

**TESTIMONY OF PATRICE MCCARRON
EXECUTIVE DIRECTOR, MAINE LOBSTERMEN'S ASSOCIATION**

**BEFORE THE
SUBCOMMITTEE ON OCEANS, ATMOSPHERE, FISHERIES, AND COAST GUARD
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION**

**BREWER, MAINE
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Senator Snowe:

Good morning. My name is Patrice McCarron. I am the Executive Director of the Maine Lobstermen's Association (MLA). MLA is the largest commercial fishing industry group on the East Coast, representing the interests of 1200 lobstermen. Lobster fishing is vital to the Maine economy, and Maine lobstermen have for generations been leaders in conserving our marine resources, including large whales. On behalf of MLA, I would like to thank you for providing this opportunity to speak for our members about the impacts on the Maine lobster fishing industry of the new federal regulations implementing the Atlantic Large Whale Take Reduction Plan (ALWTRP).

I. INTRODUCTION

On October 5, 2007, the National Marine Fisheries Service (NMFS)¹ issued a Final Rule amending the regulations that implement the ALWTRP.² The

¹ NMFS is a line office of the National Oceanic and Atmospheric Administration.

² *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations*, 72 Fed. Reg. 57,104 (Oct. 5, 2007) (Final Rule).

Final Rule revises existing measures for the protection of certain large whale species in Atlantic commercial fisheries to meet the goals of the Marine Mammal Protection Act and the Endangered Species Act (ESA). Among other requirements, the Final Rule establishes an exemption line off the coast of Maine and requires that lobstermen fishing outside of the exemption line use sinking and/or neutrally buoyant groundline,³ in order to reduce the risk of entanglement with large whales. These requirements are to become effective on October 6, 2008, during an important part of the Maine lobster fishing season.

I want to emphasize at the start that MLA and its members fully support conservation and protection of large whales, including the endangered Northern right whale. To that end, MLA has been an active member of the Atlantic Large Whale Take Reduction Team (ALWTRT) since 1997, and has collaborated with NMFS, the New England Aquarium, and the Maine Department of Marine Resources (Maine DMR) in the development and testing of new gear designed to reduce the potential for large whale entanglement. Many Maine lobstermen have participated in workshops to assist in reporting whale sightings and disentangling whales, and strategically located lobstermen are equipped with disentanglement tools and have successfully intervened in the instances where minke whales have become entangled.⁴ MLA also has urged that further study be given to large whale

³ Subsequent references in this testimony to sinking groundline are intended to encompass neutrally buoyant groundline, as well.

⁴ Minke whales are not listed as endangered or threatened under the ESA. A summary of the Maine lobster industry's efforts to protect large whales is included as Exhibit 1.

foraging activities, to determine the extent to which Northern right whales are at risk in Maine waters. MLA and its members are proud of our record of compliance with existing conservation standards, and are committed to maintaining that record in the future.

However, MLA is deeply concerned about several aspects of the Final Rule as it applies to Maine lobstermen. We continue to have serious doubts concerning the ability of Maine lobstermen to fish using sinking groundline, because of the rocky bottom conditions that prevail off the coast of Maine. MLA is concerned that NMFS is going forward with implementation of the sinking groundline requirement without adequately considering the operational and economic burdens associated with increased gear loss and the shorter lifespan of sinking groundline. Nor has NMFS adequately addressed the serious safety hazards to lobstermen associated with the use of sinking groundline in rocky bottom areas.

We are particularly concerned about the current schedule for implementation of the sinking groundline requirements, because the Final Rule:

- (1) Lacks adequate enforcement guidelines that will enable Maine lobstermen to procure and deploy compliant gear in time for the upcoming 2008 lobster fishing season;
- (2) Specifies an impractical implementation date that would not allow Maine lobstermen to come into compliance for the upcoming season, even assuming that adequate standards for compliant gear were immediately specified;
- (3) Places Maine lobstermen in an untenable position regarding the deployment of compliant gear, because without further specifications from NMFS concerning compliant groundline, lobstermen do not know how they should proceed in ordering

rope for the coming season, which for many lobstermen begins in April;

- (4) Lacks procedures for certifying compliant rope and for identifying laboratories that are qualified to provide independent certification;
- (5) Places Maine lobstermen in jeopardy of unspecified enforcement consequences under federal fishing permits for failure to comply with vague and unenforceable standards; and
- (6) Is proposed to be implemented without adequate coordination between federal and state enforcement authorities.

