



# The Commonwealth of Massachusetts Division of Marine Fisheries



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Director

August 19, 2021

Michael J. Botelho  
6 Jameson Street  
Fairhaven, MA 02719

**Re: *Matter of Botelho*, Docket No. CBP-1029353-JS-21**

## FINAL DECISION AND FINAL AGENCY ACTION

Dear Mr. Botelho,

Upon a thorough review of the administrative record, it is my decision to adopt the attached Recommended Final Decision of the Magistrate as my **FINAL DECISION** in this matter.

Therefore, my Final Agency Action is to not renew, and thereby revoke, your Charter Boat Permits for the F/V Laurie Lee and Paige Lee (DMF #1029353) and regulated fishery permit endorsements for black sea bass and tautog appurtenant to Boat Permit (DMF #166361) and Coastal Lobster Permit (DMF #3584). As a result of this revocation, you may not apply for, hold, or otherwise be issued any For-Hire Permit or regulated fishery permit endorsement for black sea bass and tautog. Any such permit or regulated fishery permit endorsement that may inadvertently or mistakenly be issued to you shall be null and void.

With regards to your Retail Boat Permit (DMF #178814, Dealer Permit #12326), my Final Agency Action is to revoke your authorization to sell finfish directly to the public under this permit. You may not apply for, hold, or otherwise be issued a Retail Boat permit authorizing the direct to public sale of finfish. Any such permit or authorization that may be inadvertently or mistakenly be issued to you shall be null and void. However, this Retail Boat Permit may be renewed for the direct to public sale of live lobsters and crabs only.

You have the right to seek judicial review of my decision in the Superior Court pursuant to G.L.c. 30A, §14(1). The complaint must be filed in Superior Court within thirty days of receipt of this **FINAL DECISION**.

Sincerely,

Daniel J. McKiernan Director

**Attachments:**  
Recommended Final Decision

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF FISH AND GAME  
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING  
DOCKET NO. CBP-1029353-JS-21

\_\_\_\_\_)  
*IN THE MATTER OF:* )  
*MICHAEL BOTELHO* and CHARTER BOAT )  
PERMITS DMF ID NOS. 1029353, RETAIL )  
BOAT PERMIT DMF ID NO. 178814, )  
DEALER PERMIT DMF ID NO. 12326, AND )  
REGULATED FISHERY PERMIT )  
ENDORSEMENTS APPURTENANT TO )  
BOAT PERMIT DMF ID NO. 166361 AND )  
3584 )  
Respondent )

**RECOMMENDED FINAL DECISION**

1. INTRODUCTION

This matter involves Respondent Michael Botelho’s (“Botelho” or “Respondent”) adjudicatory appeal of the Division of Marine Fisheries’ (“DMF” or “Petitioner”) determination not to renew Botelho’s charter boat permit, retail boat permit and certain regulated fishery endorsements for black sea bass and tautog.

DMF alleges that on at least two occasions during 2020, the Respondent violated the state’s marine fishery laws and regulations regarding black sea bass and tautog. In addition, DMF alleges that Respondent has a pattern of non-compliance with marine fishery laws in recent years. DMF determined that it was not in the best interest of the Commonwealth of Massachusetts to renew Respondent’s 2021 for-hire and retail boat permits and certain regulatory fishery endorsements on his commercial fishing permits. On January 29, 2021, DMF sent a letter to Botelho stating that the agency would not renew his charter boat permits, retail boat permit and certain permit endorsements for black sea bass and tautog, and advising him of his right to a hearing (the “Non-renewal Notice”).

For the reasons set forth below, DMF has appropriately determined not to renew, or in the alternative, it may suspend, the Respondent’s Charter Boat Permits for the F/V Laurie Lee and Paige Lee (DMF #1029353), Retail Boat Permit (DMF #178814, Dealer Permit #12326), regulated fishery permit endorsements for black sea bass and tautog appurtenant to Boat Permit (DMF

#166361) and regulated fishery endorsements for black sea bass and tautog appurtenant to Coastal Lobster Permit (DMF #3584).

This is a Final Decision pursuant to 801 CMR 1.01(11)(d).

## 2. STATEMENT OF THE CASE

DMF alleged in the Non-renewal Notice that during a for-hire charter trip on or about May 30, 2020, the Massachusetts Environmental Police (“MEP”) found the Respondent in possession of black sea bass that violated the state’s recreational bag limit and size limit set forth at 322 CMR 6.28(3).

In addition, DMF alleged that on or about October 21, 2020, MEP found the Respondent in violation of the state’s recreational bag limit for black sea bass set forth at 322 CMR 6.28(3)(b)(2); the recreational and commercial tautog minimum size limit at 322 CMR 6.40(3); the recreational tautog limit at 322 CMR 6.40(4)(e); the commercial tautog limit at 322 CMR 6.40(5)(c); the commercial tautog tagging requirements at 322 CMR 6.40(6)(b); and the rules governing combining of commercial and recreational fishing activity at 322 CMR 6.41(4).

