

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

MAINE LOBSTERMEN’S ASSOCIATION,
INC.

Appellant

and

STATE OF MAINE, DEPARTMENT OF
MARINE RESOURCES, et al.,

Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, et
al.,

Appellees.

September Term, 2022
1:21-cv-02509-JEB

Case No.: 1:22-cv-5238

DECLARATION OF PATRICE MCCARRON

I, Patrice McCarron, declare and state as follows:

1. I am the Executive Director of the Maine Lobstermen’s Association (MLA), having served in that role since 2001. I am responsible for overseeing the operations of the association and leading the association’s outreach and policy activities, including those pertaining to conserving large whales. I serve as one of Maine’s representatives on the Atlantic Large Whale Take Reduction Team (TRT). The MLA has been an advocate for its members and the lobster industry on marine resource management issues and has been highly regarded by stakeholders for its efforts to maintain the health of Maine’s unique coastal and marine resources since 1954. MLA members are committed to its mission to advocate for a sustainable lobster resource and the fishermen and communities that depend on it.

2. The National Marine Fisheries Service (NMFS) issued a new Biological Opinion under Section 7 of the Endangered Species Act (ESA) in May 2021 which found that the operation of the lobster fishery does not jeopardize the continued existence of the North Atlantic right whale population provided the fishery complies with an aggressive ten-year Conservation Framework to reduce the fishery's risk profile. In September 2021, NMFS issued new whale regulations implementing the Atlantic Large Whale Take Reduction Plan (Whale Rule) under the Marine Mammal Protection Act (MMPA). The Conservation Framework requires MLA's members to achieve a 98% risk reduction by 2030, beginning with a 60% risk reduction implemented through the Whale Rule in 2022.

3. In September 2021, the MLA filed a lawsuit, *Maine Lobstermen's Association v. National Marine Fisheries Service*, in the United States District Court for the District of Columbia on behalf of its members. The MLA asserted the BiOp is unlawful because NMFS acted arbitrarily in numerous ways, including failing to rely on the best scientific information and failing to account for the positive impact of whale conservation measures already adopted by the Maine lobster fishery. The complaint asked for relief from the new Whale Rule arising from flaws in the Biological Opinion. In September 2022, the United States District Court for the District of Columbia denied the MLA's claims.

4. I provide this declaration to inform the U.S. Court of Appeals for the District of Columbia Circuit (Court) of the serious harm that is being done to Maine's lobster fishery as a result of the decision of the United States District Court for the District of Columbia in *MLA v. NMFS*. If the decision is not reversed and remanded for further consideration of underlying scientific issues raised by MLA in this matter, there will shortly be a nearly complete, unjustified closure of the federal lobster fishery. MLA believes the closure to be unwarranted and

unsupported by the best available scientific information. Closure of the federal lobster fishery would also have significant destructive consequences on the Maine state waters lobster fishery. In addition, each and every one of the rural communities on Maine's coastline where lobstermen make their homes and from which they work will suffer economic, social and cultural disruptions on an unprecedented scale. I will address each of these categories of impacts in this declaration.

5. Maine lobstermen live along more than 3,500 miles of coastline in 120 rural communities comprising 105 coastal towns and 15 year-round islands. Maine's coastal communities consist primarily of small, rural towns with 80% of coastal communities having fewer than 2,500 residents; 25% have fewer than 800 residents.

6. Maine's coastal communities are highly vulnerable to any downturn of the Maine lobster fishery. Based on data reports produced by the Maine Department of Marine Resources (DMR), true and correct copies of which are attached to this declaration as Exhibit A, in 2021, the Maine lobster fleet landed 108,889,871 pounds of lobster valued at \$730,596,022. This represented 82% of the value of all of Maine's commercial fishery landings and aquaculture combined (\$890,668,873). Based on a 2018 report prepared by Colby College Professor of Economics Michael Donihue, a true and correct copy of which is attached to this declaration as Exhibit B, the lobster supply chain is estimated to generate at least \$968 million in additional revenue. The success of the Maine lobster fishery is the linchpin of the economic viability of Maine's coastal communities.

7. Maine DMR assigns a commercial lobster license and a maximum 800-trap tag allocation to a vessel, which is owned by the Captain. The Captain is required to operate his or her own boat. By law, every Maine lobsterman is a small, self-employed business owner. Each

runs his own boat and lives, works, and spends earnings locally. There is no corporate ownership of the Maine lobster fleet. In many of our rural coastal communities, virtually every dollar sustaining the local community flows from a lobster dollar. Without lobstermen, local restaurants, coffee shops, banks, gas stations, grocery stores, and a host of other local businesses would go out of business.

