



The Commonwealth of Massachusetts

Division of Marine Fisheries

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Secretary

RONALD S. AMIDON
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Director

Mr. Darrell Rushnak
1487 Orleans Road
Harwich, MA 02643
(p) 508-364-5250
blackgoldfisheries@gmail.com

FINAL DECISION

RE: *IN THE MATTER OF DARRELL RUSHNAK and COASTAL COMMERCIAL LOBSTER PERMIT DMF ID #1302 and ALL APPURTENANT REGULATED FISHERY PERMIT ENDORSEMENTS*

Dear Mr. Rushnak:

Upon a thorough review of the administrative record, including the written agreement between the parties, I adopt the attached Recommended Final Decision of the Magistrate in its entirety as my Final Decision in this matter.

This Final Decision is issued in accordance with G.L. c.30A, §11(8) and 801 CMR §1.01(11)(d). As set forth in the written agreement, the parties have waived their rights to judicial review of this Final Decision.

Sincerely yours,

Daniel J. McKiernan, Director

Cc: James P. Connors, Esq.
Jared Silva, Agency Representative

Enclosed:
Recommended Final Decision
Agreement of the Parties

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

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. CCLP-1302-JS-20

IN THE MATTER OF:
DARRELL RUSHNAK and COASTAL
COMMERICAL LOBSTER PERMIT
DMF ID #1302 and ALL APPURTENANT
REGULATED FISHERY PERMIT
ENDORSEMENTS

Respondent

RECOMMENDED FINAL DECISION

This is a Recommended Final Decision (RFD) of the Presiding Officer in the above captioned adjudicatory proceeding. It is issued pursuant to 801 CMR § 1.01(11)(b) and G.L. c.30A, § 11. This RFD is based on the administrative record compiled in this case, including a written agreement of the parties, all of which will be forwarded to the Director of the Division of Marine Fisheries (the “Director”) for his Final Decision.

Procedural Background

This adjudicatory proceeding was initiated by the Division of Marine Fisheries (“Petitioner” or “DMF”) alleging that the Respondent, Darrell Rushnak, violated the provisions of G.L. c. 130, §§ 41, 41A and 44, 322 CMR §§ 6.02(4) and 6.02(5)(e)(3). On June 25, 2020, the Director issued a Request for an Adjudicatory Hearing. On July 10, 2020, DMF issued an Order to Show Cause why Coastal Commercial Lobster Permit DMF ID #1302 and all appurtenant regulated fishery permit endorsements should not be suspended, revoked or not renewed by the Director. On July 24, 2020, the Respondent filed an Answer, a Request for a Hearing, and an Entry of Appearance.

An adjudicatory hearing was scheduled for October 22, 2020. On September 23, 2020, a Joint Motion to Continue for ninety days was granted to allow additional time to discuss possible resolution of the matter. On March 10, 2021, the parties filed a proposed Agreement of the Parties. Due to the Agreement of the Parties, an adjudicatory hearing was not held. The Agreement of the Parties is incorporated as part of the administrative record in this matter.

Management Background

The Atlantic States Marine Fisheries Commission’s Fishery Management Plan for American lobster manages lobster stocks through discrete Lobster Conservation Management Areas (LCMAs). The

Commonwealth of Massachusetts is home to fisheries that fish for lobster within four of these LCMA's: LCMA1 (Inshore Gulf of Maine); LCMA 2 (Southern New England); LCMA3 (Offshore Gulf of Maine/Georges Bank); and Outer Cape Cod LCMA (East of Cape Cod). Each LCMA has area specific effort and harvest controls to ensure the resource is sustainably managed.

