



The Commonwealth of Massachusetts

Division of Marine Fisheries

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RONALD S. AMIDON
Commissioner

DANIEL J. MCKIERNAN
Director

July 22, 2022

Brain Roche
3 Home Park Court
Kingston, MA 02364

FINAL DECISION

Re: *Brian Roche* and Commercial Coastal Lobster Permit DMF ID No. 4928 and all Appurtenant Regulated Fishery Permit Endorsements

Dear Mr. Roche:

Upon a thorough review of the administrative record, I adopt the attached Recommended Final Decision of the Magistrate in its entirety as my **Final Decision** in this matter. Therefore, your Commercial Coastal Lobster Permit DMF ID No. 4928 and all Appurtenant Regulated Fishery Permit Endorsements have been revoked. This Final Decision is issued in accordance with G.L. c.30A, §11(8) and 801 CMR §1.01(11)(d).

In accordance with this Final Decision, you must retrieve all of your gear set in state waters by Friday, August 12th. After August 12th you are no longer authorized to deploy traps in the waters under the jurisdiction of the Commonwealth or sell fish or lobsters under the authority of this permit. You may retain all legal sized lobster during retrieval of your traps. By Monday August 17th, surrender your permit to any DMF office or the Massachusetts Environmental Police.

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

Cc: Jared Silva, Agency Representative
MA Environmental Police: P. Moran, C, Baker & M. Bass

Enclosed:
Recommended Final Decision

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

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. CCLP-4928-JS-21

IN THE MATTER OF:)
BRIAN ROCHE and COMMERCIAL)
COASTAL LOBSTER PERMIT DMF ID)
NO. 4928 and ALL APPURTENANT)
REGULATED FISHERY PERMIT)
ENDORSEMENTS)
Respondent)

RECOMMENDED FINAL DECISION

I. Introduction

The Division of Marine Fisheries (“DMF”) filed a Notice of Agency Action dated August 13, 2021 (the “Notice”) taken in response to an ongoing investigation by the Massachusetts Environmental Police (“MEP”) of Brian Roche’s (the “Respondent”) lobster trap fishing operations, alleging violations of the state’s marine fisheries laws at Mass. Gen. L. ch. 130 and regulations at 322 CMR 4.13(2)(d), 6.31(1)(a)(1) and 6.31(4)(a). These alleged violations were documented in MEP written preliminary report 21-103-AR dated August 14, 2021.

Since MEP’s preliminary report stated that the law enforcement investigations were ongoing, the Notice asserted the right to amend the Notice if the investigation demonstrated additional violations of state marine fishery laws and regulations. The parties filed various motions for and in opposition to discovery and a Ruling on Discovery Motions was issued on September 29, 2021. On October 28, 2021, DMF filed an Amended Notice of Agency Action (the “Amended Notice”) which enumerated eight alleged violations of marine fishery laws and regulations set forth below.

On April 28, 2022, the day before the scheduled adjudicatory hearing, the Respondent filed a Motion to Stay the Adjudicatory Hearing, asserting his Fifth Amendment and Article 12 privileges not to testify. As grounds for the Motion to Stay, Respondent contended that on or

about December 21, 2021, a criminal complaint was issued by the Plymouth District Court against Mr. Roche, alleging a 67-count complaint alleging violations that also arose on or about August 12th and 13th, 2021. On April 28, 2022, I issued a Ruling on Motion of the Respondent to Stay the Adjudicatory Hearing, which is included in the administrative record, and denied the Respondent's Motion to Stay.

An adjudicatory hearing was held on April 29, 2022. All parties and their witnesses were in attendance and administered the oath. The Respondent testified in his defense at the hearing. At the conclusion, the administrative record was compiled.

II. Alleged Violations

Pursuant to Mass. Gen. L. ch. 130, § 80 and 322 CMR 7.01(9), DMF seeks revocation of the Respondent's Commercial Coastal Lobster Permit (DMF ID# 4928) and all appurtenant regulated fishery permit endorsements for the following alleged violations set forth in Summons Report #21-103-AR and enumerated below.

