



# Maine Lobstering Union

## IMLU Local 207: By Lobstermen, for Lobstermen



September 19, 2022

President Joseph R. Biden  
The White House  
1600 Pennsylvania Ave., NW  
Washington, DC 20500

RE: Survival of the Maine Lobster Fishery and Maine's Coastal Fishing Communities

Dear Mr. President:

The Maine Lobstering Union, Local 207 of the International Association of Machinists and Aerospace Workers ("IMLU"), submits the following information regarding Maine's safe and sustainable Lobster Fishery – which is currently threatened by pending litigation and proposed regulations by NOAA-NMFS that would impose regulations to protect endangered right whale in areas of Maine's territorial waters in which there are no food sources or mating/breeding grounds for right whales and, thus, no right whales.

Maine is the only State on the Atlantic Coast in which lobsters can be safely and sustainably harvested, year-round, without endangering, threatening, entangling or harassing the endangered right whale. This is true because there are no food sources, or mating/breeding grounds, for the endangered right whale in Maine's territorial waters. Indeed, there are no food sources or mating/breeding grounds for right whales within twelve (12) miles of the Maine coast at any time of year.

In the past, NOAA-NMFS has exempted Casco and Penobscot Bay from "right whale" regulations in recognition of the absence of right whales in these embayments. However, NOAA-NMFS, at the direction of the United States District Court for the District of Columbia, now propose to impose restrictions on Maine's lobster fishery – the foundation of the economy in much of Maine – to the beach in every bay and within all of its territorial waters. The pretext for these regulations is protecting the endangered right whale. However, not one right whale will be protected by these restrictions because NOAA-NMFS cannot protect a species that does not use these waters.

Maine lobsters are a lucrative commodity sought worldwide. Maine's waters are the only safe place to sustainably fish for lobsters without jeopardizing the right whale at some point in the year. Rather than acknowledge this fact and protect Maine's lobster fishery, lobstermen and economy, conservation groups and regulators are harming the Maine lobster industry with allegations that Maine lobstermen are entangling right whales with their fishing gear. There is zero evidence that any Maine fishing gear has entangled a single right whale since 2004, long before Maine lobstermen have adopted a wide range of mitigation measures purportedly

required to protect a species that does not exist in Maine's waters. We seek immediate assistance from the White House to correct this injustice and set the record straight.

Tell the world that it is safe to harvest lobsters in Maine.

**Action Requested:**

An Executive Order directing NOAA-NMFS to:

- Analyze the scientific data currently available on the location of right whale food sources within 12-miles of the Maine Coast and all Maine territorial waters within 30 days;
- Analyze the scientific data currently available on the location of right whale food sources within the Gulf of Maine within 45 days;
- Analyze the scientific data currently available on the location or right whale breeding/mating grounds within the Gulf of Maine within 45 days.
- Redefine the Critical Habitat for the North Atlantic Right Whale within the Gulf of Maine within 60 days, excluding all areas in which there are no food sources or breeding/mating grounds for right whales and no confirmed sightings of 3 or more right whale within a 75-mile area: and
- Conduct cross border negotiations with the participation of U.S. lobster and crab fishermen, Canadian officials and Canadian lobster and crab fishermen to develop uniform right whale protection measures commencing within 120 days.



A Proclamation that this Administration understands that it is safe to harvest lobsters in Maine's territorial waters and within 12-miles of the Maine coast and acknowledging that Maine's lobstermen are devoted stewards of our oceans, committed to protecting our whales.

**NOAA-NMFS have failed to comply with the President's Executive Order 13990**

On January 20, 2021, President Biden issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which declared the Administration's policy, among other things: to listen to the science; to improve public health and protect our environment; to bolster resilience to the impacts of climate change; and to prioritize both environmental justice and the creation of well-paying union jobs necessary to deliver on these goals. However, NOAA-NMFS, in proposing its new right whale regulations, have failed to consider the impacts of climate change on the Gulf of Maine.

