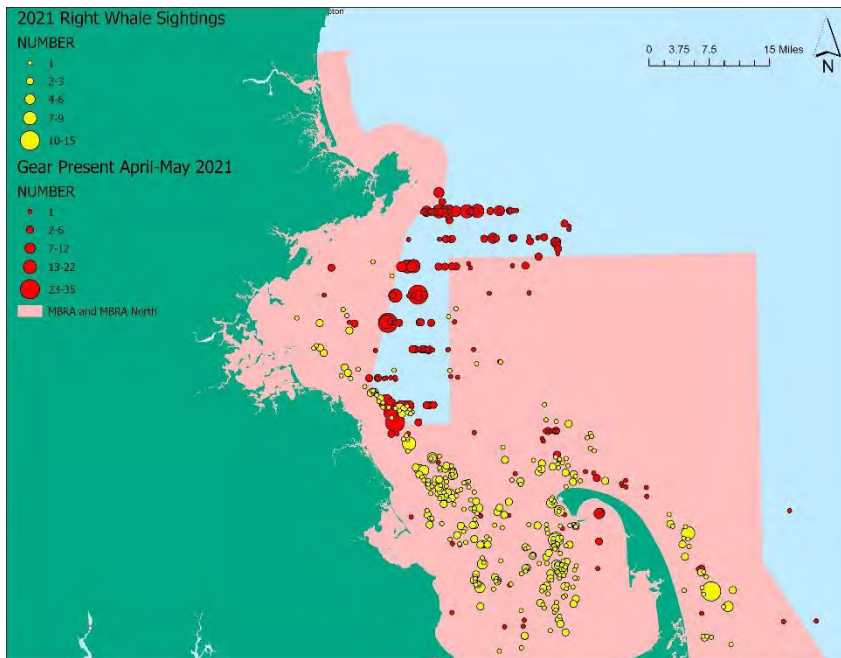


Figure 4. Right Whale sightings in 2021 and buoy lines documented in April and May 2021

8. Leaving the Wedge open not only allows active fishing, but it also allows fishers to store their gear in the Wedge. Indeed, if the Wedge remains open while adjacent areas in Massachusetts or in federal waters in the Massachusetts Restricted Area are closed, a significant number of fishers may move their gear from adjacent closed areas to the Wedge rather than bringing their gear back to their home ports. This is especially true for those fishers based in ports south of the Wedge because the Wedge is closer to the fishers' home ports than open waters north of the Wedge. I have repeatedly raised concerns to NMFS regarding gear either stored or fished in the Wedge. *See*, Ex. C, p. 1 (stating, "Having this near-shore area remain open to trap gear fishing and persistent buoy lines when adjacent state and federal waters are closed creates an opportunity for federally permitted vessels to fish or store buoyed trap gear in the area"); Ex. D, p. 1

(stating that the Wedge “is a magnet for trap gear for fishers who opt not to bring their gear home for the season and instead move gear out of the [closed areas] into the [W]edge.”); Ex. G, p. 1 (stating that the regulatory gap “created a refuge for fishers to place their gear, leading to extraordinarily high gear densities in the Wedge”).

Accordingly, leaving the Wedge open will result in more traps and associated buoy lines—whether being fished or stored—remaining in the water close to seasonally historical and predictable aggregations of Right Whales.

9. In 2022, NMFS closed the Wedge with an emergency rule, but the closure did not begin until April 1 of that year.
10. A subsequent DMF review of all Right Whale visual and acoustic surveillance data from 2018 through 2022 revealed the routine occurrence of Right Whales in the Wedge in February and March. *See* Ex. B. These data in concert with those presented in Ex. A highlight the importance of closing the Wedge annually from February through April to reduce entanglement risk because of the presence of Right Whales during this period.
11. I sent a second letter to NMFS on December 12, 2022, attached hereto as Ex. C. In this letter, I asked NMFS to again close the Wedge in 2023 to minimize the co-occurrence of Right Whales and vertical buoy rope, thereby reducing the risk of Right Whale entanglements in the Wedge where gear could be left or relocated to in February through April.
12. I sent a third letter to NMFS on January 4, 2023 (“January 4, 2023, Letter”), attached hereto as Ex. D. In this letter, I repeated my request that NMFS close the Wedge beginning on February 1, 2023. I also repeated my belief that a February 1 start date for the 2022 closure would have been preferable. Finally, I reiterated DMF’s full support for

a permanent closure of the Wedge annually from February through May, or as long as the adjacent areas remain closed, and stated, “the budgetary language [in the Consolidated Appropriations Act, 2023] provides authorization [for the closure].” *See* Ex. D, p. 1.

13. On January 6, 2023, I received a letter from Mr. Pentony indicating that NMFS would “extend the 2022 wedge emergency action to cover as much of the 2023 season as possible.” Letter from M. Pentony to D. McKiernan, dated January 6, 2023, attached hereto as Ex. E.
14. In light of NMFS’s positive response to my January 4, 2023, Letter, I approved a DMF Advisory entitled “Important Updates for Commercial Lobster Permit Holders” to go out on January 10, 2023, about the state and federal closures, with a particular reference to the Wedge that DMF expected NMFS would close. The Advisory stated:

Massachusetts Restricted Area Wedge: The Massachusetts Restricted Area Wedge (“wedge”) is an area of federal waters that is not seasonally closed to trap fishing or the use of persistent buoy lines, but is located between the Massachusetts’ state waters trap gear closure in Massachusetts Bay to the west and the Massachusetts Restricted Area west of Stellwagen Bank to the east. In 2022, NOAA Fisheries closed this area to traps using persistent buoy lines on an emergency basis from April 1 – April 30 and DMF has received a number of inquires [sic] questioning if this area will be closed again in 2023. While NOAA Fisheries has not announced a closure of this area for 2023, the Regional Administrator, Mike Pentony, has informed DMF the federal government intends to implement an emergency closure of this area imminently. Please stay tuned for more information.

A copy of this Advisory is attached hereto as Ex. F. The Advisory was posted on DMF’s web-site at

https://www.mass.gov/files/documents/2023/01/10/Update%20for%20Lobster%20Permit%20Holders_230110.pdf and was sent to DMF’s listserv of commercial lobster permit

holders and other subscribers. The Advisory was e-mailed through the listserv to 96,694 recipients, with a 44% open rate.

