

**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 DUSTIN DELANO

I, Dustin Delano, declare and state as follows:

1. I am the Vice President of the Maine Lobstermen’s Association (MLA) and have served in this role since 2020. Before I was elected as the Vice President of the association by MLA’s members, I served as 2nd Vice President in 2018, and Secretary/Treasurer in 2019. I have been a dues-paying member of the MLA since 2015. As MLA’s Vice President, I serve on the Executive Committee and assist the President in overseeing the general and active management of the business of the association and its positions on policy issues that affect Maine’s lobster fishery.

2. In 2014, I participated in the Maine Lobster Leadership Institute through which I learned about lobster science and policy issues, including MLA’s work with Maine’s lobster

fishery to protect both North Atlantic right whales and preserve a future for the lobster industry. During this program, I travelled to Prince Edward Island in Canada where I stayed and fished with lobstermen to learn about the Gulf of St. Lawrence lobster fishery.

3. Founded in 1954, the MLA is a private, non-profit trade association which represents the interests of 1200 members, including nearly a thousand Maine lobstermen who are voting members, and a few hundred non-voting friend and business members. The MLA is the oldest and largest fishing industry association on the East Coast. The MLA's mission is to advocate for a sustainable lobster resource and the fishermen and communities that depend on it, which includes the conservation of the species that are potentially impacted by the lobster fishery.

4. The MLA has been a member of the Atlantic Large Whale Take Reduction Team (TRT) since it was created in 1995. As a commercial lobsterman and the Vice President of MLA, I have firsthand knowledge of both the organization and my fellow lobstermen's long-standing efforts to develop and implement practical management measures and harvesting practices designed to reduce the risk to right whales when they are present in state and federal waters off Maine.

5. In addition to my primary occupation as a commercial lobsterman, I also commercially fish for menhaden, an important local bait source for Maine's lobster fishery. I have made my living as a lobsterman, based in Friendship, Maine, since 2009. I currently hold both a state of Maine Class III lobster license and a federal lobster permit to fish from my 40-foot boat, F/V Knotty Lady. I am fully compliant with all federal and state commercial fishing laws and regulations.

6. I grew up wanting to be a lobsterman. My family has fished in the region for four

generations before me. I first went lobstering with my father when I was five years old, and I bought my first boat—a skiff, with the money I had saved from fishing with my father—at 11 years old. I was taught at an early age that lobstering comes with a lot of responsibility. A lobsterman must respect that he has an opportunity to fish because previous generations took care of the resource. I take pride in doing my part to ensure that this fishery will be handed down to the next generation.

7. Lobstering is an amazing way of life that keeps our young people right here in Maine and contributes to our local and state economies. Lobstering is not just a job. As a lobsterman, I am a small businesses owner. I employ sternmen. And like all Maine lobstermen, I am required by the state to run my own boat and haul my own traps. I am fully invested in taking excellent care of the ocean because my livelihood depends on it. Lobstering is not only invaluable for Maine’s families, culture, and history, it sustains entire towns and regional economies.

8. In 2021, the National Marine Fisheries Service (NMFS) adopted a final rule that implements the Take Reduction Plan developed by the TRT. The final rule is intended to reduce risk to right whales by 60%. These measures include vastly expanded gear marking requirements in federal waters, removing rope from the water by adding more traps to each buoy line, making remaining rope safer by weakening buoy lines at specific intervals, and a large new seasonal closure in Maine’s Lobster Management Area 1 (LMA 1 Restricted Area). The federal whale plan directly regulates my fishing activities.

9. On March 1, 2021, I submitted a public comment to NMFS concerning the proposed regulation to implement the Final Rule. I urged NMFS to consider the economic realities of the LMA 1 Restricted Area and other proposed amendments to the federal whale

plan. I asked NMFS to consider how Maine lobstermen and their families are impacted by the closures and the restrictions on gear, and the economic devastation that will occur if Maine lobstermen are not given adequate time to adjust to the new regulations. I also supported the public comments submitted by MLA on behalf of MLA members like me.