1. On or about August 11, 2021, Respondent impeded the safe boarding of his vessel and inspection of his lobster trap fishing gear by MEP, in violation of G.L. c. 130, §4A and 322 CMR 1.01.
2. On or about August 11, 2021, Respondent failed to display his commercial fishing permit to an officer of MEP, in violation of 322 CMR 7.01(14)(g).
3. Respondent was fishing lobster traps in the waters under the jurisdiction of the Commonwealth without a valid 2021 state waters lobster trap tag permanently attached to the trap bridge or central cross member, in violation of 322 CMR 6.31(1)(a)(1) and 6.31(4). In total, 37 such violations were allegedly observed.
4. Respondent was fishing lobster trap trawls that exceeded the 2,500-foot maximum trawl length, in violation of 322 CMR 4.13(2)(d). In total, four such violations were allegedly observed.
5. Respondent was fishing buoy lines affixed to lobster trap trawls without the required three red marks measuring at least 12-inches in length with one mark at the top, middle, and bottom of the buoy line, in violation of 322 CMR 4.13(2)(b)(4). In total, 17 such violations were allegedly observed.
6. Respondent was fishing buoy lines affixed to trap gear that were not properly rigged with a 1,700-pound buoy line breaking contrivance, in violation of 322 CMR 12.06(2)(b). In total, two such violations were allegedly observed.

7. Respondent was fishing buoy lines affixed to trap gear that were in excess of 3/8-inch diameter, in violation of 322 CMR 12.06(2)(e). In total, two such violations were allegedly observed.
8. Respondent was fishing lobster trap trawls whereby the east end of the trawl was not marked or was not marked with one or more three-foot sticks, in violation of 322 CMR 4.13(2)(c)(2). In total, four such violations were allegedly observed.

III. Background

The following facts were alleged in the Amended Notice of Agency Action dated October 28, 2021 (Docket No. 13) and its attachments, including but not limited to, MEP Report #21-103-AR dated October 28, 2021 and the Supplemental Investigatory Report into Seized Lobster Trap Gear Belonging to Brian Roche and Coastal Commercial Lobster Permit (DMF ID# 4928); the Stipulation to Facts dated April 28, 2022 (Docket No. 40); Affidavit of Brian Roche dated August 18, 2021 (Docket No. 4); Affidavit of Alex Grazioso dated August 18, 2021 (Docket No. 4); as well as in hearing testimony from DMF Permitting and Statistics Program Manager Story Reed, Lt. Robert Akin, DMF Assessment and Survey Program Manager Robert Glenn, Respondent Brian Roche, and Alex Grazioso.

On August 11, 2021, Lt. Akin and Officer Armstrong of MEP were on patrol in a marked MEP boat wearing their department uniforms. MEP received a call from another fisherman, William Chaprales, who reported witnessing Fishing Vessel (F/V) Gulf Voyager haul a lobster trawl that he believed to be in excess of the state's maximum allowed trawl length. Lt. Akin and Officer Armstrong responded to this report, and pulled alongside F/V Gulf Voyager, operated by the Respondent with Coastal Lobster Permit DMF ID 4928. On August 11, 2021, Alex Grazioso was a crew member working for the Respondent on the F/V Gulf Voyager.

The officers instructed the Respondent over a loudspeaker to not allow another trap to go back into the water. After having said this, the officers witnessed another trap pulled off the Gulf Voyager and placed in the water. Once onboard, MEP officers told the Respondent that they would inspect his gear and catch. While MEP officers were speaking to the Respondent, another trap went into the water. MEP again directed the Respondent not to allow another trap to go into the water, and the trawl line was secured to a cleat. At this point, the Respondent became irate and started shouting at Officer Armstrong, waving his arms, and saying that MEP was harassing him and that he had an appointment to go to and had to get back in. The Respondent also told the officers that he was in federal waters and that they had no authority on his boat. Officer

Armstrong explained that the Respondent was mistaken, that Cape Cod Bay is located within Massachusetts state waters, and that, in addition, both Lt. Akin and Officer Armstrong are deputized as federal officers for the National Oceanic and Atmospheric Administration's National Marine Fisheries Service. Officer Armstrong requested that the Respondent provide his state fisheries permit. The Respondent entered his cabin, then later returned without the permit. Officer Armstrong again requested to see the state fisheries permit, and the Respondent did not provide it. The Respondent stated to MEP that he had somewhere else he needed to be. The Respondent wears a hearing aid and has some loss of hearing.

