



Paul J. Diodati
Director

Commonwealth of Massachusetts

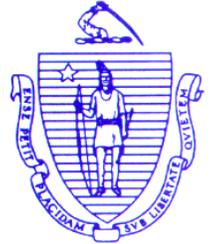
Division of Marine Fisheries

251 Causeway Street, Suite 400

Boston, Massachusetts 02114

(617)626-1520

fax (617)626-1509



Deval Patrick
Governor

Maeve Vallely Bartlett
Secretary

Mary B. Griffin
Commissioner

August 18, 2014

John Bullard, Regional Administrator
NOAA Fisheries, GARFO
55 Great Republic Drive
Gloucester, MA 01930

RE: Massachusetts Vertical Line Rule Exemptions Request

Dear John:

The Massachusetts Department of Fish and Game's Division of Marine Fisheries (*Marine Fisheries*) submits the attached request to the National Marine Fisheries Service (NMFS) for exemptions and modifications to the recently-enacted amendment to the Atlantic Large Whale Take Reduction Plan. These requests are consistent with NMFS' guidelines for exemption requests published in September 2010.

Marine Fisheries has been an active partner in the Take Reduction process since its inception in 1996, and has provided numerous comments on many aspects of the plan. Only now since the rules were published on June 27, 2014 can the agency craft precise and meaningful requests for amendments and exemptions. This is our first request for an exemption to the plan since the plan was adopted in 1997. Much of the plan's specifics, especially in past versions, were modeled after state rules developed by *Marine Fisheries*. The sinking groundline requirement is an example of this type of proactive and aggressive management. The Commonwealth required sinking groundline in all state waters in 2007; NMFS complemented this rule in 2009.

We fully understand NMFS' expectations that exemptions need to be conservation-based and, if resulting in increased risk, that risk should be negligible. The rationale for the exemptions requested here are based on safety and financial concerns for the industry and *Marine Fisheries*' intimate knowledge of whale and fixed gear presence in our coastal and nearshore waters, as well as consistency with NMFS' own strategies relative to vertical line risk in other areas. Note that *Marine Fisheries* is also uniquely poised to document the effects of the new plan, as well as any exemptions, thanks to a state and federally funded right whale surveillance program, a Disentanglement Program based at the Provincetown Center for Coastal Studies, and a longstanding mandatory data collection system that requires all commercial fishermen to report all commercial fishing trips as well as buoy line counts for all fixed gear fisheries.

The proposed exemptions have been crafted after our agency's extensive review of the final rule and the environmental impact statement as well as consultation with members of the lobster industry. Since the much anticipated release of the final rule, members of the Massachusetts lobster industry have met with *Marine Fisheries* in formal and informal meetings and expressed

dismay and frustration with some of the conservation strategies and the local impacts. We believe these amendments will provide critical relief for fixed gear fishermen from the Commonwealth and allow for continued and future co-existence of Massachusetts fisheries with endangered whales.

We look forward to working closely with you to implement these modifications as quickly as possible. Please contact me or my Deputy Director, Daniel McKiernan, to discuss these exemption requests.

Sincerely,

A handwritten signature in black ink that reads "Paul J. Diodati". The signature is written in a cursive style with a prominent initial "P".

Paul J. Diodati
Director

Enc: Massachusetts Vertical Line Rule Exemptions Request

Cc: Secretary Maeve Vallely Bartlett, EEA
Commissioner Mary Griffin, DFG
Beth Casoni, Massachusetts Lobstermen's Association
Massachusetts Marine Fisheries Advisory Commission
Massachusetts Legislative Coastal Caucus
U.S. Senator Ed Markey
U.S. Senator Elizabeth Warren
U.S. Representative William Keating
U.S. Representative John Tierney
Assistant Administrator Eileen Sobeck, Kate Swails, NMFS
Dan McKiernan, Bob Glenn, Erin Burke, DMF

Massachusetts Vertical Line Rule Exemptions Request

Submitted by the Massachusetts Division of Marine Fisheries
August 18, 2014

The Massachusetts Division of Marine Fisheries (*Marine Fisheries*) requests the following amendments to the Large Whale Take Reduction Plan's regulations at 50 CFR Part 229.32. These include spatial exemptions to "trawling-up" requirements for pot/trap gears, new gear marking requirements for exempted gears, and temporal and spatial modifications to the Massachusetts Bay Restricted Area.

Exemption Request #1: Year-round exemption to "trawling-up" in the Massachusetts state waters portion of the Northern Inshore Trap/Pot Waters south of 41° 40' N and west of 70° 00' W to the RI border (Figure 1). This would include all waters under the jurisdiction of the Commonwealth and include the center of Nantucket Sound, Vineyard Sound, and Buzzards Bay.