10. I care deeply about the Maine lobster fishery and my responsibility as a steward of the ocean and all of the life it supports. My fellow lobstermen and I have already adopted a series of measures aimed at protecting right whales and other marine creatures. We incorporate 600-pound weak links at the top of the buoy line, fish sinking rope between traps, and fish long trawls to cut down the amount of rope in the water, the number of which increases the further you fish from shore. We spent a year removing the previously required three 12-inch red marks inserted at the top, middle, and bottom of our buoy lines to aid in gear identification if a whale encounters the gear. We've replaced those with four purple marks including three 12-inch marks located at the top, middle and bottom of the line and a 3-foot mark below the buoy. I had to purchase a new set of endlines for the gear I fish in federal waters that must be marked with four 12-inch green marks adjacent to each of the purple marks I added in 2020. NMFS did not discuss this gear marking in the proposed rule, and it came as a surprise.

11. Even Maine lobstermen who are not subject to the federal whale plan rig their gear to make it safer. They may deploy a 600 pound breakaway link below the buoy or fish sinking rope for their groundline or buoy line. For the first time in 2020, they marked their gear with the Maine-specific purple marks and also had to add a weak insert to their buoy line in May 2022.

12. Adapting to these regulations has been both time consuming and difficult. Fishing sinking groundlines is far more dangerous than fishing floating groundlines as sinking rope is

easily hung-up down on the bottom creating a hazard when the gear is hauled back. Lobstermen have adapted, and through trial and error, developed strategies to haul this gear back safely. Sinking groundlines also require regular inspection and replacement as this rope chafes on the bottom and can part off unexpectedly if not properly maintained, which can be very dangerous to the Captain and crew. Despite the challenges in adapting to these regulations, and higher costs of fishing this gear, compliance with the federal whale plan has been excellent.

13. It is important to understand why U.S. whale-safe fishing methods are so effective. U.S. fishermen cannot fish floating line at the surface, so all buoy lines are comprised of at least two sections of rope, spliced or knotted together. I rig the top half of my buoy lines with 3/8" or 7/16" sinking rope coming down from the buoy, spliced into a section of 7/16" floating line to the trap. In deeper waters, I add another section of floating line, or a lengthener, to the bottom of my buoy line connected with a knot. Knots weaken any line by 40% to 60%. By contrast, the majority of Canadian snow crab and lobster gear is fished with a single length of strong floating line from trap to buoy. Last year, an MLA member shared a photo of a Canadian endline that washed up on a Maine beach that was a straight shot of 15-Fathom, 1/2-inch floating rope rigged to the buoy. Based on the yellow and black marker with a green tracer gear marking, this buoy line is from the LFA 35 lobster fishery in the Bay of Fundy. Maine lobstermen do not fish 1/2-inch line to the buoy and do not fish floating line at the surface and would connect this line with a knot. These differences in the size of lines and how they are prepared, assembled, and marked make it possible to distinguish gear from the various parts of the North Atlantic lobster fishing grounds and other gear fished in Canada. I often hear about line removed from a right whale that cannot be traced back to a fishery, but based on size and rigging, I can confidently determine the line did not come from the Maine lobster fishery. For example, according to the

NMFS, the right whale named Snow Cone is entangled in 5/8" leaded sink line which is not fished in the Maine lobster fishery. Unfortunately, NMFS does not use this type of information to rule out certain fisheries, such as the Maine lobster fishery, as causes of right whale entanglements. They simply say it can't be definitely be attributed to a specific fishery, list it as an entanglement of unknown origin, and then use a formula to attribute it back to our fishery.