MEP asked Roche how many traps the trawl onboard had in total, and the Respondent said that it was a 50-pot trawl. MEP asked how many feet of ground line were between each trap in the trawl, and the Respondent said about 80 feet. MEP asked the Respondent to do whatever he needed to do to haul back the rest of the trawl, even if it meant setting back and picking up an end line to haul it again. The Respondent told the officers that he was not hauling it back for inspection. As the officers were leaving F/V Gulf Voyager, the Respondent told Lt. Akin that he would finish setting back the trawl and that he had more gear to haul.

Once they were back onboard the patrol boat, Officer Armstrong and Lt. Akin followed F/V Gulf Voyager for about a mile. The Respondent stopped, waved to the officers to come alongside his boat, and told the officers that he had somewhere to be and would not be hauling anymore gear that day.

Lt. Akin measured the coordinates of the trawl that F/V Gulf Voyager had partially onboard at 41-47.6865 N 070-24.6828 W (West End) and 41-47.1828 N 070.24.0036 W (East End) using the patrol boat's chart plotter that measures the distances between objects in water. MEP measured the distances between these two positions at approximately 4,490 feet using the distance function on the marine patrol boat chart plotter.

The following day, on August 12, 2021, MEP hauled and removed lobster trawls bearing the Respondent's permit number located within Cape Cod Bay, as well as additional trawls bearing the Respondent's permit number that were hauled and removed on August 13 and 16, 2021. MEP performed an initial inspection for compliance with state regulations setting forth trap configuration and with the maximum allowed trawl length of 2,500 feet. At the initial gear inspection on August 12th, MEP observed a 50-pot trawl measuring approximately 4,225 feet, another 50-pot trawl measuring approximately 4,224 feet, a 25-pot trawl containing 21 lobster

pots that did not have valid 2021 trap tags, and a 21-pot trawl containing 16 pots that did not have valid 2021 trap tags. MEP then removed the seized gear to a secure location at Joint Base Cape Cod for further inspection and storage. MEP measured a third 50-pot trawl at Joint Base Cape Cod using a police cruiser with certified calibration and determined it was approximately 4,224 feet long.

On September 21, 2021, Chief Marine Fisheries Biologist Robert Glenn, who oversees DMF's Protected Species Project and is also a DMF expert in lobster gear, assisted MEP in the inspection of this seized gear at Joint Base Cape Cod to determine whether it complied with the state's buoy line marking and buoy line configuration regulations. Mr. Glenn's inspection of the gear resulted in alleged violations of buoy line marking regulations at 322 CMR 4.13 and buoy line configuration regulations at 322 CMR 12.06 more fully set forth in the Supplemental Investigatory Report into Seized Lobster Trap Gear Belonging to Brian Roche and Coastal Commercial Lobster Permit (DMF ID# 4928). During a subsequent gear inspection, F/V Gulf Voyager crew member Alex Grazioso was required to leave Joint Base Cape Cod because of a firearm, which he maintains is a hunting firearm, that was found locked in the truck of his car.

As a result of these investigations, DMF filed a Notice of Agency Action and then an Amended Notice of Agency Action seeking revocation of the Respondent's Commercial Coastal Lobster Permit (DMF ID# 4928) and all appurtenant regulated fishery permit endorsements for the alleged violations set forth in section II herein.

During the summer of 2021, the Respondent was involved in a gear conflict with Sandwich-area commercial lobstermen, including Mr. Chaprales. Mr. William Chaprales, along with other Massachusetts fishermen, entered into several contracts in the past with DMF to provide a platform to conduct research or to collect fisheries data. The Respondent and crew member Alex Grazioso assert that other lobstermen were interfering with their lobster gear and removing their trap tags.