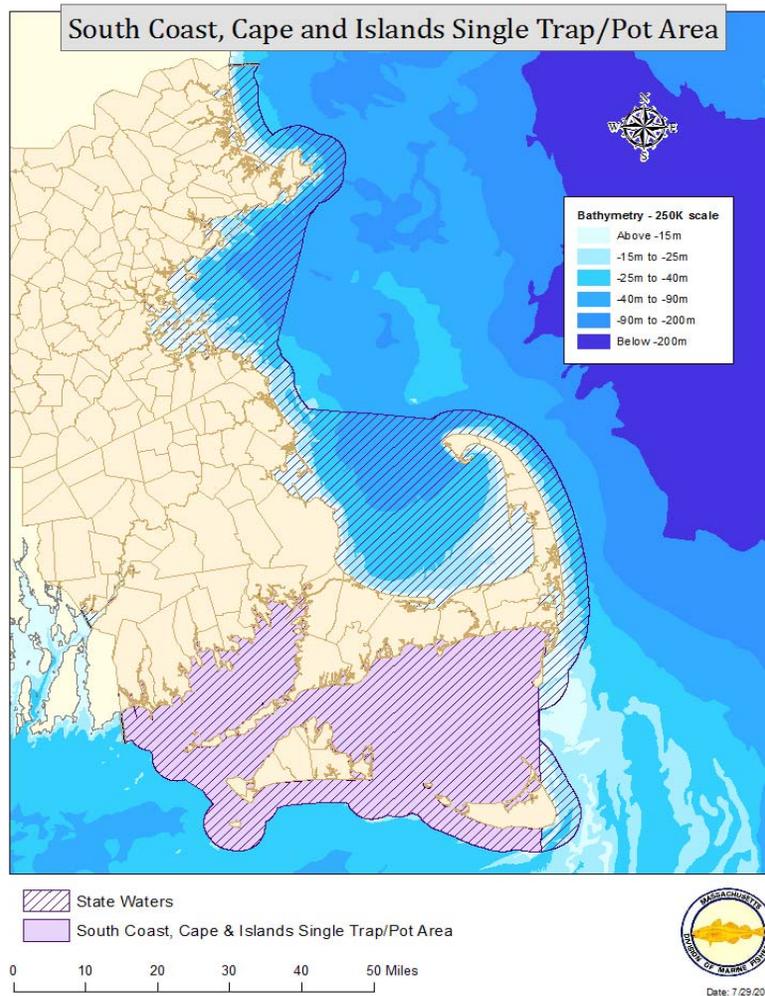


Figure 1. Proposed southern New England inshore waters exemption area.

Rationale. An exemption of inshore Southern New England waters will be conservation neutral because the results of the co-occurrence model shows minimal overlap of large whales and fixed gear occurring in this area. Trap/Pot fisheries in the area are comprised of a combination of lobster trap, fish (black sea bass and scup) pot, and conch (whelk) pot, and in the upper estuaries and salt ponds, small-scale pot fishing for American eels and invasive green crabs. As confirmed by the co-occurrence model results, the historical and expected occurrence of large whales is negligible in the exemption request area, especially in the locations and times when these fisheries are prosecuted (namely Buzzards Bay, Vineyard Sound, and Nantucket Sound in the summer and fall).

Marine Fisheries already has an aggressive limited entry program with low trap limits for the lobster, fish and conch fisheries. Each fishery is described below.

Lobster trap fishing in Lobster Management Area (LMA) 2 has undergone an unprecedented decline especially in state waters. From 1999 (the peak of the fishery) to 2011, the number of traps fished declined 37% from 82,500 to roughly 52,000. Trap amounts are subject to strict regulations and permit-specific trap limits consistent with the Interstate American Lobster Management Plan Addenda VII, XII, and XVIII. Permit specific trap allocations were issued in 2006, and beginning next year, as a result of the mandates of Addendum XVIII, there will be six years of trap allocation cuts. Next year, each permit holder is expected to have their allocation reduced by 25%, followed by an annual 5% cut for the subsequent five years. While there is some latent trap allocation in the system, the American Lobster Board of the Atlantic States Marine Fisheries Commission (ASMFC) expects the reduction in actual traps fished to be at least 25%. Moreover, as the fishery declines in the inshore portions of the range due to ocean warming (ASMFC 2010) there has been, and will continue to be, an accelerated reduction in traps fished in the state waters portion of LMA 2. Lobster traps that are shifted from inshore (state) to offshore (federal) waters will be subjected to the “trawling up” mandate and fewer buoy lines will result. In summary, lobster trap fishing is declining in this area due to a combination of attrition in the fishery, aggressive effort controls, and ocean warming. Regulations forcing lobstermen to fish trawls to effectuate a reduction in buoy line count in the state waters portion of LMA 2 is not warranted.

