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Commonwealth of Massachusetts

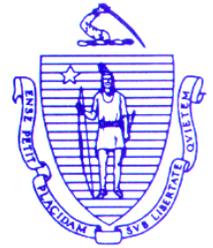
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February 6, 2012

Mary Colligan, Assistant Regional Administrator
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930

Dear Ms. Colligan:

To meet the charge given to members of the Atlantic Large Whale Take Reduction Team (TRT) at the recent meeting in Providence to offer proposals for NMFS' consideration, the Massachusetts Division of Marine Fisheries (*Marine Fisheries*) offers the following proposal. Additionally, we submit comments on the NMFS "strawman" proposal and on general issues associated with large whale conservation.

Marine Fisheries Proposal

1. **Continue the state policies and regulations that have fostered attrition in the Massachusetts fixed gear fisheries, especially those that are prosecuted in known co-occurrence areas with the requisite documentation of buoy line counts collected by on-going *Marine Fisheries* commercial landings and effort monitoring.** As noted in previous correspondence, it is in the best interests of nearly all of our fixed gear fisheries to stay the course for reductions in effort within our lobster, gillnet, and fish pot fisheries, especially those that are prosecuted in known co-occurrence areas. Our data show that there has been long-term attrition in the fisheries with declines in permits, active permits, and traps fished.

The Outer Cape Cod effort control plan has reduced traps by 11% below the 1998 baseline of 33,234 traps. As of 2010, only 2% of the trap allocation is latent (un-fished) so the potential to increase traps in this area above the 2010 level of 29,730 traps is negligible. In Area 2 (Southern New England) there has been a 12% decline in active permits and an 18% decline in traps fished since 2005. New management initiatives proposed by industry and expected to be approved by the Atlantic States Marine Fisheries Commission (ASMFC) will further reduce trap allocations by an additional 50% over the next seven years which is likely to reduce traps fished by at least 25%. In Area 1 (Gulf of Maine) there has been a 17% decline in active permits and an 11% decline in traps fished since 2005. While there is not a trap allocation scheme that limits participation, the overall trends have been downward and state regulations and policies on permit transfers contribute to this decline.

Moving forward, *Marine Fisheries* is confident that the traps fished and associated buoy lines that have declined in the last decade will continue to decline as the result of our policies on permit transfers as well as the economic conditions in the fishery. Although we do not have buoy line data prior to 2009, we are confident that with the continued collection of this parameter we will be able to demonstrate a decline in buoy lines over time.

2. **Exempt the inshore waters of Southern New England from any new regulations and instead capitalize on the past and upcoming effort control programs (e.g., expected 25% reduction in traps fished in southern New England via ASMFC Addendum XVIII).** Because there is minimal co-occurrence in Southern New England, new restrictions in this area are unwarranted. Moreover, the lobster fishery in Southern New England is expected to have a 25% reduction in traps fished over the next six years.
3. **Implement minimum trawl lengths in federal waters as long as those trawl lengths can be accommodated by the fleet.** The proposed trawl lengths of 10 pots in the 3-12 mile zone and 20 pots beyond 12 miles seem reasonable; however, only after public hearing and further gear configuration surveys will we be able to assess the effects.
4. **Require more extensive gear marking.** We support buoy line marking Option 3 which adds a second color based on Lobster Conservation Management Area (LCMA) and increased the marking frequency. In addition, we strongly urge NMFS to require buoy line and groundline marking within any state's exempted waters.
5. **Change weak link breaking strength from the current 500 lbs. in Cape Cod Bay to the region-wide standard of 600 lbs.** It is appropriate to alter the current breakaway standard of 500 lbs. within Critical Habitat during January – May 15. This standard is below the year-round 600 lb. standard in the region. The history of this rule goes back to a settlement agreement in a federal court case involving *Marine Fisheries*. However, we have been advised by NMFS gear experts that the difference between a 500 lb. and 600 lb. breakaway is insignificant and only creates regulatory confusion.
6. **Close the Cape Cod Bay Critical Habitat (as a state regulation only) from February 1 to April 30 to all fixed gear fishing for a “two-year test period.”** *Marine Fisheries* feels that any new restrictions should focus on times and areas of high right whale presence. The increased restrictions in the Cape Cod Bay Critical Habitat will address the apparent increased use of this habitat by a majority of the known right whale population. This type of “surgical” approach will substantially decrease the risk to right whales while minimizing the impacts to fixed gear fisheries.