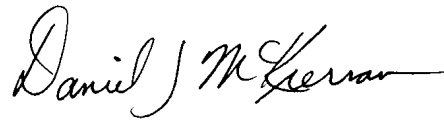
15. I communicated my ongoing concerns to NMFS regarding the ongoing need to close the Wedge and the appropriate timing for both Right Whale conservation and providing enough notice to fishers to Michael Pentony, Regional Administrator NOAA Fisheries Greater Atlantic Regional Fisheries Office in a subsequent letter dated August 22, 2023 (“August 22, 2023, Letter”) attached hereto as Ex. G.
16. As noted above, in paragraph 3, DMF administers a comprehensive Right Whale monitoring program, which is critical for DMF’s conservation efforts through photo identification, informing population estimates, developing density and residency estimates, managing risk such as entanglement and vessel strikes, and monitoring the population for health and injury assessments. As discussed above, in paragraph 8, leaving the Wedge open significantly increases gear density, which, combined with the increased presence of Right Whales in Massachusetts Bay and north, creates a “documentable seasonal co-occurrence between [Right Whales] and buoyed trap gear, particularly during April and May when Right Whales begin to seasonally migrate out of Cape Cod Bay.” *See*, Ex. C, p. 1. This creates additional burdens on DMF’s conservation activities. Given the increased risk of entanglement if the Wedge remains open, this area will get more attention from the aerial surveillance program than it would if it were closed, thus diverting surveillance monitoring from other areas. Moreover, if an entanglement occurs and is detected, the priority of the surveillance mission diverts from counting and photographing Right Whales to monitoring the entanglement and assisting the on-the-water vessel-based disentanglement team. Given finite flight hours and limited available aircraft, this outcome diminishes DMF’s monitoring program, which as noted above is critical for DMF’s conservation efforts.

17. Also as noted in the August 22, 2023 Letter (Ex. G, p. 2), DMF is concerned about the ability to enforce gear marking requirements. In particular, Massachusetts based lobster fishers are required to mark their vertical lines with the color red. If the gear is in federal waters, such as the Wedge, the lines must also bear the color green. If a fisher is licensed for both state and federal waters but is fishing in the Wedge with improperly marked gear, *i.e.* only red, without the green, then any entanglement with a Right Whale will be wrongly attributed to an entanglement in Massachusetts waters. Accordingly, if the Wedge is seasonally open, enforcement efforts in the Wedge must increase from February through April to ensure that any fisher who moves their gear from adjacent state waters to the open waters of the Wedge is properly marking their gear.
18. Correct attribution of the origin of gear involved in any entanglement is critical to measuring the success of DMF's ongoing regulatory efforts to reduce the risk of Right Whale entanglements. Massachusetts's efforts to evaluate the success and effectiveness of DMF's Right Whale conversation program depend on having accurate data about entanglements.
19. The federal closure of the Wedge is consistent with the extensive regulatory work that DMF and NMFS have done over the past several years to develop risk reduction measures, including those measures discussed above in Paragraph 3. Given the current dire status of the Right Whale population, the continued co-occurrence of vertical buoy rope and Right Whales in the Wedge in the next three months poses an increased risk of

entanglement to Right Whales and undermines DMF and NMFS's regulatory work to reduce this risk.

I, Daniel J. McKiernan, certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on February 27, 2024

A handwritten signature in black ink that reads "Daniel J. McKiernan". The signature is written in a cursive style with a long horizontal flourish at the end.

Daniel J. McKiernan
Director Division of Marine Fisheries
Massachusetts Department of Fish and Game

EXHIBIT A



The Commonwealth of Massachusetts

Division of Marine Fisheries

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Commissioner

DANIEL J. MCKIERNAN
Director

January 7, 2022

Michael Pentony
Regional Administrator
NOAA Fisheries GARFO
55 Great Republic Drive
Gloucester, MA 01930

RE: Seasonal entanglement risk for North Atlantic Right Whales in the EEZ west of Stellwagen Bank

Dear Mr. Pentony,

I am writing to inform you of an emerging entanglement risk to North Atlantic right whales (NARW) that occurs in a certain zone of federal waters sandwiched between the state and federal closures.

As you are aware, NOAA Fisheries created the Massachusetts Restricted Area (MRA) in 2015 to reduce the risk of entanglement risk to the large aggregations of NARW that occur there seasonally. This closure to fixed fishing gear included MA state waters within Cape Cod Bay and adjacent federal waters around Stellwagen Bank from February 1st through April 30th of each year. DMF immediately created analogous state regulations closing the area to fixed fishing gear.

Since 2016, DMF has also added dynamic management to the state waters portion of the MRA by extending the closure into the month of May when aerial surveillance shows that right whales remain present. In addition to this action, since the beginning of the closure, DMF has engaged in efforts, with assistance from the Massachusetts Environmental Police, to retrieve abandoned gear in the closure annually to ensure that the entanglement risk to right whales is effective as intended.

Since the advent of the MRA closure in 2015, seasonal usage of state and federal waters outside of Cape Cod Bay increased in certain areas and times where fixed gear fishing was allowed. Recent sighting data indicate that NARW stay for a longer time period than they have historically, and these whales are increasingly observed in state and adjacent federal waters in Massachusetts Bay and north to the NH state line. These changes in distribution increased the entanglement risk to NARW along the MA coastal waters. In response to these changes in entanglement risk, as well as continued declines in the population status of NARW, in 2021 DMF closed MA state waters from southeastern Cape Cod north the NH border to lobster fishing from February 1st to May 15th (Figure 1).