The Gulf of Maine ("GoM") is the most rapidly warming body of water in the world. As a consequence of that phenomenon, in the past fifteen+ (15+) years there have been radical changes in the ecology of the GoM. These changes include the shift of the food sources for the North Atlantic Right Whale ("NARW") north and west to colder waters as they follow their primary food source. As a result of the shift in the copepods favored by the right whale as their

primary food source, there has also been a shift in the migration patterns of the NARW, as well as their mating/breeding grounds. While sightings of right whales were rare along the Maine coast for many generations, due to the loss of their food source within the 12-mile line off the Maine coast, right whale are no longer in Maine's territorial waters even during annual transits from their breeding grounds. Instead, they favor waters in Cape Cod Bay and the Bay of St. Lawrence in Canada. For years NOAA has not even flown over waters in the GoM to monitor right whale movements, because there are no right whales here.

Despite these facts, NOAA-NMFS has lumped the Maine lobster fishery into the American Lobster fishery – giving no consideration to the fact Maine lobstermen can and do safely fish for lobsters in Maine waters (including out to the 12-mile line from the coast) without any co-occurrence of fishing effort and right whale. Rather than allow Maine to market its lobsters as the only truly safe and sustainable lobster fishery, Maine lobstermen are being demonized as indifferent to the plight of the right whale and our harvest is being struck from menus as unsafe and unsustainable.

Public confidence in the federal government and judiciary is being eroded by the imposition of “right whale” regulations on Maine lobstermen in areas where – for 25+ years – the federal government has acknowledged that the species does not exist. Public support for the ESA and MMPA will cease to exist where these laws are abused to impose draconian regulations that have no nexus to protecting an endanger species.

No federal regulations should be imposed on areas where there are no right whales.

Thus, the first action needed is an immediate determination of the location of the food sources for right whales in the Gulf of Maine. Areas that no longer have the food sources required for the right whale, as a result of rapidly warming waters, cannot be designated as critical habitat. The changes in the location of those food sources is already known – thus, an immediate evaluation of that scientific data should be ordered by the President through Executive Order. This assessment of the location of right whale food sources should be completed in 60 days, with an amendment of the designated critical habitat made based on that assessment. An Executive Order directing that no area can be included in the critical habitat for the right whale that does not have an available food source present should then be issued.

Further, no federal regulations should be imposed “to protect right whales” where there are no right whales. Accordingly, a reassessment of the existing regulations should be order by the President, which includes the participation of lobstermen in Maine. The number of traps fished and gear configurations used in the Maine lobster fishery should not be the subject of federal regulation in Maine's territorial waters, in the absence of right whales that require protection. Where there are no right whales, there should be no federal regulations imposed in the name of protecting right whales.

**Amend Critical Habitat to Reflect Changes in Right Whale Location Due to Changes in Location of NARW Food Sources:** As a part of the 5-Year NARW ESA review, the Unit 1 critical habitat designation made in 2016 improperly includes vast areas within the waters

150 Bar Harbor Road    Trenton, Me 04605    Phone: (207) 240-0556  
[mlu@lobster207.com](mailto:mlu@lobster207.com)

adjacent to the State of Maine that have no food source for right whales and in which NARWs are not found at any time (see, e.g. 81 FR 4837). This improper critical habitat designation has significant adverse impacts on the people and economy of Maine, by subjecting Maine lobster fishermen to ever-more burdensome regulations, *in the absence of any benefit to right whales* – which are not located in the waters being regulated as a result of the over-inclusive critical habitat designation.

<https://www.federalregister.gov/documents/2016/01/27/2016-01633/endangered-and-threatened-species-critical-habitat-for-endangered-north-atlantic-right-whale>

This designation of critical habitat must be updated to reflect the effect of warming waters in the Gulf of Maine that have caused a change in the location of the NARWs' primary food source and the resulting radical changes in the migration patterns of NARWs.

The radical, profound and likely permanent changes in the Gulf of Maine, caused by the rapidly warming waters in this area, are a matter of general public and scientific knowledge. The impact of this phenomenon on the migration of right whales has been studied by experts and commented upon in the press. For example, the Cape Cod Times months ago ran an article discussing the impact on right whales of the warming waters in the Gulf of Maine. See, Doug Fraser, "Solving a Mystery: How Researchers Found Missing North Atlantic Right Whales," Cape Cod Times (December 27, 2021)

<https://www.capecodtimes.com/story/news/2021/12/27/how-researchers-found-missing-north-atlantic-right-whales-canada/6417774001/>

Based on studies such as the one mentioned in the foregoing article, it is essential that NOAA update its Unit 1 Critical Habitat designation for the NARW to reflect this reality, caused by warming waters and the movement of NARW food sources. In failing to do so, NOAA-NMFS are not basing such determinations as the location of the critical habitat for the NARW on the best available science.