The Parties and MEP filed several pre-hearing evidentiary motions. On or about March 26, 2021, the Respondent’s counsel filed three evidentiary motions, including one to strike certain testimony of MEP, another to strike any evidence, testimony, documents or references to the October 21, 2020 incident, and a third to inspect and copy certain MEP citation books. The first two motions were denied, and the third was ultimately allowed in part and denied in part. On April 29, 2021, DMF filed a motion to strike and exclude the testimony of five witnesses proposed to be called by the Respondent. This motion was allowed in part and denied in part.

The Parties attended a pre-hearing conference on April 29, 2021, and the following were identified as the issues for adjudication in this matter in the Pre-hearing Conference Report.<sup>1</sup>

- (1) Whether Respondent on or about May 30, 2020 during a for-hire charter was found in possession of black sea bass that violated the recreational bag limit and size limit set forth at 322 CMR. 6.28(3).
- (2) Whether Respondent on or about October 21, 2020 violated the recreational black sea bass limit set forth at 322 CMR. 6.28(3)(b)(2).
- (3) Whether Respondent on or about October 21, 2020 violated the recreational and commercial tautog minimum size limit set forth at 322 CMR. 6.40(3).
- (4) Whether Respondent on or about October 21, 2020 violated the recreational tautog limit at 322 CMR. 6.40(4)(e).
- (5) Whether Respondent on or about October 21, 2020 violated the commercial tautog limit at 322 CMR. 6.40(5)(c).

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<sup>1</sup> Docket Exhibit 20, Pre-hearing Conference Report.

- (6) Whether Respondent on or about on or about October 21, 2020 violated the commercial tautog tagging requirements at 322 CMR. 6.40(6)(b).
- (7) Whether Respondent on or about October 21, 2020 violated the rules governing combining of commercial and recreational fishing activity at 322 CMR 6.41(4).
- (8) Whether Respondent as the permit holder and operator may be held liable for violations of recreational size, possession or daily bag limits established at 322 CMR that are attributable to patrons on his fore-hire recreational vessel.
- (9) Whether the Respondent has a pattern of non-compliance with marine fishery regulations in recent years that supports DMF's determination that it is not in the best interest of the Commonwealth to renew Respondent's 2021 for-hire and retail boat permits and certain regulated fishery permit endorsements.

On May 14, 2021, all Parties and their witnesses attended an adjudicatory hearing held via Zoom. All witnesses were administered the oath and the hearing was recorded.

A Tentative Decision was issued on June 30, 2021. The Respondent filed objections to the Tentative Decision on July 28, 2021 ("Respondent's Objections").<sup>2</sup> Those objections are incorporated in the administrative record and addressed in this Final Decision. The administrative record was compiled after the conclusion of the hearing.

### 3. FINDINGS OF FACT

- (1) The Mid-Atlantic Fishery Management Council (MAFMC) is one of eight regional fishery management councils established by the Magnuson-Stevens Fishery Conservation and Management Act in 1976 to manage fisheries within U.S. federal waters (administrative notice taken of [mafmc.org](http://mafmc.org)).
- (2) The Atlantic States Marine Fisheries Commission (ASMFC) establishes interstate management plans (FMPs) for variety of species, including black sea bass and tautog, pursuant to the Atlantic Coastal Cooperative Fisheries Management Act at 16 U.S.C. 5100 (administrative notice taken of [asmfc.org](http://asmfc.org)). The ASMFC is authorized, through its partner states from Maine to Florida, to manage the coastwide harvest of migratory marine fishery resources to allow for the productive and sustainable fisheries of

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<sup>2</sup> Docket Exhibit 26, Respondent's Objections. The Respondent requested an additional 30 days to file a brief in support of Respondent's Objections to the Tentative Decision. That request is denied. Respondent's Objections included reasons for each objection. 801 CMR 1.01 (11)(c)(1) provides that "the Parties shall have the opportunity to file written objections to the tentative decision with the Agency, which may be accompanied by supporting briefs ....The Parties shall have 30 days from the filing of the tentative decision or the transcript corrections under 801 CMR 1.01(10)(i)2, whichever occurs last, to file written objections." Neither party requested oral argument on the Respondent's Objections, and DMF did not file a response to Respondent's Objections.

certain species along the Atlantic coast. The FMPs establish commercial quotas and allowable recreational fishing limits. Pursuant to 16 U.S.C. 5104 and 5106, states are required to implement and enforce the measures set forth in the FMP or be subject to a non-compliance finding and remedial action by the U.S. Secretary of Commerce. (Hearing Testimony of Nichola Meserve, Docket Ex. 1, Botelho Non-renewal Notice).