IV. Findings of Fact

1. DMF has promulgated regulations at 322 CMR 4.13 designed to increase fishermen safety, reduce gear conflicts, and help fishermen see other fisherman's gear on the water and know in what direction trawls are set, to avoid safety issues associated with setting over another's gear.

2. Northern Atlantic Right Whales are among the most endangered species on the planet. A DMF biologist testified that as of the time of the adjudicatory hearing, there are an estimated only approximately 360 Northern Atlantic Right Whales left in the world's oceans.
3. In recent years, DMF was sued in federal court for alleged violations of the federal Endangered Species Act for failure to protect the Northern Atlantic Right Whale. The judge dismissed the case due to the plaintiffs' lack of standing, but she nevertheless issued an advisory ruling suggesting that if the plaintiffs had been able to establish standing, she would have ruled that DMF would have to obtain an Incidental Take Permit under the Endangered Species Act in order to continue to issue permits for vertical buoyed trap gear.
4. DMF is in the process of applying for an Incidental Take Permit through the National Marine Fisheries for the Northern Atlantic Right Whale. In this application, DMF seeks permission to take no more than one Northern Atlantic Whale every three years. Failure to comply with an Incidental Take Permit, when issued, could have serious adverse consequences for the Massachusetts lobster industry using vertical buoyed trap gear.
5. In 2021, DMF promulgated enhanced regulations at 322 CMR 12.06 designed to reduce the risk posed by traditional lobster trap fishing gear to protected species, specifically the endangered North Atlantic Right Whale. These regulations took effect on May 1, 2021.
6. In 2021, DMF took measures to provide notice, outreach training and free gear, including special rope, to permitted lobster fishermen in Massachusetts. The Respondent attended one such training provided by DMF in Sandwich.
7. The Respondent is the owner of F/V Gulf Voyager, a commercial lobster vessel, and holds Commercial Coastal Lobster Permit DMF ID# 4928.
8. Lt. Akin of MEP received a call from a fisherman, William Chaprales, on August 11, 2021 stating that the Respondent was hauling lobster trawls in Cape Cod Bay in excess of the maximum 2500 feet allowed by state regulations. During the summer of 2021, the Respondent was involved in a gear conflict with Sandwich-area commercial lobstermen, including Mr. Chaprales. Mr. William Chaprales, along with other Massachusetts fishermen, entered into contracts in the past with DMF to provide a platform to conduct research or to collect fisheries data.

9. On August 11, 2021, MEP Lt. Akins and Officer Armstrong followed up on this call by approaching and boarding the F/V Gulf Voyager for a compliance inspection.
10. On August 11, 2021, the Respondent failed to display his commercial fishing permit to an officer of MEP after being requested more than once to do so. Instead, the Respondent told the MEP officer that he had somewhere else he needed to be.
11. On August 11, 2021, the Respondent impeded inspection of his lobster trap fishing gear by refusing at least three requests, including two spoken through a loudspeaker, to stop putting traps into the water, and also by refusing a request to haul back a lobster trap trawl for inspection. The Respondent responded by saying that he was not hauling the trawl line back for inspection, and that he had somewhere else he had to be. The Respondent became irate and started shouting at Officer Armstrong, waving his arms, and saying that MEP was harassing him and that he had an appointment to go to and had to get back in. The Respondent also told the officers that he was in federal waters and that they had no authority on his boat.
12. On August 12, 2021, Lt. Akin, with the assistance of others from MEP and DMF, hauled from Cape Cod Bay and inspected five lobster trawl lines belonging to the Respondent. One 50-pot trawl line was approximately 4,225 feet in length. A second 50-pot trawl was approximately 4,224 feet in length. One 25-pot trawl line hauled contained 21 lobster traps that did not have valid 2021 trap tags bearing the Respondent's permit number. Another 21-pot trawl line hauled contained 16 lobster traps that did not have valid 2021 trap tags bearing the Respondent's permit number.
13. On August 13 and 16, 2021, MEP and DMF hauled additional trawls from Cape Cod Bay belonging to the Respondent.
14. MEP transported a total of ten trawls belonging to the Respondent to Joint Base Cape Cod to a secure facility for further inspection and storage in a secure facility.
15. A third 50-pot trawl belonging to the Respondent was measured by MEP at Joint Base Cape Cod. The length of this trawl was measured to be approximately 4,224 feet.
16. On September 21, 2021, DMF Assessment and Survey Program Manager Robert Glenn, assisted by others from MEP and DMF, inspected nine of ten trawls that belonged to the Respondent and were stored by MEP at Joint Base Cape Cod. Mr. Glenn is a Chief Marine Fisheries Biologist for DMF with expertise in lobster gear and the regulation of