The sea bass pot fishery is limited to 58 permits, just 200 pots per permit holder, and the season is open for only about six weeks in the late summer due to low quota available to the Commonwealth’s fishermen. Less than 30 permits were active in 2013. The fishery opens in early August with a routine closure of this quota-managed fishery by mid-September, when all pots must be brought ashore. The scup pot fishery occurs from May through October, but the 150 permitted fishermen are limited to just 50 pots. Less than 70 permits were active in 2013.

Finally, the conch pot fishery is limited to 144 permits and only 200 traps are allowed. The target species are knobbed and channeled whelk in shallow warm waters of Nantucket Sound, Vineyard Sound, and Buzzards Bay. In 2013, 86 permits were active.

These three fisheries are longstanding in the Commonwealth and have been under limited entry for over two decades. Single trap fishing is a normal business practice for most of the participants due to either low trip limits or low trap limits. Participants use single traps either as a harvesting strategy to maximize catch rates, or due to the small scale of the vessel where fishing trawls would be considered too dangerous. Because the state’s management strategy is to constrain effort

through low trap limits, the participants maximize catch rates by selective placement of single traps on optimal habitat. Large whales are exceedingly rare in the areas and times when these fisheries are prosecuted.

Also in the salt ponds and estuaries, some eel and green crab potting occurs in very shallow water. Without a specific gear exemption, or an exemption area, as was approved in Maine and New Hampshire waters, these small-scale pot fisheries taking place where there is almost no co-occurrence would inappropriately fall under the plan.

No special gear marking, strategic monitoring, or contingency/fallback plan is proposed for this request in the southern waters. We believe this area is sufficiently comparable to similarly exempted areas of LMA 4, 5, and 6 as well as Narragansett Bay, where no special gear marking, monitoring or contingency plans are currently required.

Timing for Exemption. The timing for the exemption from the trawling up requirements would align with the implementation timeline of June 1, 2015 that is outlined in the Final Rule.

Exemption Request #2: Exemption to the “trawling-up” requirement within a portion of the Massachusetts state waters that lies within the Northern Inshore State Trap/Pot Waters. The area requested include those waters north and east of Cape Cod from 0-3 miles from shore for all trap/pot fisheries (Figure 2), with a new unique marking scheme for all single traps fished by commercial permit holders in this exempted area. (This exemption would not alter the provisions of the Massachusetts Bay Restricted Area closure.)