Maine lobstermen need to place orders for gear for the upcoming fishing season in the very near future, and it is imperative that they be able to purchase appropriate gear to last the entire season, rather than be forced to bear the expense and burden of switching gear in October, during the peak fishing season. Right now, however, lobstermen have no assurance that the gear they purchase will be compliant, because clear standards have not been developed and communicated by NMFS.

In addition to those immediate concerns regarding enforcement of the Final Rule, MLA has more general concerns regarding the scientific and economic analyses that led to the determination of where the exemption line was drawn and where the sinking groundline requirement will be imposed. First, the Final Rule is not based on scientific evidence demonstrating that the geographic restrictions on fishing activities will protect large whales. The exemption line is not optimally located to maximize protection of large whales while minimizing the impact on lobstermen, and the restrictions are imposed year-round, failing to address both the seasonality of the large whale presence off the Maine coast and the seasonal nature

of the lobster fishery. Second, the Final Rule will have potentially catastrophic impacts on the livelihoods of Maine lobstermen, affecting families and communities by imposing greatly underestimated costs and burdens – costs and burdens that, in many instances, may prove unnecessary for the protection of large whales because the scope of the restrictions are overly broad. It is unfair to impose nearly all of the economic burden of protecting large whales – approximately 90 percent of the costs identified in the FEIS – on Maine lobstermen, and it is unjust to do so without evidence to demonstrate that the affected lobstermen are fishing when large whales are present.

MLA raised many of these concerns in comments on the Final Environmental Impact Statement (FEIS) that it filed with NMFS on September 17, 2007. Similar comments were submitted to the agency by Maine officials, including Senators Snowe and Collins, Congressmen Allen and Michaud, Governor Baldacci, and Commissioner Lapointe of Maine DMR. These comments requested that NMFS delay implementation of the Final Rule as it affects Maine lobstermen until at least June 2010. However, NMFS has not adequately responded to these comments on the FEIS.⁵ Furthermore, NMFS did not respond substantively to the June 2007 report prepared by the Government Accountability Office (GAO) at Senator Snowe's

⁵ NMFS' responses to these comments were contained in the Record of Decision (ROD), which was issued on September 21, 2007 – four days after MLA and others submitted their comments on the FEIS.

request,⁶ which identified deficiencies in the scientific and economic analyses in the Draft Environmental Impact Statement (DEIS) and recommended further study.⁷

MLA is interested in any efforts to identify known areas of Northern right whale aggregations, and fully supports affirmative steps to protect them. MLA believes that data are being developed that will provide a better understanding of the interaction between Northern right whales and lobster fishing activities, and these data will provide a better scientific basis for drawing the exemption line. We are not asking that the exemption line be redrawn in its entirety, but do believe that there is a need to refine the line based on a more thorough analysis of the data. MLA is aware that there are ongoing whale surveillance efforts, new research on oceanography and whale foraging, and planned scientific studies to better understand lobster fishing efforts, and we look forward to seeing the results that are being prepared for the Spring 2008 ALTWRT meeting. We wish to point out that MLA was responsible for working with the state of Maine to raise new revenue directly from lobstermen to continue this type of research via an increase in trap tag fees. In addition, MLA is aware that recent collaboration among a number of groups in the United States and Canada resulted in moving shipping lanes by four nautical miles to reduce encounters between Northern right whales and surface ships in routes into Canadian seaports, to avoid

⁶ Government Accountability Office, *Improved Economic Analysis and Evaluation Strategies Needed for Proposed Changes to Atlantic Large Whale Reduction Plan* (June 2007) (GAO Report).

⁷ NMFS merely added a “sensitivity analysis” to the FEIS to reflect ranges of possible costs associated with compliance with the sinking groundline requirement.

areas that were clearly known for aggregations of Northern right whales. This effort resulted from a probability analysis using Northern right whale sightings and mortality data, including evidence that five were killed by ship strike in 2006. We hope to see a similar tool developed to further reduce the rare encounters of large whales with Maine lobster gear and eliminate mortality from these encounters.