lobster gear to protect endangered species, particularly the North Atlantic Right Whale. In conducting this inspection, Mr. Glenn followed methodologies described in the Supplementary Investigatory Report into Seized Lobster Trap Gear Belonging to Brian Roche and Coastal Commercial Lobster Permit (DMF ID# 4928) (Docket No. 13).

17. Mr. Glenn observed violations of numerous protected species regulations. Seventeen of the 18 buoy lines inspected were non-compliant with the state's buoy line marking regulations for trawls. Two of the 18 buoy lines violated the state's 1,700-pound breaking strength contrivance rule, as one did not have the correct number of contrivances per length of buoy line, and one exceeded the maximum allowed spacing for contrivances in the buoy line. Two of the 18 buoy lines also exceeded the maximum buoy line diameter of 3/8 inches. These represent 21 separate violations of state regulations designed to reduce the risk posed by vertical buoyed trap gear to protected species, specifically the endangered North Atlantic Right Whale.
18. Mr. Glenn also observed surface system configuration violations. For those east ends that he inspected, four were configured without a three-foot stick. Additionally, two east ends were missing buoys.
19. During another inspection of Respondent's gear, F/V Gulf Voyager crew member Alex Grazioso was required to leave Joint Base Cape Cod because of a firearm, which he maintains is a licensed hunting firearm, that was found locked in the truck of his car. On August 11, 2021, Alex Grazioso was a crew member working for the Respondent on the F/V Gulf Voyager.
20. On or about August 11, 2021, Respondent impeded the safe boarding of his vessel and inspection of his lobster trap fishing gear by the Massachusetts Environmental Police.
21. On or about August 11, 2021, Respondent failed to display his commercial fishing permit to an officer of the Massachusetts Environmental Police.
22. Respondent was fishing lobster traps in the waters under the jurisdiction of the Commonwealth without a valid 2021 state waters lobster trap tag permanently attached to the trap bridge or central cross member. In total, 37 such violations were observed.
23. Respondent was fishing lobster trap trawls that exceeded the 2,500-foot maximum trawl length. In total, four such violations were observed.

24. Respondent was fishing buoy lines affixed to lobster trap trawls without the required three red marks measuring at least 12-inches in length with one mark at the top, middle, and bottom of the buoy line. In total, 16 or 17 such violations were observed.
25. Respondent was fishing buoy lines affixed to trap gear that were not properly rigged with a 1,700-pound buoy line breaking contrivance. In total, two such violations were observed.
26. Respondent was fishing buoy lines affixed to trap gear that were in excess of 3/8-inch diameter. In total, two such violations were observed.
27. Respondent was fishing was fishing lobster trap trawls whereby the east end of the trawl was not marked or was not marked with one or more three-foot sticks. In total, four such violations were observed.