- (3) The MAFMC and ASMFC have a Joint Summer Flounder, Scup, and Black Sea Bass Management Plan. The ASMFC has a Tautog Fishery Management Plan. (Hearing Testimony of Nichola Meserve).
- (4) Massachusetts DMF establishes size and possession limits, seasons and other accountability measures through its state regulations to manage these species to comply with the requirements of the MAFMC and ASMFC FMP for black sea bass and the ASMFC for tautog, and to promote productive and sustainable fisheries. (Hearing Testimony of Nichola Meserve)
- (5) When commercial or recreational catch is not reported correctly, this can result in over-harvest or incorrect quota limits being set because inaccurate reporting feeds poor data into the stock assessments. This can undermine federal, interstate and state fishery management efforts. (Hearing Testimony of Nichola Meserve)
- (6) In 2014, DMF promulgated a new regulation at 322 CMR 6.41(3)(c) to address a growing problem of captain and permit holder, as well as angler, noncompliance on for-hire charter boats. Patrons on a for-hire charter boat are not required to hold their own fishing permit, but instead, are covered by the for-hire charter boat operator's permit. Reports from MEP and from DMF staff conducting at sea and onshore monitoring suggested that some charter boat captains and operators were either encouraging or turning a blind eye towards angler patron noncompliance aboard charter boats. As a result of these reports, DMF's team developed a regulation promulgated at 322 CMR 6.41(3)(c) that provides that captains, permit holders and anglers can each be held responsible for the catch aboard for-hire charter boats. (Hearing Testimony of Nichola Meserve)
- (7) Charter boat for-hire permits include minimum requirements that for-hire captains or operators give verbal notice to all persons fishing as passengers from the vessel about their compliance with catch size and possession limits, and carry at least one measuring device for use by patrons. (322 CMR 7.10(5)(b) and (c), Hearing Testimony of Nichola Meserve) Some charter boat captains employ extra measures that are not specifically set forth in the regulations to achieve compliance with possession and size limits, such as inspecting individual patron catch, throwing back non-conforming patron catch, requiring patrons to have individual coolers for their fish with their name on it, hiring additional deck hands to monitor compliance, or not allowing patrons to return for subsequent trips if they don't comply with applicable

fishing regulations.<sup>3</sup> (Hearing Testimony of Nichola Meserve)

- (8) DMF monitors catch to stay within federal and interstate fisheries management quotas allocated to it through FMPs. Primary Dealers are required to report seafood purchases from fisherman weekly into the Standard Atlantic Fisheries Information System (SAFIS). (Hearing Testimony of Story Reed)
- (9) Holders of a Retail Boat Permit may sell lawfully harvested fish from the boat directly to the general public. Holders of a Retail Boat Permit must report to SAFIS weekly. The Primary Dealer reports and the Retail Boat Permit reports create a “two ticket” system to monitor catch to assist Massachusetts’ compliance within federal and interstate quotas. (Hearing Testimony of Story Reed)
- (10) Botelho is a for-hire charter fisherman and a commercial fisherman who in 2020 held charter boat permits for use onboard the F/V Paige Lee and F/V Laurie Lee (DMF ID# 1029353), a Retail Boat Permit (DMF ID# 178814, Dealer Permit #12326), and regulated fishery permit endorsements for black sea bass and tautog appurtenant to a Boat Permit (DMF Permit ID# 166361) and regulated fishery permit endorsements for black sea bass and tautog appurtenant to a Coastal Lobster Permit (DMF ID# 3584). (Docket Ex. 1, Botelho Non-renewal Notice; Hearing Testimony of Story Reed).
- (11) In 2020, the Respondent filed electronic monthly catch reports through SAFIS. The Respondent filed “did not fish reports” for 2020 for both his Boat Permit and his Coastal Lobster Permit. Inconsistently with this 2020 catch reporting, however, the Respondent did report the sale of 40 pounds and 50 pounds, respectively, of black sea bass on two occasions in October 2020 sold under his Retail Boat Permit. (Hearing Testimony of Story Reed)
- (12) On or about May 30, 2020, Officer Michael Cole of MEP was on a marine patrol along with Officers Simmons and Armstrong in the vicinity of Wings Neck in the coastal waters of Bourne. (DMF Hearing Exhibit J - MEP Incident Report 20-257-OF, Hearing Testimony of Officer Cole).
- (13) At around 2:00 pm on May 30, 2020, the officers initiated a marine fisheries compliance inspection of the vessel Laurie Lee. Six people were passengers on a for hire charter trip fishing on the Laurie Lee. Michael Botelho identified himself to the officers as the operator of the Laurie Lee. (DMF Hearing Exhibit J - MEP Incident Report 20-257-OF, Hearing Testimony of Officer Cole).
- (14) There were five baskets of fish on the port gunnel of the boat. Officer Cole inspected