Massachusetts has been aggressively managing the Critical Habitat with seasonal gear marking schemes and abandoned gear removal for over a decade. However, this habitat has become increasingly important for right whales with over 330 individuals identified last year by the survey conducted by the Center for Coastal Studies on behalf of *Marine Fisheries* and supported by NMFS. There is minimal gear in the Critical Habitat during the winter/spring. Derelict gear constitutes a substantial portion of the gear that is observed there. The closed season would enhance our ability to identify and remove any derelict gear left behind. Moreover, according to *Marine Fisheries*' statistics only 1.5% of the Cape Cod Bay landings are harvested during the winter and early spring. With the ongoing surveys, *Marine Fisheries* has a strong track record of monitoring in near real-time the presence and departure of right whales each year. For the past 15 years, our studies show nearly all whales depart by late April.

If a closure was enacted, we prefer it be done at the state level only. This would allow us to re-open the area early if right whales were to depart. A federal closure would be more rigid and unable to be lifted in the event of a change in whale seasonal use. *Marine Fisheries* has met with industry members on a formal and informal basis and suggested a closure of the area to further reduce the entanglement risk however small that risk may be. The response was mixed. Among the few fishermen who fish during these months there was no support for this closure. However, fishermen who fish in the Critical Habitat may set gear in waters outside the boundaries of Critical Habitat

(e.g., west of the 70° 30' longitude line in waters of Cape Cod Bay). We hope to study the economic and social impacts of the closure during this two-year period.

Additional Comments

Marine Fisheries agrees with NMFS' conclusions in the recently published Section 7 biological opinions on lobster and gillnet fisheries that jeopardy of endangered whales is not occurring due to the conduct of fixed gear fisheries in the northeast. This conclusion is supported by the growth of both the North Atlantic humpback whale and right whale populations since the inception of the Atlantic Large Whale Take Reduction Plan. Moreover we agree that the adoption of a vertical line strategy by 2014 may be critical to **maintain the protections and prevent escalation of risk.**

In light of the no jeopardy finding for Atlantic right whales, the trends in population growth of large whale populations, and the lack of a serious injury or mortality ever being attributed to the Massachusetts lobster fishery, *Marine Fisheries* does not support the proposed NMFS buoy line reduction "strawman" strategy. Furthermore, we are extremely concerned that NMFS has not provided a well defined management benchmark or goal that clearly demonstrates what level of buoy line reduction is sufficient to reduce the risk of serious injury or mortality to large whales. In the absence of a management benchmark, it is not possible for us to engage in meaningful negotiations with our fishing industry because we can not provide them with the answers to critical questions that will dramatically impact the way they fish, that may jeopardize their safety, and could seriously impact their livelihood. These questions include:

- What is NMFS' target for buoy line reduction?
- How much of a reduction in buoy lines is necessary to reduce risk to large whales?
- How much of a risk reduction is necessary to achieve potential biological removal?
- Will adoption of a buoy line reduction strategy prevent the industry from additional regulation in the future?

Since the TRT is unable to identify the source of most entanglements (79% are not attributable to a source), nor can it determine whether the gear causing serious injury and mortality to whales is attributable to a fishery covered by the plan or from a fishery not governed by the plan (e.g., Canadian gear), it is prudent to be cautious about adopting any aggressive gear restrictions that could cripple certain sectors of the fishery and not deliver the requisite conservation and risk reduction.