V. Applicable Statutes and Regulations

1. The Director of DMF has both the authority to issue a permit and the authority to revoke the permit he issues. Mass Gen. L. ch. 130, § 80 and 322 CMR 7.01(9).
2. Mass. Gen. L. ch. 130, § 2, which provides for fines, imprisonment, or liability for civil penalties for violations of the marine fish and fisheries chapter further provides that “[a]ny penalty imposed under this section shall be in addition to the suspension or revocation of licenses, permits or certificates as authorized by this section, and to any forfeiture proceedings authorized under this chapter.”
3. Pursuant to authorities set forth in Mass. Gen. L. ch. 130, marine fishery regulations at 322 CMR 1.01 provide that “The owner or operator of any fishing vessel shall immediately comply with instructions issued by an authorized environmental police officer to facilitate inspection of the vessel, its gear, and/or catch and safe boarding, and shall take such other actions as are necessary to ensure the safety of the authorized officer and his/her party, and to facilitate the boarding.”
4. Marine fisheries regulations at 322 CMR 7.01(14)(g) provide that it is unlawful to “fail to produce a permit upon demand of any officer authorized to enforce the marine fishery laws of the Commonwealth.”
5. Marine fisheries regulations at 322 CMR 6.31(1)(a)(1) provide that “It shall be unlawful for any commercial fisherman licensed by the Commonwealth to fish lobster traps: 1. In

any waters under the jurisdiction of the Commonwealth without a valid state waters lobster trap tag permanently attached to the trap bridge or central cross-member.” Regulations at 322 CMR 6.31(4) further provide that “It shall be unlawful for any person to set or fish a lobster, fish or conch trap in waters under the jurisdiction of the Commonwealth or the EEZ portions of Lobster Conservation Areas 1, 2 and Outer Cape Cod or have a lobster trap in possession or under control while on said waters unless said trap is tagged with an official Massachusetts trap tag in accordance with 322 CMR 6.31(1) and (2) that was issued to that person valid for the current year.” These regulations help DMF in lobster conservation efforts by identifying the owner of any lost or out-of-compliance gear. They also assist DMF in managing for protected species by identifying the source of any gear involved in entanglements.

6. Marine fisheries regulations at 322 CMR 4.13(2)(d) provides that “The total length of trawls set in waters under the jurisdiction of the Commonwealth shall not exceed 2,500 feet from end to end.”
7. Marine fisheries regulations at 322 CMR 4.13(2)(b)(4) provide that “The buoy line on trawls fished or authorized to fish in LCMA 1, LCMA 2 or the Outer Cape Cod LCMA, as defined in 322 CMR 6.33: Lobster Management Areas, shall be marked with three red marks of at least 12 inches. A mark shall be located at the top, midway and bottom of the buoy line.” LCMA 1 includes Cape Cod Bay. 322 CMR 6.33.
8. Marine fisheries regulations at 322 CMR 4.13(2)(c)(2) provide that “The east end of a trawl shall be marked with a double buoy, consisting of any combination of two buoys measuring at least seven inches by seven inches or five inches by 11 inches and one or more three-foot sticks.”
9. Marine fisheries regulations at “322 CMR 12.00 are particularly focused on minimizing the risk of interaction between fisheries, vessel activity, and North Atlantic right whales ("right whale"). The right whale is a critically endangered species. There are estimated to be approximately 400 known individuals in the population, as of 2019, and the population has been declining since 2010. Large numbers of these whales migrate into Commonwealth waters during the winter period and aggregate in Cape Cod Bay to feed on zooplankton before migrating out of the area during the early spring. To address these

risks, DMF has promulgated a series of regulations at 322 CMR 12.00 to protect right whales.”

10. Marine fisheries regulations at 322 CMR 12.06(2)(b) provide that “Effective May 1, 2021 it shall be unlawful for any commercial fisherman to fish any traps in the waters under the jurisdiction of the Commonwealth, unless all buoy lines are equipped with a 1,700 pound breaking strength contrivance.”
11. Marine fisheries regulations at 322 CMR 12.06(2)(e) provide that “Effective May 1, 2021 it shall be unlawful for: 1. any commercial fisherman to set or fish traps within the waters under the jurisdiction of the Commonwealth with buoy lines that are greater 3/8" diameter.”

VI. Discussion

The burden of proof rests with the claimant who must prove its allegations by the “clear weight” or the “preponderance” of credible evidence. *Medical Malpractice Joint Underwriting Offender Registry Board*, 395 Mass. 43 (1985). I find that DMF has carried its burden of proof and established by a preponderance of credible evidence that the Respondent violated state marine fisheries laws and regulations governing the lobster trap fishery in Section II, 1-8 herein.