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<sup>3</sup> Respondent’s Objections oppose Findings of Fact 6 and 7 on the grounds that charter captains are not authorized to enforce compliance with catch size and possession limits by their patrons, and are instead required to use due diligence to ensure compliance. 322 CMR 6.41(3)(3) clearly provides that captains, permit holders and angler patrons can each be held responsible for catch aboard for-hire charter boats. Ms. Meserve’s testimony was persuasive as to the reason this regulation was promulgated, and as to the extra measures that many charter boat captains employ to ensure compliance.

these baskets of fish, and also saw and asked to inspect an additional bushel basket of fish tucked under the gunnel of the boat. (DMF Exhibit J - MEP Incident Report 20-257-OF, Hearing Testimony of Officer Cole).

- (15) Officer Cole measured the fish in the baskets and determined that there were ten fish that were under the recreational size limit for black sea bass of 15 inches, with some undersized by over an inch. There were ten black sea bass over the recreational possession limit of five fish per person per day. (DMF Exhibit J - MEP Incident Report 20-257-OF, Hearing Testimony of Officer Cole).<sup>4</sup>
- (16) A passenger on the May 30, 2020 charter trip testified that he felt that the MEP officers appeared disrespectful to him and other charter boat patrons because the officers refused to speak with the patrons aboard the charter boat during the inspection. The conditions that day were choppy, and the Respondent was busy positioning the boat and assisting his patrons. The Respondent instructed the passengers on the regulations for size and possession limits for certain recreational fish at the start of the trip. (Hearing Testimony of Douglas Nkrumah).<sup>5</sup> The Respondent's fishing vessel Laurie Lee has rulers mounted onboard to for use by his charter trip patrons to measure fish. (Hearing Exhibit M, Boat Pictures)
- (17) On May 30, 2020, Officer Cole wrote the Respondent a non-criminal citation for possession of ten undersize black sea bass, possession of ten black sea bass over the recreational limit and liability for a for-hire charter boat captain. (DMF Exhibit J - MEP Incident Report 20-257-OF)
- (18) On or about October 21, 2020, Lieutenant Matthew Bass of MEP observed a vessel heading into Hoppy's Landing in Fairhaven. He met the vessel at the dock at approximately 2:55 pm. (DMF Exhibit G, MEP Incident Report #20-581-OF)<sup>6</sup>
- (19) Lieutenant Bass observed six passengers on the boat offloading individual coolers on the dock. Based upon his nearly twenty years of experience as an officer in the MEP Coastal Bureau, he believed this to be a "six pack" charter fishing trip. The patrons

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<sup>4</sup> Respondent's Objection 4 argues that there were ten fish over the recreational limit, and those fish were also under the size limit. Officer Cole, however, testified that he counted a total of ten fish over the black sea bass limit, and also determined that ten fish were undersized. He testified that "they were not the same fish." Hearing Testimony of Officer Cole. In any event, there were violations of both the bag and size limits.

<sup>5</sup> Respondent's Objection 5 objects that Douglas Nkrumah's testimony was not limited to the matters in this factual finding. While Mr. Nkrumah testified as to other matters, those matters were either not relevant to the matter at hand or not persuasive.

<sup>6</sup> Respondent's Objection 1 argues that no evidence concerning this October 21, 2020 incident should be allowed because MEP issued civil citations concerning this incident which have been appealed to New Bedford District Court, and the matter has not yet been heard. During this proceeding, DMF offered to stay this matter until after the New Bedford District matter was heard, and the Presiding Officer indicated in writing that she was willing to entertain such a motion. The Respondent did not move to stay the proceeding, but instead continues to argue that all October 21, 2020 evidence should be excluded. In addition, Mass G.L. ch. 130, §§ 2 and 80 allow the Director of DMF to suspend, revoke or not renew permits issued pursuant to this chapter for violations of marine fishery laws and regulations. This process is separate and in addition to the legal authority provided to the Massachusetts Environmental Police to issue civil citations that impose monetary fines or penalties.

traveled from New York together, and appeared to have their own coolers with fish they had caught. (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass)