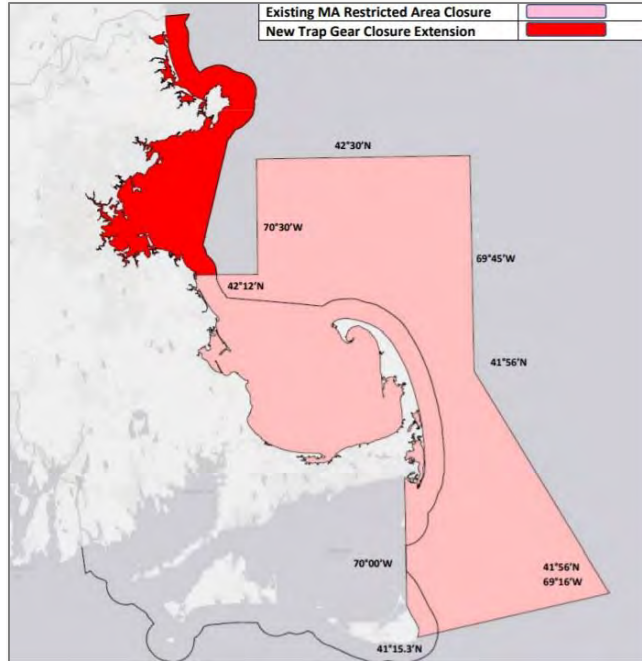


Figure 1. DMF trap/gear closure, February 1 – May 15

The National Marine Fisheries Service then mirrored the northern extension of the closure, known as Massachusetts North Restricted Area, in their Phase 1 amendment to the Atlantic Large Whale Take Reduction Plan in September of 2021. The Massachusetts North closure only runs through April 30 each year under the federal plan (Figure 2).



Figure 2. Map of Massachusetts Restricted Area

The increasing presence of NARW in these northern areas is not exclusive to state waters. In recent years, aerial surveillance conducted by the Center for Coastal Studies (CCS) has documented the presence of right whales in both open and closed portions of the waters north of Cape Cod Bay. The map below depicting gear and whales from 2018 demonstrates the necessity for DMF's northern extension of the state waters closure implemented in 2021 (Figure 3).

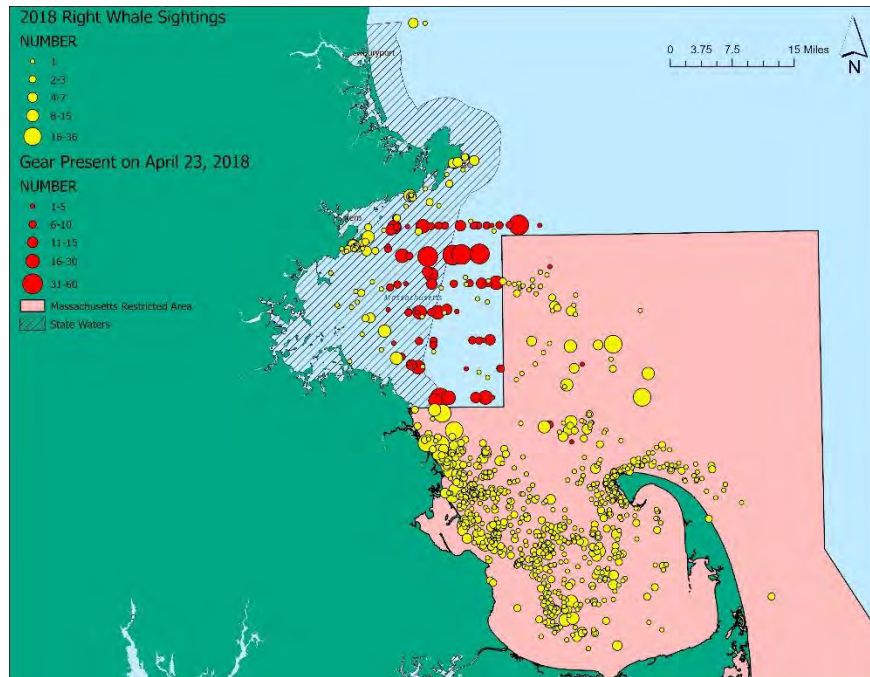


Figure 3. Right whale sightings in 2018 and buoy lines documented on April 23, 2018

However, the implementation of the Massachusetts North Restricted Area has created a gap between the closed areas between state waters of Massachusetts Bay and the northern federal waters portion of the original Massachusetts Restricted Area (Figure 2 and 4). Federally permitted vessels can continue to fish with persistent buoy lines in these areas adjacent to MA state waters during the closure period, and this area lies beyond the jurisdiction of the Commonwealth.

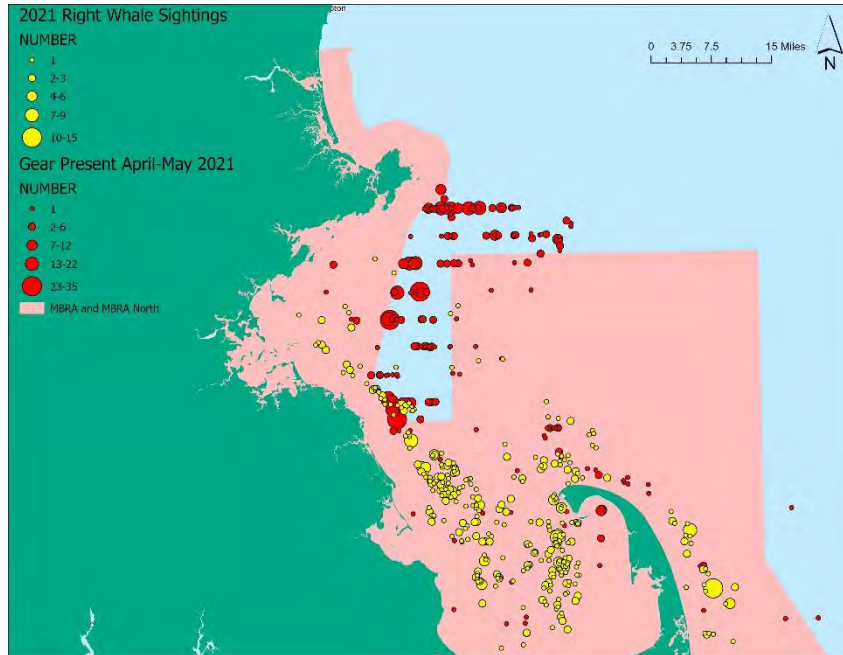


Figure 4. Right whale sightings in 2021 and buoy lines documented in April and May 2021

