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PATRICK C. KELIHER  
COMMISSIONER

January 5, 2025

Mr. David Morin  
Large Whale Disentanglement Coordinator  
Greater Atlantic Regional Fisheries Office  
NOAA Fisheries Service  
55 Great Republic Drive  
Gloucester, MA 01930

Dear Mr. Morin:

The Maine Department of Marine Resources (ME DMR) submits this letter in response to the final 2022 Atlantic Large Whale Entanglement Report and the recently completed investigation by the NOAA Office of Law Enforcement (OLE) for North Atlantic Right Whale (NARW) #5120 entanglement case. The Entanglement Report<sup>1</sup> concluded that the entangling gear originated in the Maine state waters trap/pot fishery. While ME DMR recognizes NARW #5120 was entangled in rope with purple gear marking consistent with requirements in Maine, ME DMR disagrees that the entanglement can be definitively tied to the state waters fishery. ME DMR's assessment, informed by the inspection of the recovered gear by Maine Marine Patrol, is that the gear markings on the recovered rope cannot be conclusively tied to state versus federal waters. This assessment results from the lack of a complete surface system recovered in the gear, the multiple gear configurations which are possible with the two recovered purple marks, and the concurrence of the entanglement with changes to gear marking regulations in Maine. ME DMR outlines these points below and responds to the rationale provided by NOAA on December 20<sup>th</sup> Atlantic Large Whale Take Reduction Team (ALWTRT) webinar regarding the location of this entanglement.

From the Entanglement Report and the ALWTRT webinar, it appears a key underpinning to NOAA's conclusion that NARW #5120 was entangled in Maine state waters comes from the lack of a green 'federal' mark on the recovered gear. ME DMR inspected the recovered gear and agrees no green marks were recovered; however, we disagree that this leads to a definitive conclusion that the gear is from state waters. This is largely because, in September 2020, ME DMR proactively adopted state-specific gear marking in the Maine lobster fishery<sup>2</sup>. In this original rulemaking, the purple gear marking requirements for federal waters closely align with what was subsequently adopted in the 2021 Final Rule to amend the

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<sup>1</sup> Through out this letter we refer to the 2022 Atlantic Large Whale Entanglement Report, and specifically entanglement report case number E16-22. <https://www.fisheries.noaa.gov/s3/2024-12/2022-Atlantic-Large-Whale-Entanglement-Report.pdf>

<sup>2</sup> The September 2020 Maine gear marking regulations were comprised of two rulemaking documents, both of which were implemented September 1, 2020. [https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/Chapter75\\_MAPA4\\_SOSfiling%2011-6-19\\_WEB.pdf](https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/Chapter75_MAPA4_SOSfiling%2011-6-19_WEB.pdf); [https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/MAPA4\\_Ch%2075%20gear%20marking%20exception\\_web.pdf](https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/MAPA4_Ch%2075%20gear%20marking%20exception_web.pdf)

Atlantic Large Whale Take Reduction Plan (ALWTRP): a 36” purple mark in the top two fathoms of the buoy line and three subsequent 12” purple marks in the top, middle, and bottom of the buoy line. However, the green marking requirement in federal waters was significantly different. It included just a single 6” green mark in the top two fathoms of the line. As a result, there was no corresponding ‘federal’ green marks next to the three 12” purple marks in the September 2020 gear marking regulation for Maine federal waters.

Subsequently, ME DMR underwent rulemaking in the spring of 2022 to amend these state-specific gear marking regulations to come into compliance with the 2021 Final Rule to the ALWTRP. This updated rulemaking was implemented May 1, 2022<sup>3</sup> and, specific to federal waters gear marking, required each purple mark have a corresponding 12” green ‘federal’ mark. The timing of this rulemaking is critical as the Entanglement Report notes May 1, 2022, is also the last day that NARW #5120 was seen gear free; NARW #5120 was documented entangled in the Gulf of St. Lawrence on August 20, 2022. As a result, #5120’s entanglement likely occurred at a time when Maine fishermen were transitioning their gear marking to comply with new regulations.

Given these facts, there are multiple gear configurations which could be derived from the recovered gear. One scenario is as NOAA has concluded, that the gear is from state waters and purple zip ties represents two of three required purple marks. Another equally possible scenario is that the gear originated from federal waters and the two purple marks on the recovered gear represent two of the three 12” purple marks required in the top, middle, and bottom of the endline under the September 2020 Maine gear marking requirements. These purple marks would not have had corresponding green ‘federal’ marks. Had a 36” purple mark been in the recovered gear, the absence of a green ‘federal’ mark would have been solid evidence that the gear was from Maine state waters as, under both sets of regulations, there was always a requirement for federal gear to have a green mark adjacent to the 36” purple mark (though the length of the green mark was changed). However, in the absence of the 36” purple mark, there are multiple potential gear configuration scenarios, some of which suggest state waters and others which suggest federal waters.

Further rationale provided by NOAA on the December 20<sup>th</sup> ALWTRT webinar to support the conclusion NARW #5120 was entangled in Maine state waters was that it was unclear why a fisherman would mark their line with purple marks and not the corresponding green marks at the same time. However, this situation can be easily explained with the history of Maine gear marking requirements for federal waters. Originally, only a single 6” green mark was required in the top two fathoms of the line, so three out of the four purple marks did not require corresponding green ‘federal’ marks. Thus, it is very likely that federal fishermen originally marked the top, middle, and bottom of their endlines with three 12” purple marks, and then had to go back and add 12” green marks next to the existing purple marks. Further, assumptions regarding human behavior and how someone may choose to comply with a regulation should not be used to make definitive conclusions regarding the origin of any entangled gear.

Additionally, NOAA stated on the December 20<sup>th</sup> ALWTRT webinar that given NARW #5120 was seen on May 1, 2022, gear free and roughly 90 miles from the Maine state waters line and given the timing of this sighting with new gear marking requirements that the whale was likely entangled in Maine. While ME DMR always strives for 100% compliance upon implementation of a new requirement, industry-

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<sup>3</sup> The Spring 2022 proposed rulemaking to adopt gear marking changes outlined in the 2021 Final Rule to the ALWTRP. A public hearing was on March 15, 2022, and the public comment deadline was March 28, 2022. [https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/MAPA3\\_Ch75\\_web.pdf](https://www.maine.gov/dmr/sites/maine.gov.dmr/files/docs/MAPA3_Ch75_web.pdf)

wide adoption of a new regulation often takes time. In fact, NOAA OLE commented on the same December 20<sup>th</sup> webinar that the majority of ALTWP violations they continue to see are related to gear marking. Thus, it is more likely on May 1, 2022, that some Maine gear was in compliance with the new gear marking regulations, some gear was being transitioned to the new gear marking requirements, and some gear still had the September 2020 gear marking requirements. This increases uncertainty and complicates the conclusions that can be made regarding the origination of the entanglement in state or federal waters.

The ambiguity regarding which purple marks were recovered in the endline, and the occurrence of the entanglement at a time when Maine fishermen were transitioning to new gear marking requirements significantly obfuscates the conclusions that can be made regarding the location of the entanglement. ME DMR does not argue that the purple marks recovered are consistent with requirements in Maine, but we strongly argue that it cannot be definitively concluded if this entanglement occurred in state or federal waters. Given the number of assumptions and lingering questions regarding the recovered gear, Maine DMR requests that NOAA append this letter to the final 2022 entanglement report so that it is clear Maine Marine Patrol and DMR do not agree with NOAA's conclusion.

Sincerely,



Pat Keliher, Commissioner

CC:

Colleen Coogan

Michael Henry

Michael Pentony

Kim Damon Randall