- (20) The Respondent informed his passengers onboard the October 21, 2020 fishing trip about the possession and size limits for certain recreational fish. On some past trips, he has informed his patrons that he will get in trouble if the customers do not follow the applicable fishing rules. (Hearing Testimony of Kendall Glover)
- (21) During this October 21st incident, the Respondent told Lieutenant Bass that they had been fishing commercially for black sea bass and tautog. The Respondent told Lieutenant Bass that he was fishing under the authority of his commercial Boat Permit, and “that if there are any issues on the boat, it is on me.” (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass)
- (22) The Respondent verbally gave Lieutenant Bass permission to inspect the catch. Lieutenant Bass measured and counted all the fish. Out of a total of 59 tautog taken from the boat to the dock in coolers, 34 measured less than the minimum 16 inch commercial and recreational size limit. The total 59 tautog was over the 40 fish daily commercial possession limit. None of the 59 tautog were tagged as required for commercial tautog prior to being offloaded from the boat or sold. (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass, Hearing Testimony of Nicola Meserve).
- (23) As the Respondent said that he was commercially fishing and the holder of the permits, the MEP cited the Respondent for possession over the commercial tautog limit, undersized tautog, untagged tautog and not selling tautog to a primary buyer. (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass)
- (24) Despite the statements the Respondent made at the time made to MEP, the October 21, 2020 trip was a recreational for-hire charter fishing trip. (Hearing, Respondent’s counsel, Hearing Testimony of Lieutenant Bass, DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Kendall Glover).
- (25) The Respondent gave verbal notice to his charter boat patrons on October 21, 2020 of certain recreational possession limits and minimum sizes, and he had at least one measuring device onboard the vessel. (Hearing Testimony of Kendall Glover, Hearing Exhibit M, Boat Pictures)
- (26) Under the state regulations for recreational tautog fishery, fishermen are allowed 5 fish per person. The six people onboard could have possession of up to a total of 30 fish. The tautog taken off the boat exceeded the possession limit for the recreational fishery by 29 fish. (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass). Even if the Respondent had retained 5 tautog for his own personal use, the amount of tautog on the boat still substantially exceeded the



recreational possession limit of 5 fish per person by 24 fish.

- (27) During the closed season of September 9 through May 17, it is unlawful for recreational fisherman to possess or land any quantity of black sea bass. On October 21, 2020, Lieutenant Bass found black sea bass on the Respondent's boat. (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass, Hearing Testimony of Kendall Glover).
- (28) Enforcement history for the Respondent submitted by DMF as Exhibit H includes many entries and several MEP officers testified about prior enforcement incidents involving the Respondent. Many of the entries on Exhibit H either remain open or the final disposition of those matters was not presented either through either witness testimony or made clear through Exhibit H, and thus are accorded little or no weight here. Hearing witness Sergeant Matthew McClintock, however, was present at an incident that occurred on June 25, 2019 at West Island Marina in Fairhaven, Massachusetts. Five passengers disembarked from a for-hire charter trip with Respondent on the Laurie Lee. Five for-hire patrons were issued citations for black sea bass over the possession limit and three for undersized black sea bass. (DMF Exhibit J, Incident Report 19-82-AR; Hearing Testimony of Sergeant McClintock) The MEP officers involved in this incident advised the Respondent that he was responsible for his customers catch, and the Respondent objected. (DMF Exhibit J, Incident Report 19-82-AR) According to the Enforcement History reported at DMF Exhibit H, the Respondent paid a fine for a violation of the on board for-hire recreational charter regulation and a fine for possession over the limit of black sea bass for this June 25, 2019 incident.<sup>7</sup>

Respondent's enforcement history also indicates that the Respondent paid fines for five lobster violations that occurred on or about July 6, 2015.<sup>8</sup> (DMF Exhibit H)

Most recently, the Respondent was found responsible and paid civil fines for citations issued by the MEP for this incident on or about May 30, 2020 for violations of the for-hire recreational charter regulation, possession of undersize black sea bass, and possession over the limit for black sea bass.<sup>9</sup> (DMF Exhibit H, Cole AA2690)

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<sup>7</sup> The Respondent was found not responsible for two other charges stemming from this incident. (DMF Exhibit H).

<sup>8</sup> Respondent's Objections contend that the July 6, 2015 lobster violation should be excluded, in addition to any other incidents other than May 30, 2020, because it is beyond the scope of the Non-renewal Notice. Instead, the Non-renewal Notice provides clear notice that DMF's decision not to renew Respondent's permits was based upon the alleged violations in 2020 (#20-257-OF and #20-581-OF), as well as an alleged pattern of non-compliance in recent years. The Non-renewal Notice states "[t]he non-compliance allegations set forth in the above cited Massachusetts Environmental Police Report are substantial and numerous. Additionally, your incident report history arguably documents a pattern of non-compliance with marine fishery regulations in recent years. For these reasons, the Division of Marine Fisheries has found that it is in the best interest of the Commonwealth to take the above described action with regards to the renewal of your permits in 2021." Exhibit H, which summarizes the Respondent's enforcement history and references Exhibits I-L, was attached to the Non-Renewal Notice and DMF provided Exhibits I-L to the Respondent prior to the hearing.

