



MAINE

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REVISED TESTIMONY

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Neither For nor Against

LD 710 An Act to Fund the Lobster Legal Defense Fund

April 4, 2023 (Revised testimony)

Senator Reny, Representative Hepler, and members of the Marine Resources Committee, due to the substantive amendment presented by the sponsor at the public hearing, the MLA is submitting this revised testimony neither for nor against LD 710 An Act to Fund the Lobster Legal Defense Fund.

Why Neither For nor Against

As stated in our previous comment letter dated March 23, 2023, the MLA strongly supports a \$1 million investment from the state's General Fund for reimbursement to certain industry organizations for the legal costs incurred in defense of the lobster industry regarding federal whale rules. LD 710, with General Fund support, presents an opportunity for the Legislature to acknowledge and invest in preserving the lobster industry due to its critical economic, social, and cultural importance to the entire state of Maine.

At the March 23 public hearing, however, the MLA learned that the General Fund contribution to the Lobster Legal Defense Fund proposed in the original bill was replaced with a new proposal to use 20% of the revenue collected to operate the Maine Lobster Marketing Collaborative (MLMC). As stated in our original comment letter, "The MLA does not support diverting funds from other important programs to support the industry's legal defense," and therefore does not support this language. The MLA also did not support this funding mechanism when the Lobster Legal Defense Fund was established.

The Maine Lobster Marketing Collaborative is funded by lobstermen, dealers, and processors through a license surcharge. Its mission is to market and promote Maine lobster and protect the Maine lobster brand. Underfunding the MLMC would reduce efforts designed to protect both the value of Maine lobster and the Maine lobster brand which affect the price paid to lobstermen.

While federal whale rules pose an existential threat to the industry, 2022 clearly showed that the industry's short-term survival requires a stable lobster price. It is not possible for any

organization to guarantee a stable price in a complicated marketplace with highly variable supply and demand, but it is easy to imagine that things could be much worse if marketing efforts weren't in place to keep pace and if there were not aggressive efforts to protect the Maine lobster brand.

The state should invest in the future of the lobster industry, but it should not redirect resources paid by the lobster industry to protect the Maine lobster brand and build consumer demand.

The Need is Real

The need for funding the lobster industry's legal initiatives is very real. The MLA has been engaged in legal battles addressing this round of federal whale rules since 2018 when it intervened in a court case filed by national environmental organizations against National Marine Fisheries Service (NMFS) demanding more stringent whale regulations.

Following the release of the federal 10-year whale plan and most recent final rule in 2021, the MLA sued NMFS claiming the agency did not use the best available science as required under the Endangered Species Act resulting in risk reductions that far exceed the risk posed by the Maine lobster fishery. The MLA was not successful in that litigation and is now deeply engaged in an appeal which should be decided this spring.

To take on this effort, the MLA launched a three-year, \$10 million fundraising campaign in 2021. The MLA has expended more than \$1.3 million in our efforts to prevent the federal whale plans from ending the Maine lobster fishery. Approximately \$880k has gone directly towards litigation addressing the Biological Opinion and whale rules, \$200k towards regulatory strategies, with additional funds used to hire experts to bolster MLA's strategy.

The MLA has received tremendous financial support from Maine lobstermen, businesses, municipalities, the state of Maine, and many community members, yet our small organization still faces an extraordinary challenge to raise the remaining funds needed to continue to proactively lead this fight.

Lobstermen are Already Paying a Significant Portion of the Industry's Legal Defense

MLA's early legal efforts were made possible due to the generosity of lobstermen who were the first to step up and contribute to MLA's Legal Defense Fund. While our funding base has grown, lobstermen continue to play a critical role in making MLA's legal work possible. Lobstermen must play a critical role in funding these efforts as there is no doubt that their livelihoods hang in the balance. But federal whale regulations also directly threaten Maine businesses and communities, as well as the future of our rural communities and Maine's lobstering culture and heritage.