14. In 2021, NMFS issued a biological opinion (the "BiOp") that evaluates the impacts of the American lobster fishery, which includes the Maine lobster fishery. In that BiOp, NMFS overestimates the impact of the trap/pot fisheries on the right whale by using worst-case scenarios that are inconsistent with NMFS's data, including data about the origin of fishing gear involved in entanglements. Some of these same worst-case scenarios were used by NMFS to justify the LMA 1 Restricted Area in the latest federal whale rule. NMFS's BiOp imposes a Conservation Framework to reduce its inflated risk estimates, which requires the Maine lobster fishery to achieve a 98% risk reduction by 2030. The alleged need for these reductions, and the LMA 1 Restricted Area, are not supported by the best scientific and commercial data available. I am particularly concerned that the reductions have been mandated without proper consideration of all of the whale conservation measures implemented by Maine lobstermen over the last 20 years. I do not find it credible that our government would put forward a plan that decimates the Maine lobster fishery and fails to recover the right whale especially when they have failed to regulate known sources of right whale mortality.

15. The Final Rule has already impacted my fishing business. The LMA 1 Restricted Area prohibits lobstermen from fishing in a 967-square-mile area of prime lobstering bottom off the coast of Maine from October 1 to January 31 of each year. This rectangular shaped closure runs nearly 100 miles along the length of Maine's lobster zones C, D and E, and 10 miles deep

out to the Area 3 line. As a Zone D lobsterman out of Friendship, a portion of my offshore fishing bottom is in the LMA 1 Restricted Area. This closure restricts some of the most productive fishing grounds in Maine's federal waters during the peak time when demand and price are typically strongest. When I was able to set my traps back in that area in February, the lobsters were gone. If anyone thinks that lobsters don't migrate through areas and will wait patiently for lobstermen to catch them when a closure reopens, they are just plain wrong. I was disheartened to learn from Maine's Department of Marine Resources (DMR) that nearly three-quarters of the whale sightings used as the basis of the closure were detected outside the closure in Lobster Management Area 3. I was equally frustrated that NMFS did not conduct even a single day of surveillance to monitor the LMA 1 Restricted Area for right whales during the 2021 closure. No airplane flew, no vessel-based survey or acoustic surveillance were conducted. I, and my fellow lobstermen, are also very confused and frustrated that NMFS is closing the same waters to fishermen that they have permitted for the construction of wind farms, such as in the Nantucket closure in Massachusetts.

16. The federal whale plan is not fair or equitable. NMFS will allow ropeless gear to be fished in the LMA 1 Restricted Area, but only for those who obtain an Exempted Fishing Permit (EFP), and fish high-tech acoustic release gear approved by the agency. I find it fundamentally unfair that NMFS would provide financial support for and permit a privileged few lobstermen to fish and land lobsters from that prime fishing area, while the remainder of the displaced lobstermen are sidelined. NMFS estimated that 64 vessels would be displaced from the LMA 1 closure, while DMR's Commissioner estimated as many as 150 vessels may be displaced. Yet NMFS approved an EFP to allow up to 30 vessels, New England-wide, to fish ropeless gear.

17. The federal whale plan has already caused me significant financial injury.

Commercial lobstering is my primary source of income. I predominantly fish in waters that are directly adjacent to the LMA 1 Restricted Area, and fish about a quarter of my gear in the LMA 1 Restricted Area during the winter months when the closure is in place. As a result, my fishing activities are now severely impacted for more than four months each year. I have had to relocate that portion of my gear out of the LMA 1 Restricted Area to less productive fishing bottom, and my traditional fishing bottom adjacent to the closure has been less productive because other displaced lobstermen have relocated gear there. This directly and significantly limits my income and my ability to make a living. Fortunately, those who relocated to the area where my gear was set are lobstermen who I traditionally fish around. While the January catch in 2022 was the lowest I can recall in recent history, we avoided gear conflicts. I fish from a 40-foot boat, and the wind and weather experienced in February made it impossible for me to safely stack traps on my vessel to relocate my gear back to my prime fishing bottom, and the losses I suffered from the closure extended well beyond just their obvious impacts. I got only one good haul from the traps I was able to shift back into the closure area. I am frustrated that despite the reopening in February, the closure continued to negatively impact my business due to the operational realities of the Maine lobster fishery.