Permitting and Statistic Program Manager Story Reed offered clear testimony on the permits held by the Respondent, what fishing activities they authorize, and how the lobster fishery is managed in Massachusetts.

MEP and DMF undertook multiple, substantial investigations and review of the Respondent’s lobster gear. These inspections occurred both at the time of the initial boarding and inspection by MEP on August 11, 2021; the next day on August 12, 2021 when MEP and DMF returned to haul, inspect and measure additional trawls; on two additional days when MEP hauled and inspected additional gear on August 13 and 16, 2021; and then again on September 21, 2021 when the Respondent’s trawls were inspected at Joint Base Cape Cod. Lt. Akin was a strong witness at the adjudicatory hearing, and his testimony was supplemented by a detailed MEP Report #21-103-AR dated October 28, 2021 and the Supplemental Investigatory Report into Seized Lobster Trap Gear Belonging to Brian Roche and Coastal Commercial Lobster Permit (DMF ID# 4928). Lt. Akin and others from MEP measured the length of the trawls using multiple methods and equipment, and the length of four trawls exceeded the maximum allowed

length of 2,500 feet substantially, in some cases with the trawl lengths found to be in excess of 4000 feet. Additionally, multiple inspections by MEP found that the Respondent was fishing traps without trap tags required by 322 CMR 6.31. It wasn't just a few traps, but instead 37 violations were observed. The number of traps missing tags on different trawls undercuts the Respondent's argument that other fishermen had removed the tags. Additionally, DMF offered credible testimony that the tags are well-affixed and usually are left on lobster traps for multiple years.

Chief Marine Fisheries Biologist Robert Glenn, who oversees DMF's Protected Species Project and is also a DMF expert in lobster gear, provided clear and credible testimony of the deficiencies in the Respondent's trap markings and trawl gear in complying with the requirements of 322 CMR 4.13 and 12.00, and the important reasons underlying these requirements, including fishermen safety, preventing gear conflicts with other fishermen, and aiding in the protection of endangered species such as the Northern Atlantic Right Whale.

The Respondent offered testimony at the hearing and asserted in Respondent's Rebuttal/Suggested Recommendations for a Decision of the Division of Marine Fisheries that he did not hear the multiple directives from MEP to stop putting his traps back in the water or to produce his license, and thus should not be found in violation of 322 CMR 1.01 and 7.01(14)(g). This testimony was undercut by testimony from Lt. Akin and by MEP Report #21-103-AR indicating that the Respondent did hear the requests and responded to them by becoming irate, arguing that he was in federal waters and that MEP lacked jurisdiction over his boat, and responding that he had somewhere else that he needed to be.

Respondent testified at the hearing that other lobster fisherman in the area may have interfered with his gear, removed the required trap tags or buoy markings. He produced, however, no physical or other evidence to support these assertions. I found the testimony of crew member Alex Grazioso less persuasive than some other witnesses because he works for the Respondent, and because he admitted during cross-examination to some lack of attention to detail on his part in bringing a firearm in his car onto Joint Base Cape, which resulted in him being asked to leave the facility. The Respondent and DMF entered into a joint Stipulation of Facts that included that William Chaprales entered into contracts with DMF in the past provide a platform (boat) for research or to collect data, as had other fisherman. The Stipulation of Facts also included that the Respondent had gear conflicts with other area fishermen, including

William Chaprales. William Chaprales had been in contact with MEP and, in fact, called them and asked them to investigate the Respondent's activities on August 11, 2021. The fact that Mr. Chaprales was the "tip" that led to the MEP inspection and boarding does not negate the evidence and testimony personally observed by Lt Akin and other members of MEP.