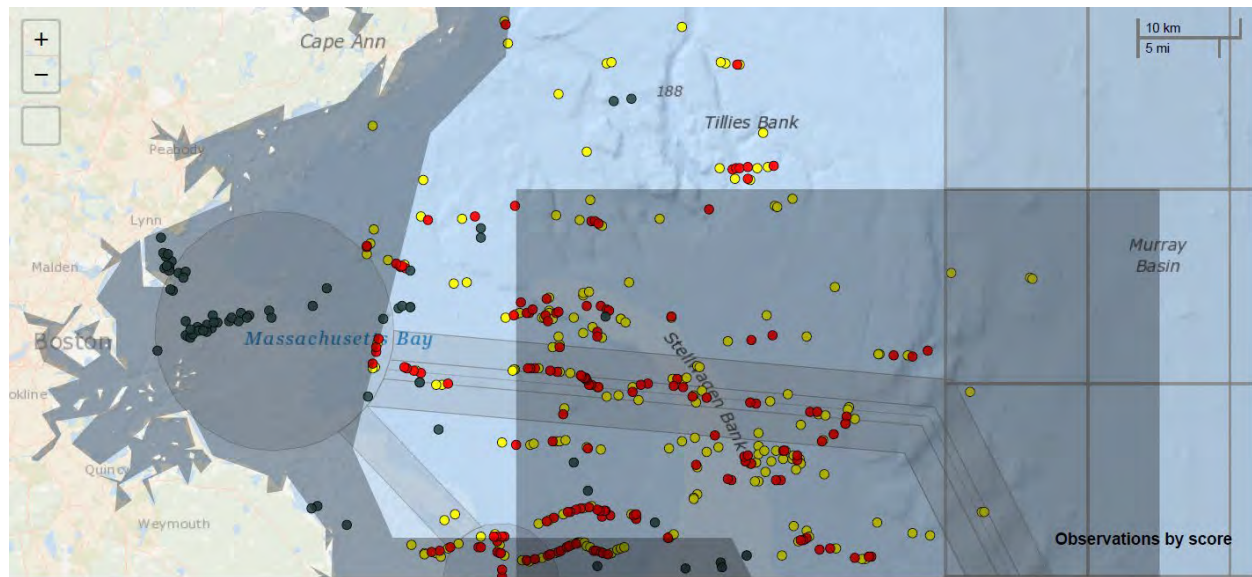
Given the current dire status of the NARW population and the need for continued reductions in entanglement risk we wanted to ensure that NOAA Fisheries was aware of this issue. We feel that continued overlap of persistent buoy lines with aggregations of NARW pose an entanglement threat and we are concerned that any future NARW entanglement in waters off the Massachusetts coast could threaten the opportunity of MA-based fishers to participate in fixed gear fisheries.

Sincerely,

Daniel J. McKiernan, Director

CC: Marine Fisheries Advisory Commission

EXHIBIT B



Locations of right whale observed February 1 through March 31 for 2018, 2019, 2020, 2021, and 2022. Data sources is WhaleMap.org. Grey dots represent confirm visual sighting, red dots represent confirmed acoustic detection, and yellow dots represent possible acoustic detections.

EXHIBIT C



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DANIEL J. MCKIERNAN
Director

December 12, 2022

Michael Pentony
Regional Administrator
NOAA Fisheries Greater Atlantic Regional Fisheries Office
55 Great Republic Drive
Gloucester, MA 01930

Dear Mr. Pentony,

I am writing you to share two concerns I have regarding the federal coordination of the Atlantic Large Whale Take Reduction Plan (ALWTRP) rule-making to reduce the risk of serious injury and mortality to the North Atlantic right whale ("NARW"). I hope you can consider and address these concerns this winter and as ALWTRP rule making progresses over the course of the next two years.

1. Spatial Gaps Between State and Federal Trap Gear Closures for the Massachusetts Restricted Area

I wrote to you on this subject on January 7, 2022. In this letter, I expressed my concerns regarding the seasonal entanglement risk for the NARW in the EEZ west of Stellwagen Bank and informed NOAA Fisheries there is a portion of federal waters within the Gulf of Maine that remains open to trap fishing and the use of persistent buoy lines and is sandwiched between Massachusetts' February 1 – May 15 Commercial Trap Gear Closure to Protect Right Whales [322 CMR 12.04] and the federal February 1 – April 30 Massachusetts Restricted Area Closure.

This spatial gap between state and federal closures poses a substantial and unnecessary entanglement risk to NARW. Having this near-shore area remain open to trap gear fishing and persistent buoy lines when adjacent state and federal waters are closed creates an opportunity for federally permitted vessels to fish or store buoyed trap gear in the area. Since 2018, sightings data indicate that NARW are being increasingly observed in state and federal waters in Massachusetts Bay and north towards the New Hampshire coastline. The combined effect is a documentable seasonal co-occurrence between NARW and buoyed trap gear, particularly during April and May when right whales begin to seasonally migrate out of Cape Cod Bay (Figure 1). I am concerned this continued overlap of buoyed trap gear with aggregations of NARW could result in an entanglement in waters off Massachusetts' coast that could threaten the viability of Massachusetts' fixed gear fisheries moving forward.

NOAA Fisheries was responsive when I raised this issue back in January and you pursued an emergency rule to close the so-called Massachusetts Restricted Area Wedge from April 1 – April 30 in 2022. The Massachusetts Restricted Area Wedge was inclusive of those federal waters west of 70° 30' west longitude between 42° 12' N latitude to the south and 42° 39.77' N latitude to the north. I commend you for taking this important action.