**It is improper to Impose Federal Right Whale Regulations of the American Lobster Fishery, Pursuant to the ESA and MMPA, in Maine Waters Where There Are No Right Whales:** Dating back to the initial NOAA Right Whale Regulations in 1997, areas in which there are no right whales, and have never been right whales, were exempted from federal regulations:

Some waters are exempt from this plan. The basic rule for the exempted water boundaries is that all waters landward of the first bridge over any embayment, harbor or inlet will be exempted. Some bays that do not have bridges over them are also exempted, including Penobscot Bay, Casco Bay, Long Island Sound, Delaware Bay and Chesapeake Bay. South of the Virginia/North Carolina border, all waters landward of the demarcation line of the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS line) are exempted. *These are all areas where large whale occurrences are so rare that NMFS believes gear requirements will have no measurable effect on reducing entanglements.* For a precise definition of the exempted areas, see the regulation section of this document.

150 Bar Harbor Road    Trenton, Me 04605    Phone: (207) 240-0556  
[mlu@lobster207.com](mailto:mlu@lobster207.com)

<https://www.govinfo.gov/content/pkg/FR-1997-07-22/html/97-18997.htm>

Imposition of federal regulations, including some of the existing regulations, in areas where the occurrence of right whales is rare or nonexistent will continue to have no impact on protecting the whales. However, these regulations do, and will, continue to have a significant economic and safety impact on lobstermen fishing in these areas and may actually endanger other whale species. Promoting and encouraging fishing in areas where there are no right whales will result in protecting the safety of the right whale. By encouraging fishing effort in areas where there are no right whales, the possibility of harassment and entanglements of right whales will be reduced and/or eliminated. It is consistent with the goals of the ESA, MMPA and Magnussen-Stevens Act to economically incentivize fishing and the production of valuable fishing resources in areas in which no right whales are located through making fishing safer and cheaper in the whale-free areas. For this reason, the MMPA directs NOAA-NMFS to focus their regulations on areas of “significance” to the species based on the right whale’s known feeding, mating and breeding grounds. The current proposed regulations, penalize lobstermen in areas where NOAA has long acknowledged there are no whales (Casco Bay and Penobscot Bay) – demanding draconian trap reductions and unsafe gear requirements in these embayments where no right whales have been seen in centuries and no food sources exist to attract the whales now. This is not a logical or permissible use of the ESA and MMPA, as there is no conservation benefit from the unlawful and improvident expansion of federal regulations to areas where there are no right whales to protect.

Public confidence and support for the ESA and MMPA are eroded by such excesses in the use of federal regulatory authority.

**The Recent Court Opinion is Premised on the False Assumption that the Portion of the American Lobster Fishery Conducted in Maine Waters Poses a Threat to the Right Whale – a Premise that is Unsupported by Historical and Current Scientific Evidence:**

The recent opinion issued by the District Court for the District of Columbia concedes that NOAA and NMFS used incomplete and “imperfect” data – particularly regarding changes in the location of the right whale population and shifts in the population to Canadian waters -- as the basis for their proposed rules. However, the Court concluded that the agency’s reliance of this flawed data was not “arbitrary or capricious” because the agency used the “best *available* science” and their conclusions, based on the flawed data currently available, were found to be reasonable by outside peer review. In short, the Court found that NOAA-NMFS’s rulemaking was reasonable not based on data but based on the lack thereof. Thus, the agency’s failure to do adequate studies for the past 15 years was excused and the proposed regulations were upheld, in the absence of current, accurate data regarding the impact of the Maine lobster fishery on serious injuries or mortalities

of right whales as a result of lobster fishing in Maine waters. The Court concluded that having updated, accurate data was not needed nor required to impose the regulations proposed, stating:

Indeed, as circumstances change and new data become available, the agency can and must continually update its assessments. At this juncture, however, the court is satisfied that NMFS suitably considered the data available at the time of its action and reasonable explained its scientific conclusions. (Opinion, p. 11)

For good measure, the agency submitted its approach for peer review by the Center for Independent Experts, which concluded that given the limited data available, NMFS's approach was "reasonable." (Opinion, p. 15).