Given the substantial interests that are at stake, MLA believes that it is critical that NMFS take four steps to ensure that Maine lobstermen are not subjected to the risk of arbitrary enforcement action during the upcoming lobster fishing season and that the exemption line is properly located. NMFS should:

- (1) Exercise discretion to defer enforcement of the sinking groundline requirement of the Final Rule with respect to Maine lobstermen until after the upcoming lobster fishing season;
- (2) Develop enforcement guidelines that provide certainty as to the gear standards to be implemented to enable lobstermen to comply in a manner consistent with the operational realities of the fishing season;
- (3) Refine and expand scientific analysis to determine the optimal location for, and possible seasonal implementation of, the exemption line; and
- (4) Conduct a rigorous analysis of the operational, economic, and safety consequences for Maine lobstermen if the sinking groundline requirement is maintained.

Discretionary deferral of enforcement of the sinking groundline requirement would give NMFS and interested parties time to conduct necessary further analyses to determine where the sinking groundline requirement is truly appropriate, and how to ensure that Maine lobstermen and those who depend upon them are not left to

bear the lion's share of the burdens associated with protecting an endangered species.

II. NMFS SHOULD EXERCISE DISCRETION TO DEFER ENFORCEMENT OF THE FINAL RULE UNTIL AFTER THE UPCOMING 2008 LOBSTER FISHING SEASON.

Under the Final Rule, the sinking groundline requirement is scheduled to be implemented on October 6, 2008. Unfortunately, this date falls during peak landings of the Maine lobster fishing season. It would be more realistic, less burdensome, and more economical for implementation of the sinking groundline requirement to coincide with the start of the lobster fishing season and the time when trap tags are renewed. If the sinking groundline requirement is to be enforced during any portion of the upcoming lobster fishing season, Maine lobstermen should be able to purchase and deploy the gear necessary to be compliant during the entire season, rather than being forced to incur the unnecessary burden of switching gear over during a key portion of the season. However, neither NMFS nor Maine DMR has provided adequate guidelines to enable lobstermen to purchase compliant gear at this time. For this reason, MLA intends in the near future to request that enforcement of the sinking groundline requirement for Maine lobstermen be deferred, as an exercise of agency discretion, until after the upcoming lobster fishing season.

In Maine, many lobstermen set gear as early as April and fish through December.⁸ Within the next few weeks, lobstermen need to place orders for rope and other gear for the upcoming season. Lobstermen who want to receive economic assistance by exchanging rope under the Gulf of Maine Lobster Foundation's (GOMLF) federally funded Bottom Line Project must register now for one of the three rope exchanges scheduled over the next few months. MLA is confident that, given sufficient lead time, rope manufacturers can manufacture ample quantities of compliant sinking groundline to serve the needs of the Maine lobster industry, once orders are placed for line that can be certified to conform to compliance protocols. However, lobstermen cannot make the necessary business decisions and place orders until they know the specifications for compliant groundline, and these specifications have not been developed in sufficient detail and clarity, or agreed to by NMFS and Maine DMR. If lobstermen are to comply with the sinking groundline requirement, and to make the decision to take advantage of the rope exchange program, they need to be able to have assurance that the rope they purchase will be compliant, and to have that assurance soon.

NMFS has defined "sinking and/or neutrally buoyant groundline" as having a specific gravity of 1.03 or greater, and has developed a complicated

⁸ Exhibit 2 contains seasonal landing data demonstrating the duration of the lobster fishing season. These data are for the calendar year 2005, and reflect landings for each calendar quarter of that year. They were compiled for the Gulf of Maine Research Institute by the Market Research, LLC research firm.

procedure for determining the specific gravity of a sample of line.⁹ The NMFS standard is based on density data taken from 384 locations from the Gulf of Maine to Key West, Florida, and thus does not reflect local water conditions. It is possible that seawater density data compiled from waters in the Gulf of Maine would indicate that rope with a specific gravity of less than 1.03 would sink in Maine waters.

The procedure for determining the specific gravity of a sample of line is of greater concern, however, since this is what enforcement agents¹⁰ will be using to determine whether lobstermen are fishing with non-compliant line. There is no accurate way for an enforcement agent or lobsterman to verify compliance in the field; the procedure would require that a sample of line be confiscated and sent to NMFS, which would test it. The NMFS test procedure requires the line sample to be submerged for seven days and weighed each day. The weight from the seventh day would then be used for the final specific gravity calculation, which involves dividing the submerged weight of the sample by the difference between the sample's submerged weight and its dry weight.¹¹ The NMFS test procedure is not the only

⁹ The NMFS density standard and procedure for determining the specific gravity of line is included as Exhibit 3.