At the conclusion of the hearing and in the Respondent's Rebuttal/Suggested Recommendations for a Decision of the Division of Marine Fisheries, the Respondent's counsel argued that the regulations at 322 CMR 12.00 are new, and that revocation or suspension of the Respondent's Coastal Commercial Lobster Permit is too harsh a remedy for violations of recently promulgated regulations. This argument is undercut by the testimony of Mr. Glenn, who explained in detail why the regulations had been promulgated and the substantial efforts DMF had undertaken to test and improve the new rope before it was offered, to inform permitted lobstermen of the new requirements, to provide certain required equipment to lobstermen at no charge, and to offer eight in-person training sessions at various locations along the Massachusetts coast on what was required. DMF offered stark and convincing evidence that the stakes for even limited instances of noncompliance are potentially severe, including injury or death to one of the most endangered species on the planet, the North Atlantic Right Whale, and the potential risks to fishing using vertical buoyed trap gear to the entire Massachusetts lobster industry. Further, the Respondent testified that he attended a training session offered in Sandwich by DMF and the Massachusetts Lobstermen's Association on these new regulations.

Commercial fishing is a complicated *business* that demands careful compliance with many statutory and regulatory requirements to manage and conserve increasingly limited fisheries resources. The Northern Atlantic Right Whale is on the brink of global extinction, and there are potentially severe consequences both for the species and for the Massachusetts fishing industry for noncompliance with regulations designed to protect this species. Robert Glenn testified that the estimates generated by a NOAA Fisheries model for the effectiveness of the new regulations at 322 CMR 12.00 in reducing the potential risk of serious injury and/or mortality of Northern Right Whales is based upon an assumption of full compliance, and that DMF reports regularly to NOAA Fisheries on compliance and non-compliance with these regulations.

Lastly, the Respondent's Rebuttal/Suggested Recommendations for a Decision of the Division of Marine Fisheries asserts that the Respondent has been impaired by his inability to

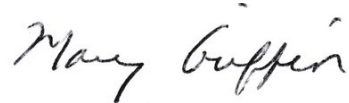
provide a statement or statements and to participate in the defense of this action without waiving his Fifth Amendment privilege by the criminal action currently pending in the Plymouth District Court. As previously discussed in the Ruling on Respondent Brian Roche's Request to Stay the Adjudicatory Hearing, which is included in the administrative record, the Respondent both filed an affidavit dated August 18, 2021, asserting his version of the incident, and then also testified at the adjudicatory hearing itself. Even if the Respondent properly asserted these Fifth Amendment and Article 12 rights and has not already waived them, findings which I do not make here, then he was not denied his opportunity to present his version of the facts relevant to this matter limited to the potential revocation of his fishing permit.¹ "Courts generally reject claims by parties to administrative hearings that they are entitled to continuances until after their criminal trials because they will not testify for fear of self-incrimination." Oznemoc, Inc. v. Alcoholic Beverages Control Commission, 412 Mass. 100 (1992) and cases cited. The hearing officer's task is to "balance any prejudice to the civil litigants which might result against the potential harm to the party claiming the privilege if he is compelled to choose between defending the civil action and protecting himself from criminal prosecution." Wansong v. Wansong, 395 Mass. 154 (1985). As previously discussed, the consequences of non-compliance with regulations promulgated to protect the endangered Northern Atlantic Right Whale are enormous for both the species and for the entire Massachusetts lobster industry.

After reviewing the witness testimony and the administrative record, I find that DMF has carried its burden of proof and established by a preponderance of credible evidence that the Respondent violated state marine fisheries laws and regulations governing the lobster trap fishery in Section II, 1-8 herein.

¹ It is instructive that Mass. Gen. L. ch. 130, § 2 provides that "Any penalty imposed under this section shall be in addition to the suspension or revocation of licenses, permits or certificates as authorized by this section, and to any forfeiture proceedings authorized under this chapter." Thus, criminal fines and civil penalties may be imposed separately and in addition to the Director of DMF's authority to revoke a permit to address significant and time-sensitive marine conservation concerns, such as those at issue here.

VII. Recommendation

DMF has carried its burden of proof to revoke, suspend or not renew the Respondent's Commercial Coastal Lobster Permit DMF ID# 4928 and all appurtenant regulated fishery permit endorsements. I recommend revocation or, in the alternative, suspension for a substantial period, the Respondent's Commercial Coastal Lobster Permit and all appurtenant regulated fishery permit endorsements.



Dated: July 21, 2022

Mary Griffin, Esq.
Presiding Officer