<sup>9</sup> The Director of Marine Fisheries has separate authority set forth at Mass. Gen. L. ch. 130, s. 80 to "revoke and cancel and require the surrender of any permit issued under this chapter if, in his opinion, after a hearing, after due notice by him or some person designated by him, the holder has violated any rule or regulation of the director ...."

(29) Botelho applied to renew his for-hire and retail boat permits and certain regulated fishery endorsements for black sea bass and tautog for 2021. (Docket Ex. 1, Botelho Non-renewal Letter and Right to Hearing).

(30) On or about January 29, 2021, DMF notified the Respondent that it would not renew the following:

- (a) Charter Boat Permits for use onboard the F/V Paige Lee and F/V Laurie Lee (DMF Customer ID# 1029353);
- (b) Retail Boat Permit (DMF Permit ID# 178814, Dealer Permit # 12326);
- (c) regulated fishery permit endorsements for black sea bass and tautog appurtenant to Boat Permit (DMF ID# 166361); and
- (d) regulated fishery permit endorsements for black sea bass and tautog appurtenant to Coastal Lobster Permit (DMF Permit ID# 3584).

(Docket Ex. 1, Botelho Non-renewal Letter and Right to Hearing).

(31) On or about April 28, 2021, while this adjudicatory appeal of non-renewal of the Respondent's Charter Boat Permit was pending, DMF received a new For-Hire Permit Application from Respondent's wife, Laurie Botelho, for a charter boat permit for the F/V Laurie Lee. The Respondent was listed on the application as the proposed licensed captain and operator if this license were issued. DMF did not issue the license. (DMF Hearing Exhibit C2, For Hire Fishing License Application, Hearing Testimony of Story Reed).<sup>10</sup>

#### 4. DISCUSSION

DMF works closely with federal, interstate and state regulatory bodies such as the MAFMC, ASMFC, and the state Marine Fisheries Advisory Commission to develop regulations governing, among other things, possession and size limits and fishing seasons, to ensure that harvest limits set by applicable FMPs are not exceeded and that conservation goals to maintain productive and sustainable harvest are met. Both recreational and commercial fisherman have a legal responsibility to comply with state laws and regulations to ensure that Massachusetts can sustainably manage its marine resources and that stocks can also be managed on a coastwide basis.

For-hire charter boat captains and operators are held to a high standard of compliance, as

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<sup>10</sup> Respondent's Objections argue that this evidence is irrelevant and prejudicial, as the Respondent did not sign the application submitted by his wife and there was no evidence of his consent. The Respondent is included in the application as the proposed licensed captain and operator. The Final Decision does not, in any event, depend upon this document, but the administrative record merely records the action that DMF took in refusing to issue the permit.

it is their *business* to take out tourists and other recreational anglers and to manage compliance for those recreational anglers who are fishing under the authority of their charter boat permit.<sup>11</sup> A witness for DMF testified that the agency promulgated a new regulation in 2014 at 322 CMR 6.41(3)(c) specifically to address a growing problem of captain and permit holder, as well as patron, noncompliance on for-hire charter boats. This regulation at 322 CMR 6.41(3)(c) specifically provides as follows.

(c) Liability for Violations Onboard For-hire Recreational Vessels. With respect to recreational for-hire fishing operations permitted in accordance with 322 CMR 7.10(5): Permit Requirements Applicable to For-hire Vessels, an individual patron, as well as the named for-hire permit holder or for-hire vessel operator, may each be held liable for any violations of recreational size, possession or daily bag limits established at 322 CMR that are attributable to the patron fishing onboard the for-hire recreational fishing vessel. In enforcing this provision, law enforcement officers may exercise their discretion on whether to cite the named for-hire permit holder or for-hire vessel operator for such violations in instances where the best industry practices required by 322 CMR 7.10(5) have been used on the for-hire vessel.

This regulation clearly provides that captains, permit holders and anglers can each be held responsible for the catch aboard for-hire charter boats (Hearing Testimony of Nichola Meserve). MEP officer testimony, incident report 19-82-AR and Respondent's enforcement history demonstrate that Respondent had been cited in the past for violations of this section, and paid civil fines for prior "For-Hire Captain" violations that involved possession and size limits of fish caught by the Respondent's patrons. (DMF Exhibit J and H, Hearing Testimony of Sergeant McClintock). On at least one occasion, the Respondent acknowledged to his for-hire patrons that he was aware of his own responsibility for their compliance with regulations governing catch. (Hearing Testimony of Kendall Glover). There is nothing in the regulations that precludes action against the captain or operator because they have complied with minimum permit requirements of informing customers of the rules and having rulers on board. There was testimony by MEP that other factors, including but not limited to the quantity of noncompliant fish onboard, can play a factor in who is cited for violations. (Hearing Testimony of Lieutenant Bass)