¹⁰ NMFS has its own Office of Law Enforcement, and also partners with the United States Coast Guard, other federal agencies, and state agencies, including Maine DMR through a Joint Enforcement Agreement.

¹¹ The NMFS protocol does not provide a procedure for determining the submerged weight of a sample. Nor does it explain the purpose of weighing on a daily basis, if the final calculation depends only on the sample's weight on the seventh day. MLA has a number of technical questions concerning the test procedure, which are included in Exhibit 4.

(or best) means for determining the specific gravity of rope; MLA has been made aware of another procedure involving far less time, but which nevertheless is complex, would require a trained technician to perform, and is not suitable for testing in the field.¹²

Moreover, the NMFS procedure appears to be applicable to line that has been fished, and on its face does not appear to provide any means for lobstermen to determine in advance that line they have purchased will meet the NMFS specific gravity standard. NMFS has not specified a procedure to be used for fresh, dry line after it has been manufactured but before it has been fished. Nor is it clear whether the specific gravity of line is subject to change after a period of use, so that groundline that may be compliant initially could become non-compliant over time. Again, there is no evident way for a lobsterman to determine whether line that may have been compliant initially has become non-compliant over a period of use.

We do not believe that NMFS is trying to subject lobstermen to a “gotcha” enforcement mechanism, but right now our members are at a complete loss as to how to be sure that they are complying with the requirements of the Final Rule. Clearly, if lobstermen are to be subject to sanctions for fishing with non-compliant groundline, it is imperative that there be a procedure to determine that their rope is compliant with the NMFS standard before they purchase and use it. To this end, MLA believes that NMFS should develop a test procedure to be used by

¹² A description of this procedure is included in Exhibit 5.

rope manufacturers so that lobstermen could purchase groundline certified to meet the NMFS standards and that would be recognized by NMFS as meeting those standards. We also believe that NMFS should require rope manufacturers to mark the rope with a tracer to indicate that it meets the NMFS standard. This would enable Maine lobstermen to be confident that the groundline they are deploying is compliant with NMFS guidelines. At present, lobstermen must rely on the manufacturer's claim that rope is "sinking groundline" or "neutrally buoyant groundline," claims which have been shown by experience to sometimes be inaccurate.

MLA also supports development of a list of independent laboratories that would be able to certify the specific gravity of groundline prior to deployment, and to conduct tests if questions are raised regarding compliance after the groundline has been fished. NMFS should develop a process to certify the results of tests conducted by manufacturers or independent laboratories, to ensure that those entities are not subject to liability because their test results may vary from results produced by tests conducted by NMFS. Because of our questions regarding the testing procedures specified by NMFS, we also would support and participate in a study using the NMFS procedures to test groundline that has been fished, to analyze how line is performing in relation to the NMFS sinking groundline standard.

Given the concerns that I have discussed, MLA believes that NMFS should exercise its discretion to defer enforcement of the sinking groundline

requirement with respect to Maine lobstermen until after the 2008 lobster fishing season. This would provide time for NMFS and Maine DMR to address enforcement issues, and to provide clear specifications that will enable Maine lobstermen to order compliant gear for the 2009 lobster fishing season. The alternative is to subject lobstermen to a set of unacceptable options: (1) Tie up and forego their livelihoods until they can be assured of purchasing compliant groundline; (2) limit their fishing activities to areas within the exemption zone; (3) break gear down into singles, with increased use of vertical line resulting in increased risk to whales; or (4) fish with rope that may or may not be compliant, and thereby subject themselves to possible penalties and license sanctions for non-compliance under enforcement rules that have not yet been determined.

Finally, we would suggest that if enforcement is to be undertaken at all beginning in October 2008, as contemplated by the Final Rule, it should be done without penalty to lobstermen. Under this approach, enforcement agents would conduct tests, identify non-compliant groundline, and notify lobstermen of any deficiencies, but no sanctions would be imposed against those found non-compliant during a transition period long enough to ensure that the scope of the Final Rule, and procedures for its implementation, have been resolved. Given the current dilemma confronting lobstermen due to the need to purchase gear in the absence of clear enforcement guidelines, lobstermen should not be subject to sanctions for failure to comply with the current vague and unspecific guidelines.

III. NMFS SHOULD REFINE THE EXEMPTION LINE BASED ON A THOROUGH ANALYSIS OF LARGE WHALE INTERACTIONS WITH LOBSTER FISHING ACTIVITIES.