18. Maine's lobster zone management law requires me to declare a home zone for setting my lobster traps. I am required to fish the majority of my gear in my home zone. It is illegal for me to simply move all of my traps outside of my declared home zone and thus further away from the LMA 1 Restricted Area. Furthermore, as a Zone D lobsterman, the fishing grounds on either side of my home zone (Zones C and E), are also part of the LMA 1 Restricted Area. Not only am I limited to relocating only 49% of my gear outside of Zone D, it is not

financially feasible, nor would it be culturally acceptable, for me to relocate my gear in one of the adjacent zones outside the closure area. I know that I am not the only lobsterman significantly impacted by the LMA 1 closure. I personally know of at least a dozen lobstermen, most of whom are MLA members, who also fish in waters subject to the restrictions and who suffered a loss of income during the closure period this season. I know of approximately 50 vessels in total that had to relocate gear out of the closure and experienced economic loss as a result. To the north (Zone C side), I also know of lobstermen who suffered gear loss due to conflicts arising from the relocation of gear from the closure. And everyone I spoke with reported that the lobsters just weren't there when they set their gear back in the closure area when it reopened in February.

19. The lobster fishery is suffering significant harm due to NMFS's failure to use the best scientific and commercial data available in issuing the federal whale rule and BiOp. I do not know of any Maine lobsterman who has ever even seen a right whale. I am not aware of any right whale becoming entangled in Maine lobster gear in nearly 20 years. I do not know of any right whale that has ever been killed by Maine lobster gear. That is important to me and my fellow lobstermen because we take pride in all of the whale conservation measures we have put in place. Because NMFS relied on worst case scenarios, it is now imposing an immediate 90% risk reduction on the lobster fishery. But such a risk reduction is unnecessary and cannot be achieved short of imposing significant additional fishery closures, trap reductions and further weakening our rope which would further harm my commercial fishing interests, ability to earn a living, and way of life. According to NMFS, closing the entire federal fishery will only achieve an 85% risk reduction, and if lobstermen relocate their gear to state waters, which they will, it will only achieve a 61% risk reduction. Given the harm caused by the LMA 1 closure alone, I

can't even imagine the devastating impacts that closing the federal fishery along with whatever other measures are needed to get to a 90% risk reduction will do to the Maine lobster fishery. I am willing to do my part to help right whales. But we need the government to use the most up-to-date science and modern technology to make sure that the rules we are operating under make sense for both lobstermen and right whales. What NMFS is pushing forward does not make sense for either whales or lobstermen.

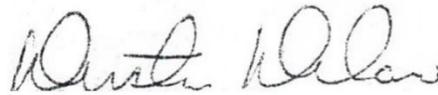
20. Maine lobstermen, like myself, generally support science-based conservation measures necessary to protect whales. We have worked hard to develop and implement effective measures. Lobstermen regularly volunteer their time, ideas, and fishing gear, working with DMR and other researchers, to innovate new ways to ensure lobster gear poses a minimal risk to right whales. But NMFS's risk reduction calculations are not science-based. A recent report from Bigelow Laboratory based in Boothbay, Maine, shows the right whale is actually migrating further and further away from where Maine lobstermen fish and into different feeding grounds. It doesn't make sense to force us to stop fishing in an area the whales no longer use. NMFS's mandate to impose massive new risk reduction are based on unrealistic scenarios and speculation. NMFS's use of speculation has caused, and will continue to cause, significant economic hardship to me and my family.

21. I sincerely hope that the federal government is not purposefully killing Maine's lobster industry. From my perspective, my fellow lobstermen and I have become collateral damage in NMFS's poorly-researched and misguided plan to recover the right whale population. As one kid told me, if the federal government shuts down this fishery, they are not telling me to get a new job, they are telling me to get a new life. I really like my life. I am really proud to be part of a lobstering heritage that has supported this state for centuries. I want NMFS and all the

stakeholders in the Maine fishery to avoid irreparable harm to that heritage by ensuring that the BiOp and Plan are guided by sound science and respect for the generations of lobstermen who have built and maintained an unmatched record of conservation practices and sustainable fishing.

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

Executed on October 6, 2022, in Friendship, Maine.

A handwritten signature in black ink, appearing to read "Dustin Delano", written in a cursive style.

Dustin Delano