Across the LCMA's, the possession of female egg-bearing lobsters is prohibited, as is the forced removal of eggs from any female egg-bearing lobster ("scrubbing"). In Massachusetts, in LCMA's 1 and 2 commercial fishermen are required to cut a v-shaped notch ("v-notch") into the flipper to the immediate right of center on any female egg-bearing lobster before releasing the lobster back to the sea. Across all Massachusetts LCMA's the possession of lobsters bearing a v-notches is prohibited subject to area specific standards. The purpose of these rules is to protect spawning females from harvest for a period, thereby enhancing the likelihood of successful reproduction. Prohibiting possession of female egg-bearing lobsters, removal of eggs from female egg-bearing lobsters, and possession of lobsters bearing a v-notch are tools to enhance spawning stock biomass and are key components of the current interstate and Massachusetts lobster conservation and management programs.

The Massachusetts Legislature has enacted laws and the Division of Marine Fisheries has promulgated regulations to protect spawning female lobsters. G.L. c. 130, § 41 and 322 C.M.R. 6.02(4) prohibit the possession of female egg-bearing lobsters. G.L. c. 130, § 41A and 322 C.M.R. 6.02(4) prohibit the forced removal of eggs from female egg-bearing lobsters. G.L. c. 130, § 44 and 322 C.M.R. 6.02(5)(e)(3) prohibit any commercial fisherman fishing or authorized to fish in the Outer Cape Cod LCMA to possess any female lobster with a v-notch greater than ¼" and tapering to a sharp point without setal hairs.

Discussion

According to the Massachusetts Environmental Police (MEP) Incident Report #19-134-AR, the incident report of Officer Matthew Simmons, the supplemental incident narratives of Officer Simmons, Sargent Scott Opie, and Captain Kevin Clayton, the September 17, 2019 Memorandum from DMF to Simmons, and other materials included in DMF's Request for an Adjudicatory Hearing, the following facts are alleged.

Respondent holds Commercial Coastal Lobster Permit DMF ID# 1302 issued by DMF for use onboard the F/V Risky Business. The permit authorizes Respondent to fish for lobster within the Outer Cape Cod LCMA, and Respondent also holds an appurtenant fishery permit endorsement for dogfish.

On September 11, 2020, Simmons was conducting a uniformed patrol at Ryder's Cove in Chatham, Massachusetts. He observed those onboard the F/V Risky Business offloading its catch to a white box truck. Simmons approached the vessel to conduct a marine fishery inspection. He identified himself to the two individuals onboard the vessel, Darrell Rushnak and sternman Joshua Greene.

The lobsters onboard the vessel were under Rushnak's possession and according to Rushnak's GPS plotter were caught in the waters under jurisdiction of the Commonwealth within the Outer Cape Cod LCMA. Simmons began an inspection of Rushnak's lobsters, which were stored in seven plastic lobster crates. Upon initial inspection, Simmons readily observed four lobsters which were egg-bearing. Rushnak and Greene both acknowledged that there were eggs attached to these four lobsters. These four non-conforming lobsters were then released back to the ocean at Ryder's Cove.

Given the presence of these non-conforming lobsters, Officer Simmons informed Rushnak that the Environmental Police would need to conduct a more thorough inspection of all the lobsters in his possession. Due to concerns about exposing the lobsters to heat, those present agreed that the inspection would be conducted at George's Fish Market. Officer Simmons was joined by Captain Clayton and Sargent Opie at George's Fish Market. Simmons and Opie inspected all the lobsters in the seven crates under Rushnak's possession. Through this inspection, Rushnak was found to be in possession of 21 egg bearing lobsters and two lobsters with a v-notch greater than ¼" and tapered to a point without setal hairs.

Nineteen female lobsters were identified as not bearing eggs, but they had damage to their abdomen consistent with the forced removal of eggs from female lobsters. The Mass Environmental Police made arrangement with DMF to examine those 19 female lobsters with abdomen damage consistent with the forced removal of eggs. Dr. Tracy Pugh ("Pugh") was assigned to lead this examination. Pugh is a senior biologist and the head of DMF's Invertebrate Project who conducted her PhD work on lobster reproduction. Pugh was joined by DMF biologists Steve Wilcox and Alex Boeri. Their findings are captured in a September 17, 2019 report from Pugh to Simmons, included in the administrative record.