Discretionary deferral of enforcement of the sinking groundline requirement would also provide a window of opportunity to refine the exemption line for Maine based on a thorough scientific analysis of large whale interactions with lobstermen. NMFS has stated that the information it used to develop the state exemption areas “was the best scientific information available.”¹³ NMFS relied upon a number of sources, including large whale sightings data compiled over several decades and satellite tracking information reported in published papers. MLA has reviewed the data relied upon by NMFS, as well as the analysis presented in the FEIS and the Final Rule, and one thing is clear: The exemption line drawn by NMFS was not based on a thorough analysis of large whale interactions with lobstermen, and thus has not been drawn – as it should be – to minimize compliance costs that will be incurred by lobstermen by imposing gear restrictions in areas where their fishing effort is known to coincide with the presence of large whales.

The exemption line drawn by NMFS is based on an analysis of large whale sightings and tracking data compiled over a number of decades. The NMFS analysis does not take into consideration when the sightings took place – what year, what month, what season – or their interaction with lobster fishing activity. MLA engaged a team of researchers at the University of Buffalo to analyze the large

¹³ Final Rule, 72 Fed. Reg. at 57,126.

whale sightings database, which is maintained by Maine DMR and other institutions and which compiles sightings data for Northern right, humpback, and finback whales. The researchers prepared a series of maps for each large whale species that breaks down the number of large whales sighted by decade of sighting, number of whales per sighting, and season of sighting.¹⁴ They also prepared a series of maps showing whale sightings over the period 1990-2005, focusing on the number of large whales sighted within the three-mile line and the 50-fathom curve along the Maine coast.¹⁵ The data show that protected large whales very rarely appear inside the 50-fathom curve: There were only seven sightings of Northern right whales, seven sightings of humpback whales, and 33 sightings of finback whales – with 27 of the finback sightings occurring in a concentrated area known as The Kettles. This strongly suggests that depth should be a factor in drawing the exemption line, whether at the 50-fathom curve or elsewhere.

The researchers also analyzed the data to identify areas where Northern right whales have been known to aggregate for feeding, with a cluster of three or more whales considered an “aggregation.” Using the methodology developed by NMFS,¹⁶ they prepared a map that shows that almost all aggregations

¹⁴ These maps are included as Exhibit 6.

¹⁵ These maps are included as Exhibit 7.

¹⁶ This methodology is described in Phillip J. Clapham and Richard M. Pace III, “Defining Triggers for Temporary Area Closures to Protect Right Whales from Entanglements: Issues and Options” (April 2001), available at <http://www.nefsc.noaa.gov/nefsc/publications/crd/crd0106/crd0106.htm> (last accessed Feb. 13, 2008).

of Northern right whales during the period 1972-2000 occurred beyond the 50-fathom curve, and were concentrated in certain areas.¹⁷ Finally, the researchers analyzed the relationship between whale sightings data and lobster fishing activities. For the period 2000-2005, they estimated trap density by month for the period April-November, the months in which the majority of lobster fishing in Maine takes place. They developed maps that show no Northern right whales were sighted in state waters during any of Maine's prime lobster fishing months, and only three were sighted in federal waters inside the 50-fathom curve – two in April, when fishing activity is still comparatively light, and one in September, when activity is more intense.¹⁸ This suggests that there is virtually no interaction between Northern right whales and Maine lobstermen within the 50-fathom curve, and thus there is a negligible risk of entanglement.

MLA recognizes that the results of this research are not definitive, but does believe that it represents an approach that is superior to the analysis presented by NMFS. At various points in the Final Rule, NMFS acknowledges that it may be appropriate to revisit the exemption line in the future, based on information that becomes available. Our concern is that the Final Rule exemption line does not accurately reflect the potential for interaction between large whales and lobster fishing activities, and is not based on the same level of analysis that NMFS has employed in identifying critical habits and determining appropriate

¹⁷ This map is included as Exhibit 8.

¹⁸ These maps are included in Exhibit 9.

changes to key shipping lanes for the protection of large whales. Maine lobstermen will bear significant costs and be subjected to increased safety risks in complying with the sinking groundline requirement, and it is important that the line be drawn in such a way as to impose the fewest costs while still protecting large whales from potential harm.