The Maine lobster industry is one of the most valuable fisheries in the nation, and critical to the economy of Maine. Lobster dollars are the first dollars earned and spent in most coastal communities. This money supports not only lobstermen, but also their families, local businesses, schools, non-profit organizations, and the town. If the lobster industry fails as a result of the onerous federal whale plan, the economic impact on the people, businesses, and communities that depend on it will be devastating.

The Legislature should not be looking solely to lobstermen to support this effort. Yet that is what the proposed amendment to LD 710 would do. The Legislature, instead, should be considering how it can support this legal effort with General Funds due the importance of the lobster industry to the state of Maine.

Maine Lobster Marketing Collaborative Critical to Maine's Lobster Industry

The Legislature must also understand how important the Maine Lobster Marketing Collaborative's work is to the lobster industry. MLMC not only markets Maine lobster and communicates our story of stewardship and sustainability to consumers, but it also protects the Maine lobster brand from attacks by national environmental groups, ecolabels, the media, and other sources. Its efforts in 2022 were impressive and MLA is encouraged that the Marine Resources Committee will hear the MLMC's annual report on April 5 before it considers any proposal to cut its budget.

Certainly, the MLMC is not directly involved in legal defense of the industry, but it does provide an array of critical services that indirectly support the state and the industry's ability to pursue its legal defense efforts. A few examples of the collaborative's work include:

- Maintaining a website <https://rightwhalesandmainelobster.com/> which hosts important fact sheets about right whales and Maine lobster and dispels the myths about the source of harm to right whales, and professional videos explaining the importance of the lobster industry to Maine's communities, the lobster industry's expansive efforts to sustain the lobster resource and protect right whales;
- Conducting market research to inform right whale media strategy by monitoring the public's awareness of the issue;
- Coordinating and managing the industry's media strategy. MLMC reviews media inquiries and assembles the best voices from the industry to address various requests. Equally important, the Collaborative advises on which media inquiries should be avoided because they are agenda driven or biased against the lobster industry;
- Marketing and promoting Maine lobster and telling the story of our lobstermen, heritage and sustainability; and
- Organizing educational events to explain complicated developments such as changes to ecolabels to key stakeholders.

The lobster industry's ability to fight the whale issue would be significantly weakened if the MLMC is not able to continue its work to protect the Maine lobster brand while driving up demand for Maine lobster.

Considerations for the Future of the Lobster Legal Defense Fund

Reimbursement Program: The MLA is grateful for the support we expect to receive from the Lobster Legal Defense Fund in 2023 (though we did not agree with the funding mechanism). However, because this is a reimbursement program, these funds cannot be used to support time sensitive, proactive strategies. The MLA has not yet received any reimbursement and does not expect to see any significant contribution until the end of 2023 when adequate fees from the sale of lobster licenses have accumulated.

Scope of Fund: The MLA's legal defense and fundraising strategies are continually evolving. For MLA, this involves more than litigation. Key components also include work on regulatory issues, science, and gear development with the industry. The state fund, as established, narrowly defines the scope of work that can be reimbursed and the issue that can be addressed ("legal proceedings involving the regulations of the United States Department of Commerce, National Oceanic and Atmospheric Administration implementing the Atlantic Large Whale Take Reduction Plan").

Eligibility and Extending Fund to 2030¹: MLA is collaborating with the Maine Lobstermen's Community Alliance to explore opportunities to create a funding base to address the broad array of challenges that continue to threaten the lobster industry, our economy, communities and fishing heritage. The Alliance, a 501-C-3 organization, is not a "statewide association representing individuals engaged in commercial lobster fishing" and would not be eligible for reimbursement. While the MLA will continue to aggressively pursue its legal defense efforts, it is possible that organizations other than industry associations and labor unions may also be pursuing this work in the future.