8. In 2019, the Maine lobster fishery was composed of 4,745 commercially licensed lobstermen and 1,087 student license holders. Maine's lobster fleet directly supports more than 12,000 jobs on the water (4,745 Captains, up to 7,000 crew, 1,087 students). Licenses and trap tags can only be sold by the state of Maine; there is no sale or transfer allowed. In addition to the harvesters, the shoreside wholesale lobster sector, that is, the lobster supply chain, supports an additional 5,500 jobs. The revenues generated from harvesters, dealers, and processors support hundreds of additional businesses throughout Maine's coastal economy. Approximately one-quarter of Maine lobstermen hold a federal permit, which allows them to fish beyond 3 miles from shore and out to approximately 40 miles. This federal waters area, managed by the Atlantic States Marine Fisheries Commission (ASMFC), is known as Lobster Management Area 1 (LMA 1). In 2017, NMFS issued 1,601 LMA 1 federal lobster permits. According to DMR, 1,278 Maine commercial lobstermen held a federal permit in 2019 (79% of all LMA 1 federal permits). These data are based on reports produced by Maine's DMR and NMFS, true and correct copies of which are attached as Exhibit C, as well as the information contained in the report attached as Exhibit B.

9. Today, Maine lobstermen face punishing regulatory restrictions from a misguided effort by NMFS to focus the nation's plan to save right whales on the U.S. lobster industry. NMFS's plan is a 10-year program to shrink the U.S. lobster industry's footprint by 98%. NMFS

itself admits the program will not ensure the species survival because the recent spike in whale mortalities in Canadian waters, if unmitigated, would undermine the prospects for recovery of the species even if the U.S. federal lobster fishery were completely shut down. The combination of recently implemented closures and new restrictions on fishing, with NMFS's accelerated timetable for reaching risk reduction milestones is adversely impacting the MLA's members's fishing operations and livelihoods, as well as imperiling the economic welfare of the small, rural communities that depend on the lobster fishery. These impacts are not hypothetical. They are already hitting the lives of men and women who depend on lobstering to make a living. Many are questioning whether there is a future in lobstering and are reluctant to continue to invest in a business that NMFS has stamped with an expiration date.

10. The MLA worked for many years with federal regulators and other stakeholders to address the association's well-documented concerns with scientific deficiencies related to NMFS's Whale Rule. MLA's concerns were disregarded when NMFS issued the BiOp and Final Rule, which contain major scientific deficiencies. MLA's concerns were similarly swept aside by the District Court that deferred to NMFS on its many arbitrary and scientifically problematic decisions.

11. Amid MLA's numerous concerns, the BiOP suffers from a pervasive flaw: it uses a "worst case scenario" approach to its scientific assessments. NMFS incorporates serial conservative estimates, the effects of which are compounded through each step of its analysis, to project declines in the right whale population over the next 50 years. NMFS's overly precautionary assumptions bias the analysis toward unrealistic and implausible scenarios. To no avail, MLA has repeatedly explained the many ways in which NMFS's scenarios are not representative of the Maine lobster fishery today or its potential impact on right whale recovery.

But NMFS persists with an over-reaching regulatory goal of dismantling Maine's traditional, sustainable lobster fishery.

12. NMFS recently provided the TRT with its latest data on known causes of right whale mortality in 2020 and 2021 updating the data used as the basis of the Biological Opinion and Final Whale Rule. These new data show the continued trend of zero *known right whale mortalities or serious injuries associated with Maine lobster gear or any U.S. commercial fishing gear*. By contrast, there were two entanglement deaths confirmed to Canada from 2020 to 2021, bringing the total death count of right whales from Canadian fishing gear to 12 since 2016. An additional 8 right whales died in Canada due to vessel strikes since 2016. These data also reveal four right whale deaths resulting from U.S. vessel strikes from 2020 to 2021, totaling 5 since 2017.

13. Despite the continued lack of documented U.S. entanglement of right whales, published research confirming the continued shift of right whale migration patterns away from Maine's fishing grounds, and the lack of any evidence showing an increase in the risk posed to right whales by the lobster fishery, NMFS announced recently that the lobster fishery's mandated 60% risk reduction will be escalated to 90% in the May 2022 Final Rule. In pursuit of this goal, NMFS has now directed the TRT to identify an additional suite of measures to achieve the higher level of risk reduction by 2025.