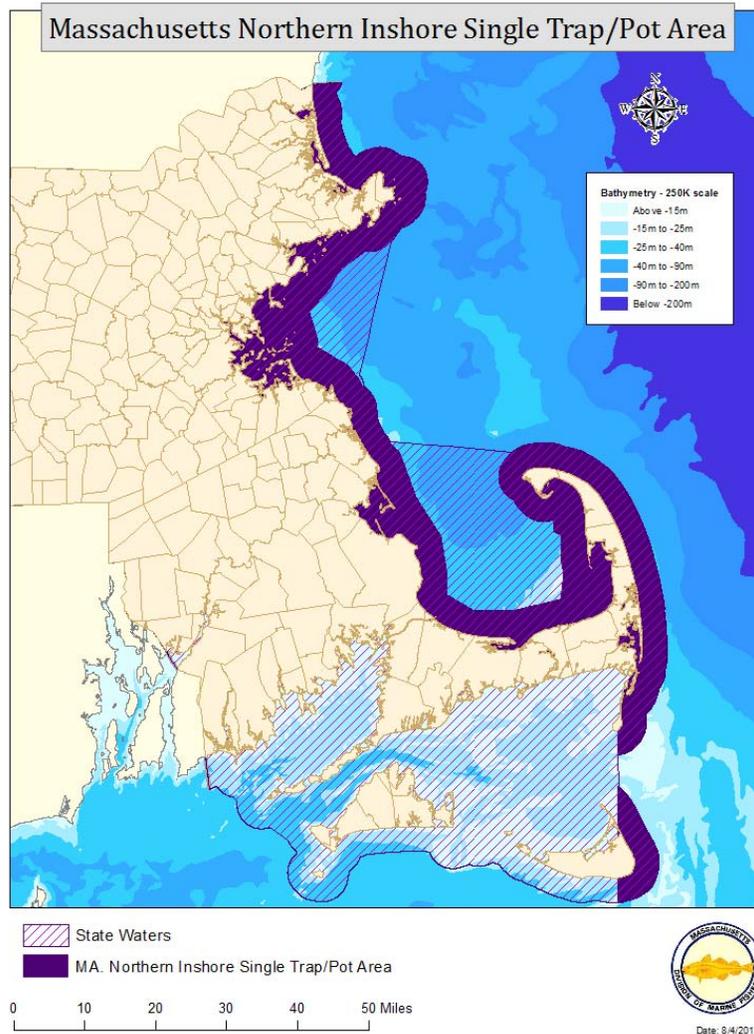


Figure 2. Proposed northern Massachusetts inshore waters exemption area.

Rationale. Outside of the right whale season in the Cape Cod Bay area, Massachusetts has minimal occurrence of large whales within three miles of shore (compared to state waters beyond three miles and the waters of the EEZ). The seasonal fisheries, their scale and fleet composition, as well as the expected occurrence of large whales are completely analogous to those adjacent waters of New Hampshire where the state waters were exempted.

We acknowledge that the 3-mile zone surrounding eastern Cape Cod is more likely to see humpback whales than other state exempted waters, but NMFS must recognize that the area

known as the Outer Cape Cod Lobster Management Area (OCCLMA) is under the most restrictive effort controls of any American lobster trap fishery in the nation, and is worthy of an exemption. The area is managed by the Commonwealth under the auspices of the ASMFC. The management plan was crafted over a decade ago by the OCC Lobster Conservation Management Team, a voluntary group of professional lobstermen who opted for limited entry, draconian effort controls, and closed season as the pillars of their conservation plan. Their individual trap limits are controlled by individual trap allocations (based on historical trap fishing effort). The average trap allocation among current participants is approximately 400. Due to some of the strongest tides in New England and seasonally narrow zones of productive fishing bottom inhabited by migrating lobster, single trap fishing within the 0-3 mile area has been identified as absolutely critical by some participants.

At recent public meetings, participating fishermen have pleaded with *Marine Fisheries* staff and elected officials to take a closer look at the logistics of the fishery to understand the factors that result in single trap fishing being the safest, most economical, and productive technique in OCCLMA. We agree with those who insist that the “trawling up” mandate will have dramatic negative impacts on many participants. (*Marine Fisheries* will provide a future in-depth characterization of the OCC lobster fishery in advance of the review by the Take Reduction Team.) The dynamic tides, featureless substrate, and migratory nature of lobster experienced by this fishery dictate the use of single traps in nearshore waters. Unlike the coast of Maine, where fishing doubles or triples with 60' to 90' of groundline in confined areas of rocky substrate is productive, successful lobster fishing in OCC relies on spreading gear out across specific depth contours to take advantage of lobsters migrating to the inshore waters of Massachusetts Bay. When fishing on migratory lobsters where the density of “resident” lobsters that remain within a small home range is negligible, it is absolutely critical to fishing success to have traps spaced far enough apart so that the effective fishing radius of each trap does not overlap. As such, to maintain profitable catch rates in OCC, fishermen would have to fish doubles with extraordinarily long (150' to 300') groundlines to maintain profitable catch rates. This poses a significant safety threat to small boat fishermen in OCC.

Marine Fisheries believes it is critical to promote safe fishing practices for the smallest of operations. Note that state law allows full-time students to be holders of the Student Lobster Permit, authorizing the fishing of 25 traps from June 15 to September 15. These permit holders often fish alone and from small open boats. Single traps are deployed for reasons of scale and safety. We are deeply concerned about these fishermen’s safety due to the mandate of increased trawl length and the potential for gear conflicts for those who fish close to shore.

We believe there is a need to subject all small-scale pot fishermen to common standards whenever possible, including commercial, recreational, and student fishermen. Recreational lobstermen are allowed to fish up to 10 traps in any state waters, but the NMFS rules do not affect non-commercial fishing. Consistency is important because the non-commercial lobster fishery is nearly indistinguishable from the small-scale commercial fishery in fishing skill, style, and scale of operation. Through our public meetings on these issues, we have come to learn that single lobster trap fishing is conducted by student commercial lobstermen, small-scale commercial lobstermen, and recreational lobstermen within three miles, beyond the 1-mile distance we had previously believed. This warrants a uniform gear requirement (for both commercial and recreational) within this entire 3-mile inshore zone.