We agree that in areas where whales have been known to aggregate, such as Jeffreys Ledge and Mount Desert Rock, it is appropriate to set sinking groundline requirements. In addition, where there is evidence indicating that whales may be present in particular areas where lobster fishing takes place, and at particular times during the lobster fishing season, MLA would support imposition of sinking groundline requirements in those places at those times. MLA supports a risk analysis approach, but does not support the methodology that has been employed in the past to determine Dynamic Area Management (DAM) zones, which has resulted in gear modifications being required in vast areas where whales are not present. We are aware that the methodology for identifying DAM zones has also been questioned by other bodies.

MLA fully supports further scientific analysis to determine other ways to protect large whales without imposing undue burdens on lobstermen and the economy of Maine. In the meantime, however, NMFS should immediately begin analyzing the interaction between large whales and lobster fishing, both geographically and temporally, to determine where new gear requirements are warranted for the protection of large whales off the coast of Maine, and during what

portions of the lobster fishing season. NMFS should work in collaboration with Maine DMR, and with the benefit of the funds supplied by the industry through increased trap tag fees, to conduct this analysis. This will enable the agency to refine the exemption line, to ensure that it permits lobstermen to fish with floating groundline in those areas where there is no reasonable risk of large whale entanglement.

IV. NMFS SHOULD CONDUCT A FULL ANALYSIS OF THE OPERATIONAL, ECONOMIC AND SAFETY IMPACTS OF THE FINAL RULE ON MAINE LOBSTERMEN.

MLA believes that, as it currently stands, the Final Rule will have significant, and potentially catastrophic, effects on the livelihoods of Maine lobstermen, with cascading effects on their families and the communities that support their work. NMFS attempted to analyze the economic and social impacts of the ALWTRP amendments on those affected by it, but its analysis was far from rigorous, and although the deficiencies in the analysis were identified, both in the GAO Report and comments on the FEIS, the agency failed to provide a substantive response to these concerns in the Final Rule or in the ROD. NMFS largely brushed aside evidence concerning operational and safety impacts of the sinking groundline requirement. The unacknowledged impacts of the Final Rule on Maine lobstermen highlight the need to draw the exemption line scientifically, based on the latest data and most sophisticated analysis.

The sinking groundline requirement imposed by the Final Rule represents a “one-size-fits-all” approach to large whale protection that is ill-suited

to the operational realities faced by Maine lobstermen. The bottom areas along Maine's coast are very rocky, and are subject to extreme tidal currents.¹⁹ These conditions are different from those faced by fishermen operating in other lobster fishing states. The use of sinking groundline in these areas is highly impractical, as gear will chafe along the rocks and barnacles and break off, causing loss of ropes and traps. Where sinking groundline is required, Maine lobstermen will incur significantly higher costs associated with the increased cost of rope and with gear loss, and also will incur additional expenditures of time in attempting to fish so as to avoid gear loss.

More troubling is the very real danger associated with gear becoming hung down beneath rocks. When this happens, and the gear is hauled, the rope may snap, or it may cause serious damage to the boat. Either way, there is a serious threat to the safety of the persons aboard. An incident of this type occurred in 2007, in an area off the coast of Massachusetts where the conditions are far less rocky than those found off the Maine coast.²⁰ NMFS has indicated that it will continue to monitor safety concerns related to sinking groundline, but its generic response to operational and safety issues related to the use of sinking groundline off the Maine coast is to simply state that sinking groundline is currently being used by some fishermen in Maine, even in rocky bottom areas.

¹⁹ Included as Exhibit 10 are maps prepared by Maine DMR, showing the prevalence of rocky bottom terrain off the coast of Maine. GOMLF is currently conducting research to document the severity of tidal currents Downeast.

²⁰ A published report concerning this incident is included as Exhibit 11.

As I will explain later in my testimony, Maine DMR has tested a low-profile groundline that it believes will protect whales while permitting lobster fishing in rocky bottom areas. However, time will be needed to assess whether this will work. Maine DMR has proposed an amendment to the ALWTRP based on its proposal, and this will need to be evaluated through the ALWTRT process. MLA hopes that this will help alleviate some of the operational and safety concerns presented by the Final Rule, but if that does occur, it will be at some point in the future. That process will not assist Maine lobstermen in dealing with the immediate operational impacts and safety hazards occasioned by the Final Rule.

In addition, the Final Rule imposes a significant level of additional costs on the Maine lobster fishing industry. The Final Rule estimates that the additional costs associated with compliance with the sinking groundline requirement will be approximately \$13.4 million per year. The Final Rule attributes 91 percent of these costs to the United States lobster industry, the majority of which is located in Maine. However, the cost estimate is based on an incorrect understanding of the seasonal inshore/offshore nature of the lobster fishery, and of the number of individual lobstermen who fish outside the exemption line.