Based on a google search, it appears that the Maine Lobstering Union is conducting its fundraising efforts for its legal defense through Sustainable Maine Fishing Foundation, "a not-for-profit organization made up of men and women from all facets of the Lobstering Industry."² This is not a "a labor union representing individuals engaged in commercial lobster fishing in the State," which the statute requires to receive reimbursement of legal defense funds.

Investing General Fund dollars in the state's Lobster Legal Defense Fund would help the MLA achieve its fundraising goals and ensure that the association is able to continue to lead this fight to save Maine's lobster industry over the next few years. The MLA does not support diverting funds from other important programs to support the industry's legal defense.

The MLA urges you to pursue LD 710 with funding from the General Fund, and not to redirect proceeds raised to market Maine lobster and protect our brand.

Thank you.

¹ The Maine Lobster Marketing Collaborative must be reauthorized in 2026 or it will be repealed.

² <https://lobster207.com/sustainable-maine-fishing/> and <https://sustainablemainefishingfoundation.com/>

Background: MLA Legal Defense Efforts

As a result of a 10-year whale plan released by the National Marine Fisheries Services (NMFS) in 2021, the Maine lobster fishery must reduce its already minimal risk to right whales by 98 percent. This is an unachievable goal that will devastate Maine's lobster industry and the families, businesses and communities that depend on it.

The MLA has been actively engaged in efforts to protect endangered right whales since the first federal whale plan was drafted in 1997. In the years leading to the release of the 10-year whale plan in 2021, the association exhausted all options to avoid the situation that we now face: a whale plan that will eliminate the Maine lobster fishery and fail to reverse the right whale population decline.

The MLA, the state of Maine and other industry groups have had no choice but to fight this plan through the courts. In September 2021, the MLA took the bold step of suing NMFS over the 10-year whale plan in the United States District Court for the District of Columbia.

MLA argued that NMFS failed to implement the Endangered Species Act (ESA) as Congress intended by basing its plan on "worst-case scenarios" which overestimate the lobster industry's risk to right whales. MLA argued that NMFS cherry-picked the science and used unsupported assumptions and to justify its mandate for Maine's lobster fishery to reduce its already minimal risk to right whales by 98% by 2030.

In September 2022, the Court ruled against the MLA in an opinion that deferred to NMFS on all counts without disputing the validity of MLA's concerns. The MLA immediately appealed this decision and was granted an expedited appeal before the DC Court of Appeals. Opening briefs were filed in November 2022, oral arguments were heard in February 2023, and supplemental briefs were filed in March. A decision is expected as soon as April.

The MLA is also an intervenor in a case filed in DC District Court against NMFS by several non-governmental organizations (NGOs) which claim that NMFS has not done enough to protect the right whale. In July 2022, the Court ruled in favor of the NGO's on several of its claims resulting in an expedited rulemaking schedule for the lobster industry to achieve a 90% risk reduction in 2024 as an interim phase of the 10-year whale plan. Fortunately, with strong support from Maine's governor and entire congressional delegation, Congress intervened in December 2022 with a law pausing any new whale rules for 6 years (until 2028) and providing \$50 million in new funding to conduct research to understand the actual cause of the right whale decline.

It is important to understand that to be successful, this fight requires a coordinated, multi-faceted strategy between lobster industry groups and the state of Maine. The MLA is nimble and has been able to act quickly in executing an aggressive legal strategy in pursuit of our goal to save Maine's lobster industry. The state of Maine provides essential expertise through its science and policy staff, as well as critical credibility to the lobster industry's claims against NMFS given the state's public trust obligation to manage the lobster fishery and protect marine wildlife. This means that both the lobster industry groups, and Maine DMR must have adequate financial resources to hire expert legal teams.

These legal battles are extremely expensive, but without a legal challenge, the lobster industry as we know it will cease to exist. That is guaranteed. At each phase of this legal fight, the MLA has sought the best attorneys to represent Maine's iconic lobster industry. The MLA is currently working with two of the best law firms in the nation.