We do not believe there is consensus about the effect that a shift to multiple pot trawls will have on the severity and complexity of entanglements. Single traps are the lightest and simplest pot gear. Moreover, fishermen will invariably deploy heavier ropes in order to trawl-up. It is our contention that an allowance for single traps in the exemption area described here may actually be safer for whales than doubles, particularly in OCCLMA where single pot fishermen have told us they will have to fish groundlines that are very long to overcome the reduction in catch efficiency caused by fishing doubles in such a featureless bottom area. The typical “OCC gear configuration” for doubles would be a single buoy line attached to a groundline with the first trap gangion at the contour depth plus a 2:1 to 3:1 ratio (to allow for the severe currents in this area), and the second trap gangion at 150' to 300'. This would result in a configuration in which a whale entangled in the buoy line would be dragging one trap likely suspended off the bottom, and a second trap dragging along the seafloor. We contend that this convention would result in more complicated and potential injurious entanglements of large whales than would occur with single pots. NMFS must agree with the rationale that single pots may be less injurious to a whale, as the agency has *required* single pots in the Southeast U.S. for that very reason (see Final Rule).

Even a simple two-pot trawl when crossed over another similar trawl will result in a complex and heavy set of gear that could anchor a whale or result in serious injury when the whale attempts to free itself. The lobstermen we spoke to were willing to adopt a more elaborate marking scheme to identify the single trap buoy lines to prove their point. They insisted that a more elaborate marking scheme will reveal that the single trap approach is legitimately safer for large whales.

Finally, we believe disentanglement programs are essential to long-term conservation of endangered whales and are especially effective at mitigating single trap entanglements. The Commonwealth and the fishing industry are fortunate to have a program strategically positioned at the tip of Cape Cod to investigate and disentangle endangered whales. With long-standing NMFS support, the Commonwealth administers a long-term contract with the Provincetown Center for Coastal Studies to perform disentanglement. The Commonwealth is now investing \$150,000 annually in the Disentanglement Program to support the ongoing work.

We urge NMFS to be consistent in their application of the principle that single pots are potentially less injurious by approving this request. Massachusetts is in a unique position to monitor the effect of this exemption due to the proposed gear marking scheme, the fishing gear data collection system in Massachusetts, and the disentanglement program.

Gear Marking. We propose a new special gear marking scheme for all buoy lines on commercially fished single traps within the 3-mile exemption zone. Two different marking schemes are proposed: one for OCC permit holders and another for LMA 1 permit holders. To identify this exempted gear, the new vertical line marking scheme of three 12" red marks (top, mid, and bottom) should be refined with an additional 4" mark superimposed on the center of the 12" mark of a contrasted color. The additional colors for OCCLMA and LMA 1 would be determined after consultation with the lobster industry, NMFS, and the Take Reduction Team.

Timing for Exemption. The timing for the exemption from the trawling up requirements would align with the implementation timeline of June 1, 2015 that is outlined in the Final Rule.

Exemption Request #3: Modify the Massachusetts Bay Restricted Area seasonal closure by: (A) Eliminating January from the closed period; and (B) Expanding the area extent of the closure to the east and south by including the remainder of the Outer Cape Cod Lobster Management Area east of 70 degrees (Figure 3).