The GAO report highlighted the numerous uncertainties and defects in the NMFS cost estimate as reflected in the DEIS. Among other matters, GAO determined that NMFS lacked documentation for its estimate of the lifespan of

sinking groundline, and did not make the estimate based on field tests.²¹ Thus, NMFS could not adequately estimate added costs associated with the need to replace groundline more frequently. NMFS did not use a range of prices for its estimate of the costs of purchasing sinking groundline; GAO noted that it contacted suppliers and dealers and found that costs could be as much as 34 percent higher than the price relied upon by NMFS in its analysis.²² The federally funded rope exchange program, which I noted earlier in my testimony, will assist in ameliorating these costs to a degree, but the initial funding level of approximately \$2 million remains relatively small compared to the overall purchase costs that we anticipate. Furthermore, those funds currently are available only through 2009, so that unless guidelines for compliant rope are specified prior to the 2009 fishing season, even that amelioration of the costs of compliance may disappear.

GAO also noted that NMFS essentially guessed at the cost of gear loss by Maine lobstermen,²³ and that the NMFS estimates of affected Maine lobstermen were based on unsupported assumptions regarding the nature of lobster fishing in Maine, and particularly the assumption that lobstermen operate in only one area throughout the year.²⁴ Although NMFS added a “sensitivity analysis” to the FEIS in response to the GAO critique, this analysis is extremely superficial, consisting of

²¹ GAO Report at 26.

²² *Id.* at 26-27.

²³ *Id.* at 27.

²⁴ *Id.* at 28.

a series of calculations for moderate increases (or decreases) associated with each variable in isolation. It does not consider a wide range of scenarios involving substantial increases over the NMFS cost estimates and the NMFS estimates of the number of lobstermen affected by the Final Rule.

In addition, GAO noted that NMFS lacked data to support an analysis of the ability of Maine lobstermen to absorb additional costs imposed by the Final Rule and remain in business, and thus could not adequately gauge the impact of the Final Rule on lobstermen and lobster fishing communities.²⁵ NMFS estimated lobstermen's annual revenues based on a limited sample of lobstermen, because comprehensive revenue data do not exist. NMFS then arbitrarily assumed that if gear modification costs were greater than 15 percent of a lobsterman's estimated annual revenue, the lobsterman would go out of business. NMFS could not provide a basis for this assumption, and so its estimate is without foundation.

MLA conducted its own analysis of the effect of compliance with the sinking groundline requirement, including cost and lifespan of sinking groundline, trap costs, gear loss costs, and the overall number of Maine lobstermen affected, which our evidence shows to be a substantially larger segment of the Maine lobster fishing community than assumed by NMFS. Our analysis, which was included in our comments on the FEIS, indicates that the cost of compliance with the sinking groundline requirement could amount to approximately \$134 million annually, or

²⁵ *Id.* at 29-31.

approximately ten times the NMFS estimate.²⁶ By comparison, the value of the Maine lobster industry in 2006 was approximately \$300 million. We have also estimated that, contrary to NMFS estimates that there will be a total of 173 vessels for which compliance costs amount to 15 percent or more of mean annual revenues, there will be more than 4,400 vessels that will be “heavily affected” in this manner. Given the importance of the lobster fishing industry to Maine’s coastal communities, this impact could be catastrophic to employment, associated businesses, and the regional economy.

In the ROD, NMFS brushed aside the MLA analysis in the same manner that it responded to other criticisms of its compliance cost estimates, by claiming that its own assumptions were reasonable and referring to its cursory sensitivity analysis. Whether or not our analysis is correct, there is no basis for placing confidence in the NMFS analysis, in light of the methodological flaws identified by GAO. There is no reason why NMFS cannot conduct a more rigorous analysis, given the importance of these issues to the Maine lobster industry, and NMFS should take the time to determine a better estimate of the operational, safety, and economic impacts upon Maine lobstermen of imposing the sinking groundline requirement.

²⁶ A summary of the MLA analysis is included as Exhibit 12.