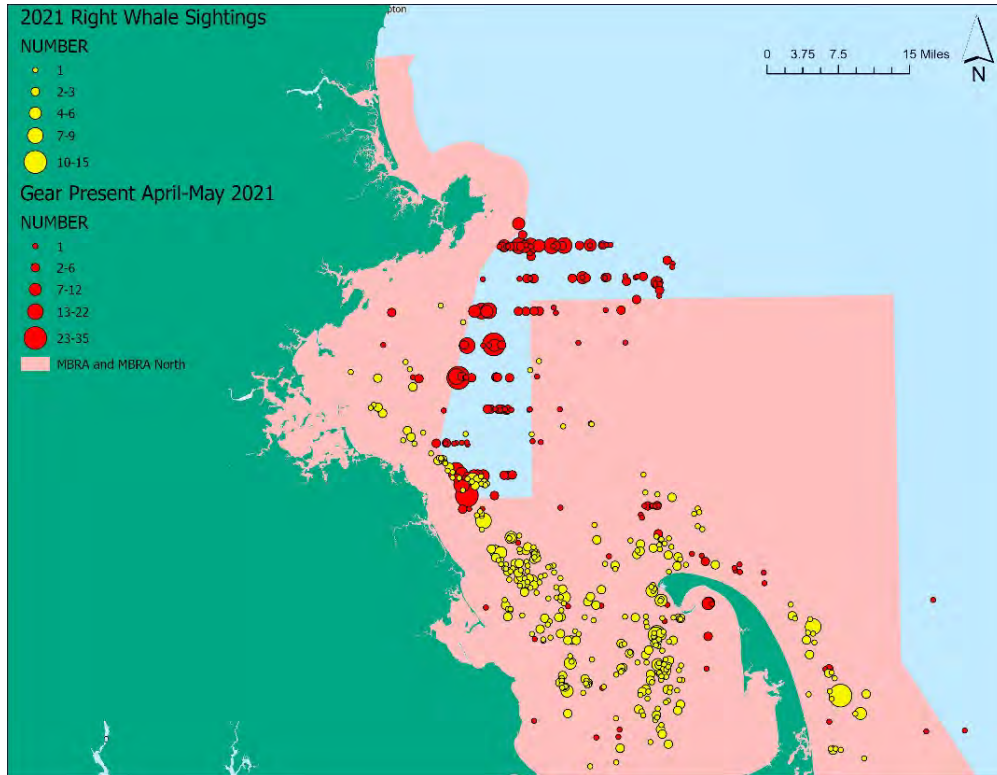


Figure 1. Right whale sightings in 2021 and buoy lines documented in April and May 2021 (CCS data)

During the course of 2022, NOAA Fisheries did not pursue interim rule-making to make permanent the emergency closure of the Massachusetts Restricted Area Wedge. As a result, in 2023, this area will again be open to federally permitted vessels to fish or store buoyed trap gear during the late winter and early spring months. I encourage NOAA Fisheries to consider the entanglement risk posed by spatial gaps in seasonal buoyed trap gear closure coverage. Moreover, I strongly support NOAA Fisheries re-closing the Massachusetts Restricted Area Wedge—similar to this past year—for 2023 and 2024, or until the new ALWTRP rules are implemented.

2. Enhanced Coordination in ALWTRP Rule Making Within NOAA Fisheries and with the Councils

As a result of the recent Boasberg decision, NOAA Fisheries has initiated a two-year rule making process to reduce the risk of NARW entanglements in regulated fisheries by 90% coastwide in order to achieve PBR. This presents a substantial and unprecedented conservation challenge. The breadth of this rule-making endeavor is considerable and it expands across

various fisheries and gear types. Moreover, some potential outcomes may have indirect impacts on fisheries not regulated under the ALWTRP. Accordingly, NOAA Fisheries should enhance coordination regarding ALWTRP rule-making efforts between its Protected Resources Division and its Sustainable Fisheries Division and with the New England and Mid-Atlantic Fishery Management Councils.

There is substantial overlap between what the TRT is discussing and considering and the work being conducted by the Sustainable Fisheries Division. In my experience, there can be a disconnect between the two programs. For instance, there are legacy fisheries—where effort and participation is tightly controlled at the state and federal levels (e.g., lobster trap)—that are required to substantially cut how they conduct their fishing activities to address NARW entanglement risk. Meanwhile, there are limited federal controls on the proliferation of new fixed gear fishing effort (e.g., waved whelk pot, black sea bass pot) in the federal zone that increase the presence of persistent buoy lines in the water column and subsequent risk to NARW. This disconnect complicates management and hurts NOAA Fisheries credibility with stakeholders.

To this point, I was encouraged that staff from the Sustainable Fisheries Division attended the recent ALWTRP industry scoping meeting with the southern New England gillnet fleet. There is overlap between the management of the skate, monkfish, and groundfish fisheries in the region and the management of this gillnet fishery with regards to NARW entanglement risk. Having staff from both divisions present made for a more robust and informed dialogue. More deliberate coordination among NOAA Fisheries staff is necessary and appropriate to comprehensively address the robust challenge the TRT currently faces.

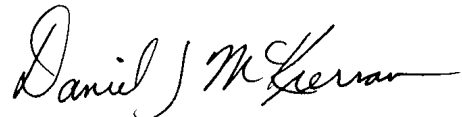
Similarly, there should be vigorous coordination between NOAA Fisheries and the New England and Mid-Atlantic Fishery Management Councils. There are certain management measures that may achieve risk reduction that are outside the purview of the TRT and require Council action. For instance, the southern New England monkfish and skate gillnet fleet expressed interest in addressing latent effort as a means of reducing entanglement risk and this would require the Council to amend the relevant fishery management plans.

However, the most important place for coordination between the ALWTRP rule making process and the Councils is with regards to the potential use of on-demand buoy line systems (“ropeless fishing”) and or alternatively, using only one buoy line on multi-trap trawls. If these types of trap fishing activities are going to be authorized or mandated in the federal zone, there will be a proliferation of trap gear without surface markings. This substantially increases the likelihood of gear conflicts and poses a significant additional safety risk to commercial fishers whose gear may become hung-up on this unmarked gear. To avoid such gear conflicts, I anticipate the New England and Mid-Atlantic Fishery Management Councils are going to have to take actions across a variety of federally managed fisheries prosecuted by mobile gear to require vessels be equipped with technology to determine the presence unbuoyed trap gear.

On a similar but unrelated matter, the draft Sturgeon Action Plan to reduce bycatch in gillnet fisheries warrants similar coordination across NOAA Fisheries, and with the Councils, as well as the Atlantic States Marine Fisheries Commission.

Thank you for your time reviewing my concerns. Please let me know if there is any way for the Massachusetts Division of Marine Fisheries to further assist NOAA Fisheries in meeting this critical and considerable management challenge.

Best regards,

A handwritten signature in black ink, reading "Daniel J. McKiernan". The signature is written in a cursive style with a long horizontal flourish at the end.