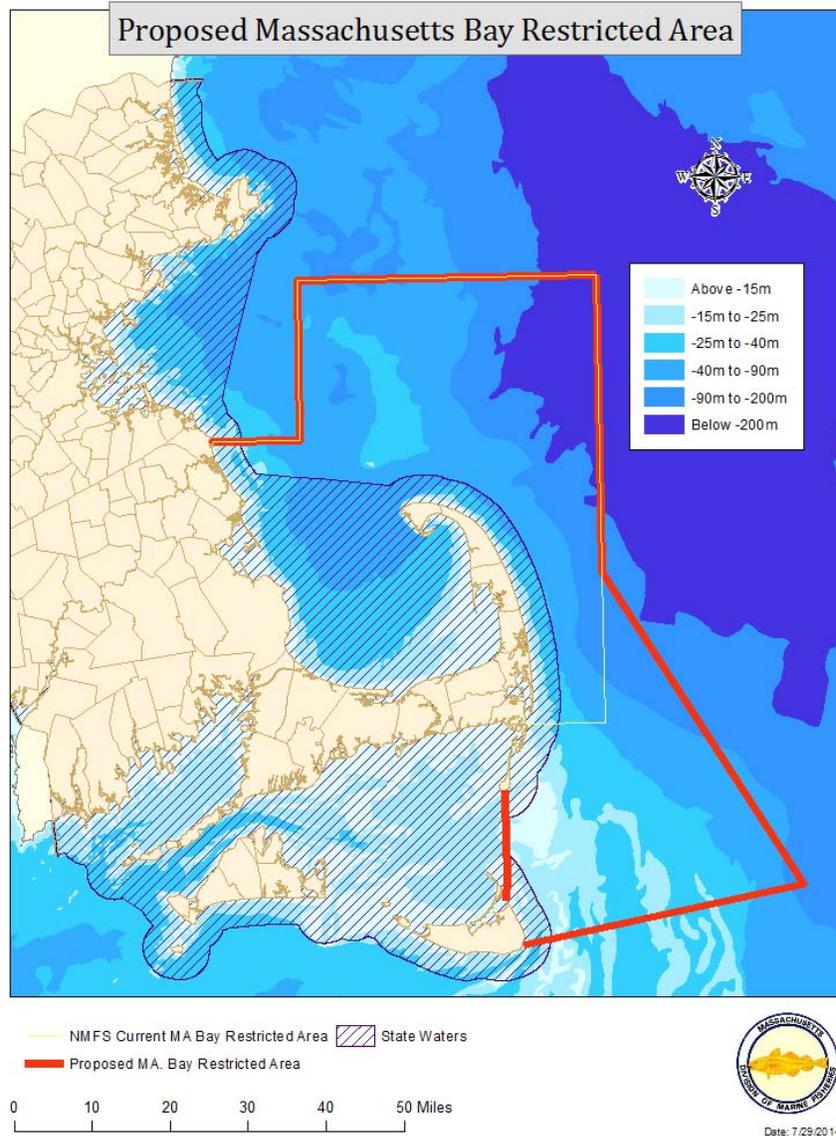


Figure 3. Proposed Massachusetts Bay Restricted Area Closure modification.

Rationale. A February 1 start date better matches the results of the co-occurrence model. The model shows minimal co-occurrence values in waters north of the Critical Habitat (especially on Stellwagen Bank) during the month of January. Right whales sightings in January are predictably much lower compared to the following three months (February – April) (Nichols et al., 2008).

There are many lobstermen who have historically fished the winter months in the Massachusetts Bay Restricted Area and will be impacted by the closure. Relatively strong lobster landings and

the high ex-vessel price make this a critical time for the Massachusetts lobster fishery, especially in the northern portion of the closed area. However, a closure start date of February 1 would allow lobstermen to complete normal lobster fishing operations through the lucrative holiday months of November and December and into January and then safely remove their fishing gear throughout the month of January when weather permits. We believe that although the area will not be closed by regulation in January, the effect of a February 1 closure date will be to severely reduce the amount of gear in the area during January as fishermen incrementally remove their gear to meet the February 1 deadline.

For OCCLMA, a shift in dates is also consistent with rulemaking already in progress by *Marine Fisheries*. The Division has begun rulemaking to amend the existing January 15 – March 15 haul-out period¹ to February 1 – March 31 for all OCC lobster permit holders, to accommodate lobstermen who sought to complete their fishing season in later January and for those who may need an extra two weeks to remove their gear from the water, delayed by January storms. Our proposed rule was approved by the Commonwealth’s Marine Fisheries Advisory Commission on April 13, 2014 and final enactment of the new state regulation is still pending because the Division was awaiting the outcome of the federal vertical line rule. If approved as a 3-month (February-April) closure, *Marine Fisheries* will work to accomplish an addendum to the ASMFC lobster management plan to amend that aspect of the OCCLMA effort control plan.

We note there is a substantial tradeoff and additional conservation resulting from this proposal. Increased whale protection is accomplished by expanding the closure to the southeastern portion of OCCLMA. Increasing the current closed area, estimated to be 2,140 square miles, to include all of OCCLMA, will increase the total area closure by an additional 900 square miles, thereby increasing the proposed area by 42%. The sighting-per-unit-effort results suggest the southern portion of the OCCLMA has predictably high numbers of right and humpback whales, especially in March and April. By leaving waters south of 41° 40' N and east of 70° 00' W open throughout the winter/early spring, we fear that this area could become a magnet for lobster gear and increase risk of entanglements there. Consequently, we recommend closing all of OCCLMA along with the Massachusetts Bay Restricted Area but only for three months.

This will create a more logical and streamlined regulation because OCCLMA permit holders are already subject to the aforementioned 2-month haul-out period (January 15 – March 15), and this new rule would amend the closure to be three months (February – April) coincident with the times when whales are most abundant. It also will make enforcement of seasonal closures more efficient because the dates of the closed period would be consistent across the entire area. The immediate impacts will be on OCC lobstermen who currently set their gear in late March and April in advance of the spring “run” of lobsters migrating inshore.