There is ample evidence in the administrative record that on or about May 30, 2020, during a for-hire charter trip the Respondent possessed black sea bass in violation of the recreational bag limit and size limit set forth at 322 CMR 6.28(3). Officer Cole is an experienced officer with MEP's Coastal Bureau, and his testimony was persuasive that he measured the fish in the baskets and determined that there were ten fish that were under the recreational size limit of 15 inches, with some undersized by over an inch. His testimony was

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<sup>11</sup> Pursuant to 322 CMR 7.10(5), a charter boat permit covers "all recreational fishing by recreational anglers onboard the for-hire vessel during a for-hire trip, as well as any private recreational fishing conducted by the individual named on the for-hire permit." Respondent's Objections argue that it is unfair to hold charter captains to a high standard of compliance because they lack enforcement powers. DMF presented persuasive witnesses at the hearing that testified that the regulation was promulgated specifically to allow captains, permit holders and patrons to each be responsible for patrons' violations, when those patrons are fishing under the authority of the charter boat permit holder's or captain's permit, and that the regulation was promulgated in response to reports of noncompliance on for-hire trips.

also persuasive that there were ten black sea bass over the recreational bag limit of five fish per person per day. (DMF Exhibit J - MEP Incident Report 20-257-OF, Hearing Testimony of Officer Cole).

Similarly, there is evidence that on or about October 21, 2020, the Respondent violated the recreational black sea bass limit at 322 CMR 6.28(3)(b)(2), the recreational tautog minimum size limit at 322 CMR 6.40(3), the recreational tautog limit at 322 CMR. 6.40(4)(e), and the rules governing combining of commercial and recreational fishing activity at 322 CMR 6.41(4). Lieutenant Bass, who is an experienced Coastal Bureau officer, measured and counted the fish taken from the boat to the dock. (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass).

During the closed season of September 9th through May 17th, it is unlawful pursuant to 322 CMR 6.28(3)(b)(1) for recreational fishermen to possess or land any quantify of black sea bass. On October 21, 2020, Lieutenant Bass found black sea bass on the Respondent's boat. (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass, Hearing Testimony of Kendall Glover).

Out of a total of 59 tautog taken from the boat on October 21<sup>st</sup> to the dock in coolers, 34 measured less than the minimum 16-inch recreational (as well as the commercial) size limit at 322 CMR. 6.40(3). Additionally, there were a substantial number of fish over the recreational limit of 5 tautog per person. Under the state regulations for the recreational tautog fishery, fishermen are allowed 5 fish per person. The six people onboard could have possession of up to a total of 30 tautog. The tautog taken off the boat exceeded the possession limit for the recreational fishery by 29 fish. (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass). Even if the Respondent had retained 5 tautog for his own personal use, the amount of tautog on the boat still substantially exceeded the recreational possession limit of 5 fish per person by 24 fish. Even if this had been a commercial trip, the Respondent still would have exceeded the commercial tautog daily possession limit of 40 fish.

Since the Respondent told MEP that it was a commercial trip, he was cited at the time for violation the commercial tautog possession, minimum size and tagging requirements. The hearing testimony and evidence suggests, instead, that the Respondent was aware that he and his charter trip patrons had substantially exceeded the recreational tautog possession limits, and tried to claim it was a commercial trip to take advantage of the higher commercial limit of 40 tautog per day at 322 CMR 6.40(5)(c). In addition, the commercial rules allowed for the possession of black sea bass whereas the recreational rules for this time of year did not. 322 CMR 6.29(b)(1) and 322 CMR 6.28(5).

At the time, the Respondent told Lieutenant Bass that he was commercially fishing for black sea bass and tautog under the authority of his commercial Boat Permit, and "that if there are any issues on the boat, it is on me." (DMF Exhibit G, MEP Incident Report #20-581-OF, Hearing Testimony of Lieutenant Bass). There is ample evidence, based on the observations of Lieutenant Bass at the time, testimony of one of the patrons on the boat, and also statements of the Respondent's counsel at the hearing, that this was actually a for-hire recreational charter trip. (DMF Exhibit G, Hearing Testimony of Lieutenant Bass, Testimony of Kendall Glover).

The evidence and witness testimony at the hearing also support the finding that the Respondent violated the provisions of 322 CMR 6.41(4) that prohibit combining commercial and recreational fishing activity.<sup>12</sup> The regulations prohibit fishing under a commercial permit and rules for commercial fishing while taking for-hire patrons on a charter trip.