Daniel J. McKiernan, Director
Massachusetts Division of Marine Fisheries

cc: Massachusetts Marine Fisheries Advisory Commission; Massachusetts Department of Fish and Game; New England Fishery Management Council; Mid-Atlantic Fishery Management Council

Enc: January 7, 2022 letter from DMF to GARFO



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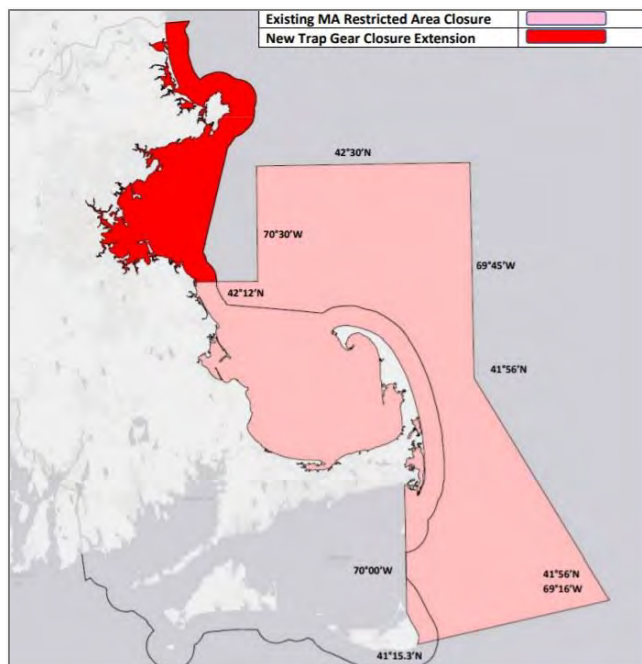


Figure 1. DMF trap/gear closure, February 1 – May 15

The National Marine Fisheries Service then mirrored the northern extension of the closure, known as Massachusetts North Restricted Area, in their Phase 1 amendment to the Atlantic Large Whale Take Reduction Plan in September of 2021. The Massachusetts North closure only runs through April 30 each year under the federal plan (Figure 2).



Figure 2. Map of Massachusetts Restricted Area

The increasing presence of NARW in these northern areas is not exclusive to state waters. In recent years, aerial surveillance conducted by the Center for Coastal Studies (CCS) has documented the presence of right whales in both open and closed portions of the waters north of Cape Cod Bay. The map below depicting gear and whales from 2018 demonstrates the necessity for DMF's northern extension of the state waters closure implemented in 2021 (Figure 3).

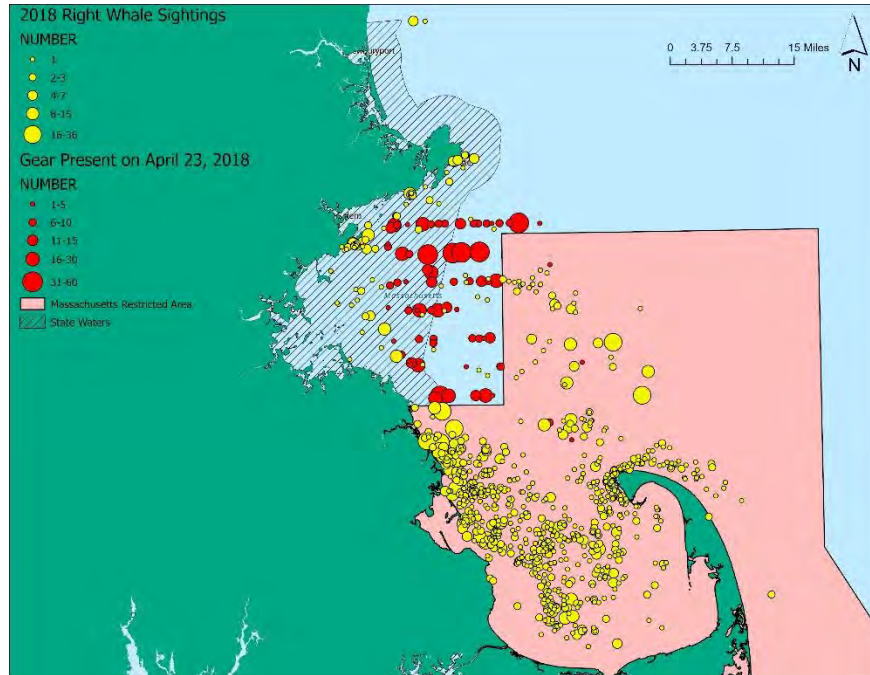


Figure 3. Right whale sightings in 2018 and buoy lines documented on April 23, 2018

However, the implementation of the Massachusetts North Restricted Area has created a gap between the closed areas between state waters of Massachusetts Bay and the northern federal waters portion of the original Massachusetts Restricted Area (Figure 2 and 4). Federally permitted vessels can continue to fish with persistent buoy lines in these areas adjacent to MA state waters during the closure period, and this area lies beyond the jurisdiction of the Commonwealth.

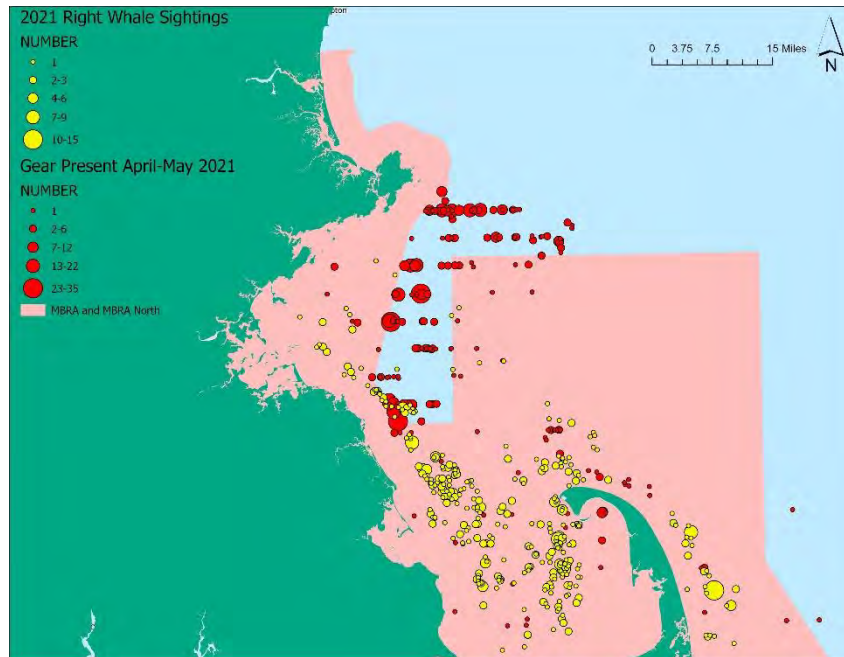


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Sincerely,

Daniel J. McKiernan, Director

CC: Marine Fisheries Advisory Commission

EXHIBIT D



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RONALD S. AMIDON
Commissioner