The other anticipated effect will be on the burgeoning whelk pot fishery for waved whelk in the EEZ portion of OCCLMA. This fishery is in its infancy but has already flourished in the EEZ off southern New England and Long Island. The fishery is anticipated to proliferate in this and other areas of the Gulf of Maine, especially east of Cape Cod when NMFS reopens the Northern and Southern Temporary Paralytic Shellfish Poisoning Closure Areas, expected later in 2014.

¹ A two month winter-time “haul-out” period was created by the LCMT in the 2004 management plan adopted by the ASMFC as a means to ensure all gear was removed from the water and the restrictive trap limits were adhered to.

It is also worth referencing some historical facts about past closures. In the Final Rule's Response to Comments, NMFS' explains its rationale for establishing the January – April closure as a simple expansion of the existing gillnet closure in Cape Cod Bay Critical Habitat (CCBCH). However, that fails to recognize the historical basis of the CCBCH closure and current fishing practices. When *Marine Fisheries* enacted the January 1 – May 15 right whale season regulations in 1996, there was no reported gillnetting occurring in the area in the few years prior to the closure. The action was taken because we feared gillnets could proliferate in the area, displaced to Cape Cod Bay by the growing (federal) Harbor Porpoise gillnet closures that were enacted in Massachusetts Bay. The Commonwealth had no evidence then, nor now, that gillnets were involved in any right whale entanglements in state waters, but we prevented gear from being displaced into known right whales high use areas. However, even while we prohibited gillnetting in 1996, we allowed lobster trawl fishing to continue for nearly two decades. It is ironic that NMFS is using the gillnet closure in Critical Habitat as a part of its logic to create this expanded Massachusetts Restricted Area, but have exempted gillnetting in the expanded closure.

Finally, for the sake of fishermen safety in mid-winter, if harbors unexpectedly ice-up in January and or/weather becomes extraordinarily inclement that gear could not be removed during the month of January, NMFS should be prepared to declare a gear removal grace period in near real-time, for some period in early February at the discretion of the Regional Administrator. We urge NMFS to consult other regions or nations to examine their approaches for regulating and enforcing fixed gear fishery openings and closures in the face of inclement sea and weather conditions.

Timing for Exemptions. The timing for the exemption from the January portion of the seasonal closure would go into effect January 2015.

Contingency Plans. No trigger action (closure, etc.) is proposed in the event of an entanglement causing a serious injury or mortality during January in the Massachusetts Bay Restricted Area because we are proposing a more overall conservative strategy by expanding the areal aspect of the closure to include all waters of the OCCLMA. However, we welcome NMFS and TRT review of any entanglement event and any *Marine Fisheries* supplied analysis of data depicting buoy line counts and effects of the rule on effort and risk of entanglement.

Exemption Request #4: Create discrete "Trap Storage Areas" within the Massachusetts Bay Restricted Area during April 16 – 30, where setting of lobster trap trawls would be allowed (Figure 4).