Even discounting open matters or matters where the final determination is not clear from the administrative record, the Respondent's enforcement history establishes a history of noncompliance with DMF permits and regulations. In addition, his inaccurate reporting of catch on 2020, as well as his statements to the MEP attempting to characterize a for-hire charter trip as a commercial trip, suggests that he does not take compliance with DMF regulations seriously enough to undertake the significant responsibilities associated with his for-hire charter or other commercial permits. We are in a more heavily regulated era of recreational and commercial federal, interstate and state fishery management where it is essential for permittees to adhere to permit requirements, size limits, possession limits and other rules to sustain our limited fishery resources.

The following are determinations of the issues agreed upon at the pre-hearing conference for adjudication in this matter.

- (1) Respondent on or about May 30, 2020 during a for-hire charter was found in possession of black sea bass that violated the recreational bag limit and size limit set at 322 CMR. 6.28(3).
- (2) Respondent on or about October 21, 2020 violated the recreational black sea bass limit at 322 CMR. 6.28(3)(b)(2).
- (3) Respondent on or about October 21, 2020 violated the recreational tautog minimum size limit at 322 CMR. 6.40(3). If it had been a commercial trip, the Respondent would have also violated the commercial tautog minimum size limit, which is the same as the recreational minimum size limit, at 322 CMR 6.40(3). Since the evidence supports the finding that it was a recreational for-hire charter

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<sup>12</sup> 322 CMR 6.41(4) provides as follows:

(4) Rules regarding the Combining of Commercial and Recreational Fishing Activity.

(a) It shall be unlawful for any persons to engage in recreational fishing during the same trip when fishing is occurring under the authority of a commercial fishing permit, issued in accordance with 322 CMR 7.01(2): Commercial Fisherman Permits. If an individual is in possession of fish taken under the authority of a commercial fisherman permit, then all fish in their possession or onboard the vessel must conform with the species specific commercial fishing seasons, size limits and bag limits established at 322 CMR 6.00.

(b) If a commercial fisherman permit is issued to a person, or a person onboard the vessel, or for use onboard the vessel and any such person possesses fish in a quantity that exceeds the recreational fishing limits set forth at 322 CMR 6.00, then it shall be *prima facie* evidence of a violation of 322 CMR 6.41(4)(a).

(c) All fishing conducted under a recreational for-hire fishing permit issued in accordance with 322 CMR 7.10: Recreational Saltwater Fishing Permits, shall adhere to the recreational fishing limits set forth at 322 CMR 6.00. It shall be unlawful to fish under the authority of a commercial fisherman permit issued in accordance with 322 CMR 7.01(2) Commercial Fisherman Permits and the applicable regulated commercial fishery regulations at 322 CMR 6.00 while onboard a for-hire vessel taking patrons recreationally fishing.

trip, Respondent is not also found in violation of the commercial minimum size limit.

(4) On or about October 21, 2020, Respondent violated the recreational tautog possession limit at 322 CMR. 6.40(4)(e).

(5) If the October 21, 2020 trip had been a commercial trip, the Respondent would have violated the commercial tautog possession limit at 322 CMR 6.40(5)(c). Since the evidence supports the finding that it was a recreational for-hire charter trip, Respondent is not also found in violation of the commercial tautog possession limit.

(6) If the October 21, 2020 trip had been a commercial trip, the Respondent would have violated the commercial tautog tagging requirements at 322 CMR. 6.40(6)(b). Since the evidence supports the finding that it was a recreational for-hire charter trip, Respondent is not also found in violation of the commercial tautog tagging requirements.

(7) Respondent on or about October 21, 2020 violated the rules governing combining of commercial and recreational fishing activity at 322 CMR 6.41(4).

(8) Respondent as the permit holder and operator may be held liable for violations of recreational size, possession or daily bag limits established at 322 CMR that are attributable to patrons on his fore-hire recreational vessel.

(9) Respondent has a pattern of non-compliance with marine fishery regulations in recent years that supports DMF's determination that it is in the best interest of the Commonwealth to not renew or, in the alternative, to suspend for a substantial period of time, Respondent's for-hire and retail boat permits and certain regulated fishery permit endorsements.

## 5. RECOMMENDATION

The administrative record supports DMF's decision to not renew, or in the alternative, to suspend, the Respondent's Charter Boat Permits for the F/V Laurie Lee and Paige Lee (DMF #1029353), Retail Boat Permit (DMF #178814, Dealer Permit #12326), regulated fishery permit endorsements for black sea bass and tautog appurtenant to Boat Permit (DMF #166361) and certain regulated fishery endorsements for black sea bass and tautog appurtenant to Coastal Lobster Permit (DMF #3584).

Date: August 13, 2021

By: Mary Griffin  
Mary B. Griffin, Esq.  
Presiding Officer  
MA Dept. of Fish and Game