DANIEL J. MCKIERNAN
Director

January 4, 2023

Michael Pentony
Regional Administrator
NOAA Fisheries Greater Atlantic Regional Fisheries Office
55 Great Republic Drive
Gloucester, MA 01930

Dear Michael,

On December 12 2022, I made a request to NOAA Fisheries to repeat the seasonal closure enacted last winter to close the Massachusetts Restricted Area Wedge (“wedge”)—a spatial gap between the state and federal seasonal trap gear closures in Massachusetts Bay. This area west of Stellwagen Bank is a magnet for trap gear for fishers who opt not to bring their gear home for the season and instead move gear out of the Massachusetts Seasonal Trap Gear Closure and the Massachusetts Restricted Area and into the wedge. The co-occurrence of this gear with the seasonal presence of right whales in the wedge, particularly during the spring months, creates an elevated risk of entanglement.

Your agency’s action to close this area was much appreciated by the Commonwealth, although the timing of your 2022 action was delayed and began on April 1—a full two months after the adjacent areas were already closed. A February 1 start date for this closure would have been preferred to rid the area of persistent buoy lines and further reduce entanglement risk when right whales are present. I had anticipated after last winter’s closure of the area that NOAA would be in a position to enact this as a final rule. Unfortunately, due to a variety of circumstances, a permanent closure to the wedge has not transpired and it has become an ephemeral rule necessitating annual renewal.

Much has transpired over the past few weeks with the enactment of the Congressional Omnibus Appropriations action affecting your agency’s ability to further regulate the American Lobster and Jonah Crab fisheries through modifications to the Take Reduction Plan. I suspect you and the policy and legal experts are still determining the impacts of the Congressional action on the agency’s action plan to conserve right whales. With all this considered, as well as the intense work NOAA Fisheries and DMF have dedicated over the past several years to the development of additional risk reduction measures, I do not want to see this issue fall through the bureaucratic cracks.

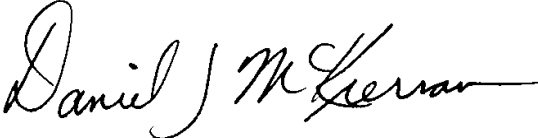
DMF believes this closure is still warranted and should be pursued by NOAA Fisheries. In fact, the budgetary language provides authorization for you to continue with this action:

(b) EXCEPTION.—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.

You and NOAA Fisheries staff have DMF's full support for a permanent adoption of a closure of the wedge annually from February through May, or as long as the adjacent areas remain closed. Please let me know if you believe this rulemaking is warranted and executable given the circumstances created by the Omnibus Appropriations action. We are already receiving inquiries from lobster fishers who are making business decisions to remove or leave gear in the wedge.

In closing, if you need any assistance on this matter my staff and I are available to assist.

Sincerely,

A handwritten signature in black ink that reads "Daniel J. McKiernan". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Daniel J. McKiernan, Director

Cc: Janet Coit, Assistant Administrator for Fisheries
Samuel Rauch, Deputy Assistant Administrator
Marine Fisheries Advisory Commission members

EXHIBIT E



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930

January 6, 2023

Daniel J. McKiernan, Director
Massachusetts Division of Marine Fisheries
251 Causeway Street, Suite 400
Boston, MA 02114

Dear Dan,

Thank you for your letter reaffirming your request that we extend the 2022 emergency closure of the Massachusetts Restricted Area Wedge (“wedge”) to cover the 2023 season. As you note in your letter, recent developments with respect to our 2023 appropriations have required we spend time fully reviewing the Act to ensure we understand the expectations and opportunities it presents. Nonetheless, we have every intention to extend the 2022 wedge emergency action to cover as much of the 2023 season as possible. We are currently working on an extension of this emergency rule; while we are unlikely to have this in place by February 1, 2023, we hope to publish the rule soon thereafter. We also intend to initiate a follow-on rulemaking that would make this closure permanent.

I appreciate your support on this issue as well as our other work to develop meaningful and effective measures to protect and promote the recovery of North Atlantic right whales while also ensuring a successful and sustainable lobster fishery.

Please let me know if you have any questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "Michael Pentony".

Michael Pentony
Regional Administrator



EXHIBIT F



The Commonwealth of Massachusetts

Division of Marine Fisheries

251 Causeway Street, Suite 400, Boston, MA 02114

p: (617) 626-1520 | f: (617) 626-1509

www.mass.gov/marinefisheries



CHARLES D. BAKER
Governor

KARYN E. POLITO
Lt. Governor

BETHANY A. CARD
Secretary

RONALD S. AMIDON
Commissioner

DANIEL J. MCKIERNAN
Director

January 10, 2023

Marine Fisheries Advisory

Important Updates for Commercial Lobster Permit Holders

Seasonal Commercial Trap Gear Closure Reminder: Massachusetts' seasonal commercial trap gear closure goes into effect on February 1, 2023 ([see map](#)). The closure includes all waters under the jurisdiction of the Commonwealth north and east of Cape Cod. The state closure does not extend into those southern state waters in Lobster Conservation Management Area 2. This state closure was extended in 2021 to include state waters north from Scituate to the New Hampshire maritime border. The closure remains in effect until May 15 but may be rescinded before or extend past that date based on the observed presence or absence of right whales in state waters.

The purpose of this closure is to protect seasonal aggregations of right whales from potential entanglements in buoy lines. Compliance with this closure is critically important to the Commonwealth's right whale conservation strategy. DMF will be partnering with the Massachusetts Environmental Police and a small group of commercial trap fishers to remove any lost or abandoned gear remaining in the closure area after this date. To assist us in this, DMF is requesting fishers contact DMF if they observe any lost or abandoned gear and provide us with information regarding the location, i.e., latitudinal/longitudinal coordinates or the TD's (LORAN coordinates) of this gear. Please e-mail any such information to conservationsolutions@mass.gov.

There are also seasonal federal closures to the fishing of lobster and crab trap gear with persistent buoy lines occurring from February 1 – April 30. This includes the Massachusetts' Restricted Area, which contains adjacent federal waters on Stellwagen Bank and within the Outer Cape Cod Lobster Conservation Management Area, as well as the South Island Restricted Area, which is bounded by 41° 20' N to the north, 40° 30' N to the south, 69° 30' W to the east, and 71° 19' W to the west.