14. NMFS introduced its accelerated risk reduction mandate in a series of presentations to the TRT in recent months. Nowhere in those presentations did NMFS proffer a rational explanation of why additional protective measures are urgently required so soon after the industry implemented a suite of significant changes in gear configurations and fishing practices. To make matters worse, just three months after the November 2021 Take Reduction Plan was

implemented, NMFS downgraded the plan's expected risk reduction credit by 10 percent based on a new, exaggerated set of assumptions, making the task of reaching a 90% risk reduction even more daunting. This new plan is virtually impossible to implement without disrupting the fishery's carefully crafted sustainability management scheme.

15. Closing the federal fishery will put a tremendous strain on our state waters lobster resource which has been successfully stewarded by our fishermen for many generations. Federal boats operate nearly 12 months of the year, while most state waters lobstermen fish only five months, from July through November. This creates a lose-lose situation for everyone, including the lobster resource. Federal vessels will need to unleash the full force of their fishing power in an effort to land enough lobster to try to break even (which will be difficult to achieve due to the higher overhead of these operations), and in the process the federal vessels will out-fish the smaller state waters vessels, making it nearly impossible for either sector to remain profitable. Each boat will receive too small a piece of the pie; there are simply not enough lobsters in state waters to sustain all of these boats. This would also create crowding, gear conflict, and cause significant social and cultural unrest. I worry what this concentrated level of fishing effort will do to the sustainability of the lobster resource in state waters.

16. MLA is concerned that unless NMFS is directed to halt its rush to impose ever more restrictive and unjustified risk targets and to reevaluate its scientific assumptions, the fate of Maine's fishery will have been irretrievably sealed. NMFS is not acting on the basis of best available science and should not be permitted to force the downsizing and virtual elimination of a fishery that has been operated in a sustainable manner for more than 150 years. I want the Court to understand that no right whale has ever been documented to have been seriously harmed or killed in our fishery. The Court should also be aware that NMFS is acting on a hypothetical,

implausible risk scenario and that NMFS discarded ample evidence that the whale population is at risk from other human and environmental factors. Nonetheless, it is embarked on a ruinous plan to dismantle the U.S. lobster industry. NMFS's relentless march to eliminate the rope and gear needed for lobstermen to make a living is now causing them to search for other ways to feed their families. MLA's only option is to petition this court for prompt review of MLA's well-documented assertions of legal and scientific error by NMFS.

17. Despite devastating effects on the Maine lobster fishery, according to NMFS, shutting down all federal fixed gear fisheries from Maine to Florida, including the lobster fishery, will achieve only an 85% risk reduction, thus falling short of the mandated 90%. Even worse, when NMFS considers the likely scenario in which gear fished in federal waters is redeployed in state waters, the estimated risk reduction falls to only 61%. For those lobstermen still allowed to fish in state waters, NMFS estimates the need to eliminate half of their rope from the water, a result which could be achieved at the cost of removing 75% of their traps. The remaining rope would then have to be modified to weaken the top 75% of the length of each line. Cumulatively, shutting down the federal lobster fishery and drastically cutting back the 3-mile wide state fishery would achieve a 94% risk reduction, according to NMFS estimates. However, even this level of cutbacks makes the unrealistic assumption that no federal gear is redeployed in state waters.

18. The lobster industry has long prided itself on being a diverse fishery with low barriers to entry. If you are willing to work hard, you can get started in a small boat with a few traps and work your way up to a larger boat. According to NMFS, the lobster fishery's only hope to avoid full closure of all state and federal waters lobster fisheries is to replace its sustainable fishing practices with yet-to-be proven ropeless fishing technology that the Agency itself asserts

will take nearly a decade to reach commercial viability. A true and correct copy of Michael Pentony Declaration from *CBD vs Raimonndo* is attached to this declaration as Exhibit D).

NMFS's plan for a ropeless fishery ignores the unique diversity of Maine's fleet and will remove opportunity for all but the lobster fishery's largest vessels and for the next generation of fishermen from rural communities who had expected lobstering to be their future. According to Maine DMR, the Maine lobster fleet's largest vessel category, boats 40 to 50 feet in length, accounts for only 10% of the fleet. By contrast, 20% of Maine's lobster fleet is made up of boats 18 feet in length or less. This is why adoption of ropeless fishing—NMFS's ultimate goal for its whale protection plan—will result in immense pressure to replace Maine's owner-operator lobstering system with a heavily consolidated, corporately owned fleet. As observed in fisheries around the world, the result is a few very big winners, with the majority of fishermen forced out of business. This would be a death knell for the Maine lobster industry and our coastal communities, even if its commercial deployment were practical any time in the relatively near future, which it is not.