In addition to these fundamental issues, we would like to reiterate some of our positions from the November 4, 2011 letter that listed our concerns about the objectives of the plan. We remain concerned that the NMFS "strawman" and the overall plan's objective to reduce risk of buoy lines only focuses on reducing the number of buoy lines through changes in gear convention and only addresses active gear. This strategy is deficient because it fails to recognize the potential for increased fishing effort in the areas by various fisheries, as well as most jurisdictions' inability to accurately characterize the number of buoy lines.

Please understand that *Marine Fisheries* has furnished buoy line count data provided in annual recall logs by commercial fishermen to NMFS and IEC for use in the model in a good faith effort to contribute to the process. Our buoy line data are collected via an annual recall log and are not directly compatible with the traps fished data collected from trip-level reports. These data were collected as a complete census of all permit holders and was part of a *Marine Fisheries* strategy that anticipated buoy line count becoming a critical parameter in the future.

The data we collected were not designed to capture exact gear configurations. They are not appropriate for distinguishing single traps vs. multiple trap trawls, nor the number of traps per trawl for each permit holder.

Many fishermen change their gear configuration either seasonally or across different areas. If fishermen deploy gear as both singles and trawls, there is no method to identify the amount and characteristics of each configuration from the existing data. Consequently, the data fail to depict the amount of gear fished in various configurations and as such we doubt that the model can accurately forecast the impacts of various trawl configurations.

In the absence of a management benchmark for risk reduction at a local level, it is extraordinarily challenging for *Marine Fisheries* or any other participating jurisdiction to develop strategies and regulations to reduce buoy lines. While it is self-evident that fewer buoy lines in the water column will reduce risk of encounter, we strongly oppose the suggested “strawman” strategy that would eliminate the single trap fishery within state waters. Such a rule would create unacceptable safety hazards for the smallest operators in the fleet and would eliminate much of the heterogeneity that we have in the fleet. Moreover, it would create hardship for the small vessel operators that are active in the Area 2 and Outer Cape Cod (OCC) lobster areas where past and future trap reductions have – and will continue to – reduce trap allocations and the commensurate scale of the fishery. As a business strategy, some lobstermen with small trap allocations opt to maximize their catch by setting their traps as singles. If single traps were banned, many of these small-scale fishermen’s safety and livelihood would be at risk. *Marine Fisheries* will continue to promote the use of multiple trap trawls by fixed gear fishermen, but a regulations prohibiting singles is the wrong strategy. In summary, we suggest you consider making this a performance-based strategy, not one of design.

NMFS mandatory “trawling up” strategy in inshore waters essentially would prohibit a long-standing practice of fishing single traps with a single buoy line attached. This technique is practiced by small-scale commercial fishermen, and recreational lobstermen fishing primarily close to shore within range of these small vessels. The gear is simple in design, and because it is done primarily in shallow water the lines are short and the weakest in the industry. Most rope used by these small-scale fishermen is only 5/16” diameter.

We can get an approximate understanding of lobster gear configuration from a recent (2010) survey conducted by *Marine Fisheries*’ Lobster Investigations staff as part of a study of “ghost gear” funded by NOAA’s Marine Debris Program. This project attempted to determine the causes and fate of lost lobster traps. The response rate was surprisingly good: in excess of 60% among active lobstermen. Commercial lobstermen were asked for trap configuration.

Percent of vessels by gear convention by Lobster Management Area (LMA)				
# of Traps per Trawl	LMA 1	LMA OCC	LMA 2	LMA 3
Singles	18%	71%	56%	0
Pairs	4%	2%	0%	0
3-7	19%	0	10%	0
8-12	34%	2%	16%	0
13-17	10%	15%	14%	0
18-24	12%	10%	2%	0
25+	3%	0%	2%	100%

The majority of fishermen in Areas 2 and OCC who responded to the survey fish single traps. This is attributable to a number of factors. Both these areas are subject to strict effort control plans under the ASMFC Lobster Management Plan where the number of traps allowed to be fished is dictated by past fishing history during an eligibility period.