Massachusetts Restricted Area Wedge: The [Massachusetts Restricted Area Wedge](#) ("wedge") is an area of federal waters that is not seasonally closed to trap fishing or the use of persistent buoy lines, but is located between the Massachusetts' state waters trap gear closure in Massachusetts Bay to the west and the Massachusetts Restricted Area west of Stellwagen Bank to the east. In 2022, NOAA Fisheries closed this area to traps using persistent buoy lines on an emergency basis from April 1 – April 30 and DMF has received a number of inquires

questioning if this area will be closed again in 2023. While NOAA Fisheries has not announced a closure of this area for 2023, the Regional Administrator, Mike Pentony, has informed DMF the federal government intends to implement an emergency closure of this area imminently. Please stay tuned for more information.

Federal lobster trap permit holders are reminded that all buoy lines affixed to trap gear set in federal waters must comply with federal buoy marking requirements. See NOAA Fisheries' gear marking illustration for more information on marking [requirements](#). Please note that Massachusetts' regulations require all red state marks have a corresponding federal green mark when the gear is set in federal waters.

Weak Links: DMF is no longer requiring commercial trap fishers to rig the buoy lines with a weak link at the buoy capable of breaking when exposed to 600-pounds of push-pull pressure. Fishers who continue to want to fish with weak links at the buoy may continue to do so.

This action does not, in any way, alter the continued requirement that commercial trap fishers fish buoy lines that break when exposed to 1,700 pounds of tension. This may be achieved through fishing custom 1,700-pound breaking strength buoy line or inserting [contrivances](#) approved by NOAA Fisheries into the buoy line. For Massachusetts state waters, these contrivances are to occur within the top 75% of the buoy line at a frequency of once every 60'.

2023 Trap Tag Order Form Update and Installation Deadline: Trap tag order forms have been mailed. Please note the coastwide trap tag price, negotiated by ASMFC on behalf of the Northeast states, has increased from \$.17 to \$.18 per tag for 2023. Please place your trap tag orders by February 1st to ensure delivery prior to May 1st. Permit holders are reminded that the deadline for affixing year-specific trap tags on traps is May 1st of the current fishing year.

2022 Commercial Permits Extended Through February 28, 2023: Due to delays in the generation, mailing, and processing of 2023 permit renewal applications, DMF has extended the validity of 2022 commercial, dealer, and special permits through February 28, 2023. Active permit holders will need a valid 2023 permit beginning on March 1, 2023. See original December 1st [advisory](#).

Limited Entry Permit Renewal Deadline Reminder: Renewal applications for limited entry permits or permits that have limited entry endorsements or a striped bass endorsement must be received in our office or postmarked by February 28, 2023.

If you have any questions, please email us at marine.fish@mass.gov.

EXHIBIT G



The Commonwealth of Massachusetts

Division of Marine Fisheries

(617) 626-1520 | www.mass.gov/marinefisheries



MAURA T. HEALEY
Governor

KIMBERLEY DRISCOLL
Lt. Governor

REBECCA L. TEPPER
Secretary

THOMAS O'SHEA
Commissioner

DANIEL J. MCKIERNAN
Director

August 22, 2023

Michael Pentony
Regional Administrator
NOAA Fisheries Greater Atlantic Regional Fisheries Office
55 Great Republic Drive
Gloucester, MA 01930

RE: Massachusetts Restricted Area Wedge

Dear Mr. Pentony,

In our ongoing cooperative efforts to protect northern right whales, there is an important but currently unresolved conservation measure that deserves our collective attention—the so-called Massachusetts Restricted Area Wedge (“Wedge Area”) seasonal closure. From the Division of Marine Fisheries’ perspective, the rationale for a federal closure to trap gear or persistent buoy lines in the Wedge Area is strong and unchanged for our prior correspondence. The Wedge Area is adjacent to the largest seasonal aggregation of right whales in the world. Furthermore, aerial surveillance data demonstrate routine use of this area and nearby portions of inshore Massachusetts Bay by right whales from February into May. The gap in the closure between state and federal waters that occurred in 2021 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 instead of the fishers retrieving the gear and bringing it ashore. The potential for a dense gear field adjacent to a large aggregation of right whales creates a level of entanglement risk that is troubling and begs for a permanent management solution.

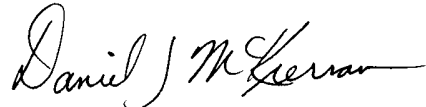
I appreciate NOAA’s responsiveness over the past two years to enact emergency closures to persistent buoy lines in the Wedge Area. You took these actions in part at the request of the Commonwealth, but the timing of the actions over the past two years has been less than ideal. In 2022, NOAA Fisheries was only able to close the Wedge Area for the month of April, limiting its effectiveness as a risk reduction measure. In 2023, the closure was enacted for February 1, but announced on January 31, giving commercial lobster fishers limited time to comply.

NOAA Fisheries has publicly stated in court filings its intent to permanently close the Wedge Area. In the recent litigation filed by the Massachusetts Lobstermen’s Association challenging the 2022 emergency closure of the Wedge Area, your declaration stated, “NMFS intends to issue a notice of proposed rulemaking seeking public comment on a rule that would permanently implement a seasonal closure of the MRA Wedge Area to trap/pot fishing with vertical buoy lines on an annual basis. Based on public comments, the relevant factual circumstances, and the best scientific information available at the time, NMFS will then determine whether to finalize

the rule and, if so, the scope of the final rule.” DMF supports this and urges you to commence this rulemaking as soon as possible to avoid delays in implementation and maximize the utility of such a closure. DMF is also keenly interested in enhancing the ability for the Commonwealth to enforce all rules designed to protect northern right whales in Massachusetts’ waters and adjacent federal waters.

Please let me know how DMF can facilitate the adoption of this surgical seasonal closure that will enhance right whale conservation.

Sincerely,

A handwritten signature in black ink that reads "Daniel J. McKiernan". The signature is written in a cursive, flowing style.

Daniel J. McKiernan, Director
Massachusetts Division of Marine Fisheries

cc:
Massachusetts Marine Fisheries Advisory Commission