19. NMFS has been arbitrary and contradictory in its scientific assumptions applied to management of the two primary human causes of harm to right whales. In July 2022, NMFS published a proposed rule to reduce harm from vessel strikes by 27%— a stark contrast to the agency's aggressive demand for a 90% risk reduction from the lobster fishery. Using NMFS's methodology for estimating "risk reduction" for U.S. commercial fisheries, vessel strikes would have to reduce risk by 75%, not 27%. NMFS's favorable treatment of the shipping industry is both arbitrary and confounding, given that from 2017 to 2021, NMFS reported five known right whale mortalities from U.S. vessels strikes compared to zero known U.S. fishing entanglement deaths during that same time period. This contrast between assignment of responsibility to the

shipping industry and the lobster industry is a stark example of NMFS's arbitrary use of science that must be reviewed. U.S. vessels continue to kill whales while the lobster industry does not. NMFS should be focused on stopping current, documented threats to whales from vessel strikes and Canadian fishing gear rather than hypothetical entanglements in Maine fishing gear that has already been made significantly safer to avoid risk to right whales. And NMFS should do its job correctly so it does not give short shrift to up-to-date science that documents the geographical shift in right whale habitat away from the Gulf of Maine.

20. The serious concerns noted above are real and immediate in their impact on the Maine lobster fishery. To meet NMFS's arbitrary risk reduction targets, the Maine lobster fishery would be reduced to a fraction of what it is today, putting thousands of people out of work, and setting off a domino effect of devastating economic impacts throughout the State causing lobstermen, their families and their communities to suffer serious and irreparable harm. This harm to the working people of Maine is not a hypothetical future result — it is happening now.

21. The level of anxiety in the lobster industry is beyond anything I have ever experienced. Many lobstermen travelled up to 5 hours to attend the one in person public hearing NMFS held for the scoping phase of its new rulemaking to reduce risk from the lobster industry by 90%. The meeting was attended by lobstermen, many of whom brought their wives and children so they could look NMFS officials in the eye and show them the lives that will be ravaged by these measures. Others testified of their fear that their grocery stores, restaurants, banks and schools will close because lobster dollars will no longer be spent in those communities. MLA has been told of trap builders already laying off workers due to cancellation of orders and banks hearing from lobstermen who are concerned about their ability to repay loans and others who have dropped plans for loans that would support new business investments.

Well established lobstermen regularly call the MLA office begging to know what NMFS is going to do. They have no idea what to plan for – closures, trap reductions, gear modifications, or all of these – or when and where they will be required. MLA is regularly hearing of more and more lobster boats, gear, and federal permits listed for sale in online commercial fishing gear forums by lobstermen who fear that if they wait to find out what NMFS is doing, their entire business – the culmination of their life’s work -- will be worthless. And there are few viable job options. Some have already said that they will leave the state and the profession that defines who they are, because there will be no other opportunity for them in Maine.

22. All are in utter shock and disbelief that their own government can and will eliminate a fishery that has never been known to kill a single right whale – a species that most have never seen despite each of them having spent tens of thousands of hours at sea. They are already mourning the loss of their fishing heritage. These are good people. They are world renowned for their stewardship of marine resources. They care deeply about the ocean, lobsters and right whales. They want to be part of the solution but, without action by the Court, NMFS will proceed to destroy their future in the lobster fishery, and we will stand powerless as misguided regulations from agency over-reach eliminate the very heart and soul of the state of Maine, our lobster industry.

23. MLA asks the Court to act promptly to reverse the District Court’s decision rubber stamping NMFS’s unsupported and patently erroneous analysis of the fishery’s current impacts on right whales. In the interest of simple fairness — and to ensure NMFS is following the best available science— I believe it is important for NMFS to be directed to re-examine its assumptions of allocating of risk responsibility, and it should also be directed to address a significant disparity in how it regulates various industries that interact with right whales.

24. Attached to this declaration as Exhibit E is a true and correct copy of Erin L. Meyer-Gutbrod *et al.*, Ocean Regime Shift is Driving Collapse of the North Atlantic Right Whale Population, *Oceanography*, Vol. 34, No. 3 (2021).

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on October 10, 2022, in Kennebunk, Maine.



Patrice McCarron