Allocation Bin	LMA 2	Percentage	OCLMA	Percentage
1-100	33	25%	16	22%
101-200	13	10%	4	6%
201-300	20	15%	5	7%
301-400	22	17%	5	7%
401-500	14	11%	14	19%
501-600	5	4%	7	10%
601-700	5	4%	7	10%
701-800	20	15%	14	19%
Cumulative Count	132	100%	72	100%

Most fishermen have allocations less than 500 traps and no lobsterman may fish more traps than their allocated number without obtaining trap allocation from a fellow lobsterman through a *Marine Fisheries* approved transfer that is subject to a 10% conservation tax.

In Outer Cape Cod, the lobstermen’s choice to fish a preponderance of single traps is related to the physical features of the environment. In the northern portion of the OCC area (Nauset Inlet north to Provincetown) the bottom type is mostly featureless and is characterized by shifting sand. Tide and storm surge cause traps to be moved around and lobstermen fear trawls will become entangled with one another resulting in dangerously entangled gear and inevitable trap losses.

Some fishermen who fish these single traps have argued repeatedly and convincingly that to fish more complex gears (trawls) is operationally unsafe in a small vessel. Fishermen who have witnessed entangled whales “anchored” by the weight and complexity of multiple pot trawls have legitimately questioned the wisdom of transforming the relatively benign single trap gears into multiple trap trawls for fear of increasing the risk of serious injury.

Many pot fishermen who are limited to low numbers of traps by regulation have argued convincingly that they need to fish single traps to maintain sufficiently high catch rates of their target species and to optimize efficiency. With lower trap limits, it is necessary for them to spread the gear out to maximize the opportunity to attract migrating lobsters, while minimizing the interference of surrounding traps. For lobstermen with larger boats and high trap limits, it is efficient for them to haul traps in a trawl configuration because they can haul more total traps within a day in this manner. However, each trap within the trawl typically has a lower catch rate than a trap fished as a single because the distance between traps is not sufficiently large enough to prevent adjacent traps in a trawl from competing with each other.

In 1997, *Marine Fisheries* prohibited single trap fishing in Cape Cod Bay Critical Habitat during January – May 15. However, we allow these traps to be deployed after the right whales have departed the area. This restriction was designed to minimize vertical lines in the water column but moreover to discourage the setting or abandoning of any gear in Critical Habitat at non-productive and non-profitable fishing times (winter/early spring).

Recent studies at the New England Aquarium have suggested that entanglement injury is a function of the length of time the entanglement is on the whale, and the complexity of the gear. Heavy rope and complex gear is expected to cause more injuries and mortalities than lighter simpler gear. We have many disentanglement records in the Center for Coastal Studies database of single traps and buoy lines being carried by large whales (humpbacks and right whales) and successfully disentangled thanks to the simplicity of the gear and the thin, relatively weak lines. Moreover, we would portend and other team

members are likely to agree that the single trap arrangement is likely the most benign gear that a whale could encounter.

We urge NMFS to develop a more uniform reporting system to quantify future fishing effort in federal and state waters. There is an ongoing frustration among managers and some industry advocates about the inconsistent data collection among various jurisdictions. We understand that Vessel Trip Report (VTR) requirements are fishery management plan-specific and we are fortunate that many federally permitted lobstermen do fill out VTRs so there is some useful data about the fishery. However, unless NMFS decides to require all federally permitted lobstermen to submit VTRs the data remain incomplete. This patchwork reporting standard is undermining NMFS' efforts to track these fisheries. NMFS should invest now to improve reporting so the TRT can better assess fishery performance in the years and decades ahead.

Finally, we commend NMFS' strategy to regulate these issues through existing zones already established by other fisheries management jurisdictions, specifically the Lobster Conservation Management Areas and the Maine Lobster Zones. By linking the rules to LCMA and Zone, the chances of success will be greatly enhanced.

Sincerely,

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

Daniel J. McKiernan
Deputy Director

CC: Paul J. Diodati, Director
Massachusetts Marine Fisheries Advisory Commission
Large Whale Take Reduction Team
Lobster Conservation Management Teams in Areas 1, 2, 3, and Outer Cape Cod