V. MAINE DMR’S LOW-PROFILE GROUNDLINE PROPOSAL, WHILE AN IMPROVEMENT, FAILS TO ADDRESS IMPORTANT CONCERNS.

On January 28, 2008, Maine DMR submitted to ALWTRT a proposal for use of low-profile groundline in certain areas in the Northern Gulf of Maine.²⁷ Maine DMR recognizes that the rocky coastal terrain and the strong currents present in the Northern Gulf of Maine require that there be some degree of groundline flotation, to permit Maine lobstermen to fish safely and efficiently. In addition, Maine DMR is concerned that lobstermen seeking to comply with the sinking groundline requirement will break down their gear and use more vertical line, which may cause additional danger to whales. Maine DMR believes that rope manufacturers can now produce groundline that will float near the bottom, but that is also resistant to abrasion resulting from scraping along the rocky bottoms of Maine coastal waters.

MLA has reviewed the Maine DMR low-profile groundline proposal, and appreciates the work that Maine DMR has done in developing this alternative to the Final Rule. While MLA has not yet taken a final position regarding the proposal, we have some initial observations to present at this time. First, the Maine DMR proposal represents an improvement for lobstermen by allowing a more operationally feasible rope to be fished outside the exemption line contained in the Final Rule, in the so-called “sliver waters” that are within the three-mile limit, and in some portions of federal waters. This should reduce the amount of vertical line used in lobster fishing off of the Maine coast. The proposal includes Geographical

²⁷ A copy of this proposal is included as Exhibit 13.

Information System plots showing the distribution of substrate type along the Maine coast, clearly demonstrating the high percentage of rock and hard bottom substrates. However, the proposal does not suggest consideration of establishing seasonally-based exemption lines based on the data MLA has presented concerning large whale interactions with lobster fishing activities. Moreover, the large whale sightings data presented in the proposal do not show seasonal patterns and are not corrected for level of effort required to obtain sighting.

The low-profile groundline proposal provides for compliant rope to be uniquely marked for use in Maine and federal waters by Maine lobstermen. Assuming that manufacturers can produce rope to the proposed specifications, this should enable enforcement agents to distinguish between compliant and non-compliant groundline. This is a significant improvement on the approach NMFS has taken under the Final Rule, where line would have to be confiscated and subjected to a convoluted and questionable testing procedure before a determination could be made.

Finally, the Maine DMR proposal calls for implementation in October 2008. This date is unrealistic. Before the Maine DMR proposal could be implemented, NMFS would need to approve low-profile groundline for use in the proposed areas and establish physical standards for low-profile groundline. The state rulemaking process also will need to be completed. As I have already discussed, Maine lobstermen must know as soon as possible what line they can use and what rules they are to follow so they can order gear and be ready for the

upcoming fishing season, which begins in April for many. The rope proposed by Maine DMR is not currently available commercially, and thus cannot be purchased in time for the upcoming season.

Again, MLA appreciates the work Maine DMR has done in preparing the low-profile groundline proposal, and we look forward to continuing to work with Maine DMR and others in improving gear technology to further decrease the risk to large whales. This effort should go forward hand-in-hand with the continued efforts MLA is supporting to refine the scientific analysis of large whale behavior and their interactions with lobster fishing in Maine.

VI. CONCLUSION

To sum up, I want to again emphasize that MLA and its members fully support whale conservation efforts, and are anxious to work to achieve a plan to protect the Northern right whale that is scientifically sound and that will not impose disproportionate and unjustified costs and burdens on Maine lobstermen. We believe that the Final Rule does not meet these criteria. It is unsound in its scientific and economic analyses and imposes severe safety hazards, and NMFS has not shown that the heavy burdens the Final Rule will impose on Maine lobstermen are necessary to protect the whales it seeks to protect.

Right now, MLA and its members are most concerned about purchasing gear for the upcoming lobster fishing season. Maine lobstermen are committed to complying with clear enforcement guidelines, when those guidelines are developed. As I have explained, however, the procedures that NMFS has

outlined for determining compliance with the sinking groundline requirement are far from sufficient to enable lobstermen to fish with confidence that they are complying with the Final Rule. For that reason, we intend to request that NMFS exercise its discretion to defer enforcement of the sinking groundline requirement of the Final Rule with respect to Maine lobstermen until after the 2008 lobster fishing season. We hope that this will enable NMFS and Maine DMR to develop the necessary guidelines, and will also provide time for further analysis of the scientific and economic issues I have described, so that the exemption line can be refined and the sinking groundline requirement will be imposed in those areas where it is truly necessary to protect large whales.

Thank you.