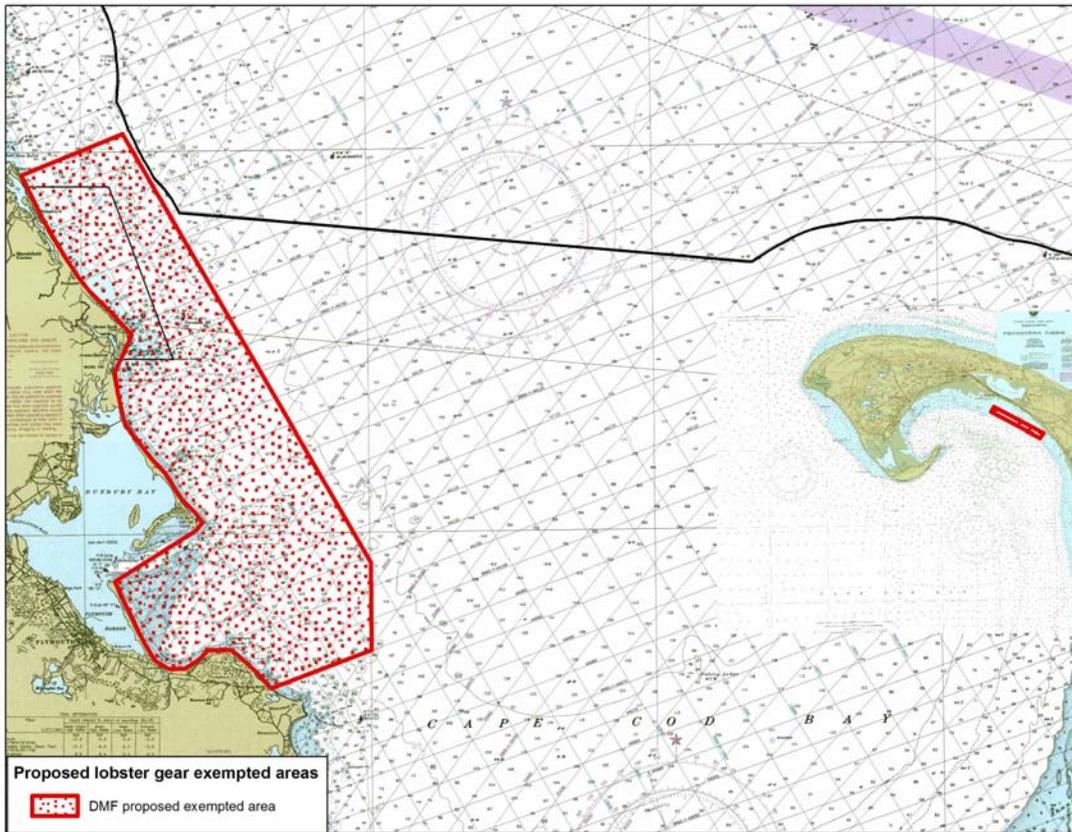


Figure 4. Proposed Trap Storage Areas.

Rationale. Affected lobstermen have forecasted significant challenges associated with an unprecedented “opening day” effect caused by a May 1 lifting of the Massachusetts Bay Restricted Area closure. They anticipate extreme congestion at the piers and loading facilities as lobstermen compete to begin their season. Because the Cape Cod Bay vessels are not equipped to carry large amounts of traps in a single load, this bottleneck of loading space will constrain the setting of gear even after the opening date. For fishery management comparison, Canadian lobster fisheries are managed by seasons and trap limits, but the fishermen have vessels capable of carrying hundreds of traps at a time on the opening day of the season. In addition, for OCC lobstermen who fish traditional wooden traps, pre-season gear soaking has always taken place, especially in the Provincetown Harbor area where lobstermen have temporarily strung un-baited traps together just below the subtidal zone for a few weeks before setting them as single traps in May on the fishing grounds.

Participating fishermen have suggested that designated area be set aside for temporary gear storage during the last two weeks of April in order to mitigate the effects of the gear setting derby and accommodate traditional pre-season soaking practices. The discrete areas were selected in order to not pose a threat of right whale entanglements. On the western side of Cape Cod Bay, the

proposed Trap Storage Area is west of the federal and state designated Critical Habitat Area. This area is designed to service the needs of fishermen from the ports of Plymouth, Marshfield, and Cohasset. In the eastern portion of the Bay, the proposed Trap Storage Area is within the Critical Habitat but in sufficiently shallow water where right whales are unlikely to occur. This area is designed to accommodate the fleets in Provincetown/Truro and Wellfleet ports.

The coordinates (in degrees decimal minutes format) of the proposed Trap Storage Areas are as follows:

- 1) Western Cape Cod Bay - polygon with following corners, conforming to shoreline along westernmost boundary

	NW	NE	SE	S	SW
Lat	42 9.396	42 10.478	42 59.265	41 56.96	41 56.017
Long	-70 42.087	-70 38.579	-70 30.0	-70 30.0	-70 33.476

- 2) Eastern Cape Cod Bay

	WNW	ENE	ESE	WSW
Lat	42 3.037	42 2.329	42 2.216	42 2.908
Long	-70 8.107	-70 6.399	-70 6.515	-70 8.199

Gear Marking Scheme for the Trap Storage Areas. No unique gear marking or rigging schemes are proposed for these temporary Trap Storage Areas.

Contingency Plans. If aggregations of three or more right whales are seen within any of the proposed Trap Storage Areas in the seven-day period prior to their opening, the area would be closed until *Marine Fisheries* and PCCS determine right whales have departed the Bay. If an entanglement causing a serious injury or mortality attributable to a Trap Storage Area occurs, the exemption would be rescinded, or alternative buoy line construction would be mandated in the following year through state rulemaking.

References

Atlantic States Marine Fisheries Commission (ASMFC). 2010. Recruitment failure in the Southern New England lobster stock. Report by the ASMFC American Lobster Technical Committee, April 2010. 57 p.

Nichols, O.C., R.D. Kenney, M.W. Brown. 2008. Spatial and temporal distribution of North Atlantic right whales (*Eubalaena glacialis*) in Cape Cod Bay, and implications for management. *Fishery Bulletin*, 106(3), 270-280.