No mortalities were attributed to natural causes. All mortalities were attributed to anthropomorphic causes. If a death was not caused by a ship strike it was attributed to entanglements in fishing gear (even without gear evidence to support that conclusion) and then, only lobster gear, despite considerable evidence that right whales are entangled in fishing gear (particularly gillnets) used by other fisheries. All cryptic deaths (deaths assumed in the absence of a body when the whale is not sighted) were attributed to human causes – especially fishing gear – as though no deaths were caused from age, illness, predation by sharks or killer whales, lack of food, weather conditions, or pollution. "In calculating cryptic mortality, NMFS decided against including natural mortality in its projections, writing that 'there is little evidence showing this to be a cause of right whale mortality except at the calf stage. . . . The agency, however, explained why natural mortality was not statistically significant enough to include in its analysis, and it cited a study so concluding.'" (Opinion, p. 19). Moreover, the agencies do not account for the possibility that whales have simply left the limited areas that NOAA-NMFS surveys. Worse, when the source of entanglements (U.S. or Canadian gear) could not be determined, the entanglement was attributed equally to Canadian and U.S. fixed gear fisheries – especially the crab and lobster fisheries – even though there was no evidence to support the conclusion that any deaths or injuries were caused by U.S. gear, and even though available data reveals that right whales are three times for likely to become entangled in Canadian waters than they are in U.S. waters.

The agency's failure to do any assessment of the positive or negative impact and effectiveness of existing regulations on reducing harm to the right whales was excused by the Court, as was the imposition of new regulations when no assessment was done nor proposed to determine if the current regulations were working. The Court denied all Plaintiffs' motions for Summary Judgment and granted the Cross Summary Judgment Motions of the Center for Biological Diversity and NMFS.

The Court's ruling was particularly disheartening and dismaying when one considers the utter lack of scientific evidence or commonsense that underlies the decision to impose these draconian regulations in areas of Maine waters that NOAA has acknowledged, *for*

25 years, have no right whales at any time. This harm is inexcusable and unjustifiable because it is being inflicted by regulations that will not protect a single right whale from injury, harassment or death – **because there are no right whale in the territorial waters of Maine.**

The Court expressly notes that NMFS did not consider even its own rudimentary data on the impacts of climate change on the migration North to Canada of the right whale population, stating:

The Court acknowledges that NMFS could have more comprehensively addressed Plaintiffs' evidence that climate change has caused right whales to spend more time in Canadian waters – either altering its models to account for those migration patterns or explaining more thoroughly why it needed not to do so. The Court is cognizant, moreover, of the data that suggest that the whales are moving north; indeed, the agency's own peer-review report identifies "a clear recent shift in the spatial distribution" of the right-whale population towards Canada. See J.A. Vol. 4 at 167 (BiOp 74464). If new data continue supporting this trend, the agency may in the future need to either update its modeling or say more about why it has not.

*But what will become of Maine and its lobstering communities while NMFS contemplates whether or not to actually consider the impacts of climate change in the Gulf of Maine – the fastest warming body of water on Earth?* The Court and NMFS offer no consideration of the human toll that their decisions have had, and will continue to have. This failure to consider the human and economic toll of the agency's inaction on conducting a proper, scientific assessment of the current problem faced by right whales, and their decisions to impose draconian regulations in areas where there are no right whales to protect, undermines public confidence in the legitimacy of the ESA, MMPA, federal regulatory agencies within the Biden Administration, and the judiciary as a check on what common folk would define as an arbitrary and capricious exercise of regulatory authority in a manner that does nothing to further the protection.

Respectfully submitted,



Virginia Olsen  
Executive Liaison and Political Director  
Maine Lobstering Union  
IAMAW Local 207  
[v.olsen@lobster207.com](mailto:v.olsen@lobster207.com)



David T. Sullivan  
General Vice President  
Eastern Territory  
International Association of  
Machinists and Aerospace Workers  
[dsullivan@iamaw.org](mailto:dsullivan@iamaw.org)