The examination consisted of reviewing the abdomen of each lobster where the egg clutch is held to determine if eggs - at any stage - were present, and if the pleopods were damaged in a manner consistent with forced egg removal. If the observed pleopods were viewed to be potentially damaged or affected in such a manner, Pugh and Wilcox removed them and placed them in a vial. Each individual sample vial was labeled and numbered to correspond to an identified lobster and Boeri's notes for that examination.

The sample vials containing the pleopods were then transported back to DMF's New Bedford field office for additional examination. During this work, Pugh observed that many of the female lobsters were abnormally clean and free of debris despite having older shells; the age of the shells was detectable given the wear on the underside of the claws and the presence of shell disease. The undersides of several of the females also smelled of chlorine bleach, a common chemical used to efficiently remove eggs and the associated casings and cementum from a female lobster's abdomen. On September 13, Pugh analyzed the pleopods from the 19 lobsters that were identified as having signs of forced egg removal following standard procedures. Her analysis determined that 15 lobsters forcibly had their eggs removed. Of these 15 lobsters, she identified 12 as likely having their eggs forcibly removed with bleach.

In summary, Rushnak was found to be in possession of 21 egg bearing lobsters, 15 lobsters from which the eggs had been removed, and two lobsters with a v-notch greater than ¼" and tapered to a sharp point without setal hairs. These allegations, if proven, would constitute violations of the following:

1. G.L. c. 130, § 41 and 322 C.M.R. 6.02(4), which prohibit the possession of female egg-bearing lobsters;
2. G.L. c. 130, § 41A and 322 C.M.R. 6.02(4), which prohibit the forced removal of eggs from female egg-bearing lobsters; and
3. G.L. c. 130, § 44 and 322 C.M.R. 6.02(5)(e)(3), which prohibit any commercial fisherman fishing or authorized to fish in the Outer Cape Cod LCMA to possess any female lobster with a v-notch greater than ¼" and tapering to a sharp point without setal hairs.

Agreement

The parties have agreed to the following disposition in this matter.

1. The Respondent agrees to a three-month suspension of Coastal Lobster Permit DMF ID #1302 during the period of November 1, 2021 through January 31, 2022 for the taking and landing of lobster.
2. To effectuate this suspension:
 - a. Respondent agrees to remove all his lobster trap gear from the waters under the jurisdiction of the Commonwealth prior to November 1, 2021.
 - b. On days when Respondent's lobster trap gear is being hauled-out for the season, Respondent is to contact the Agency Representative by phone (617-634-9573) and inform the Division of Marine Fisheries of the approximate time Respondent will be returning to port and the approximate amount of lobster trap gear that will be brought in.
 - c. Respondent agrees to remove all of his 2021 trap tags from his lobster trap gear upon bringing the hauled-out gear to shore.
 - d. Respondent agrees to contact the Agency Representative by November 2, 2021 via e-mail (jared.silva@mass.gov) or phone (617-634-9573) to determine how to return all used and unused 2021 trap tags to the Division of Marine Fisheries for disposal.
 - e. Not reset his lobster trap gear until that time in 2022 when lobster trap gear may be lawfully set in the Outer Cape Cod LCMA, pursuant to the seasonal closure of the Outer Cape Cod LCMA at 322 CMR §6.02(7)(a) and the seasonal commercial trap gear haul-out period at 322 §CMR 12.04(2).
3. The parties acknowledge that the suspension of the Respondent's Coastal Lobster Permit DMF ID #1302 for the taking and landing of lobster does not prevent the Respondent from conducting all other commercial fishery activities lawfully authorized by his Coastal Lobster Permit DMF ID #1302 and its appurtenant endorsements.
4. The Respondent agrees to a three-year administrative probationary period occurring from May 16, 2021 through May 14, 2024. During this probationary period, any violation of this signed agreement or any marine fishery law or regulation of the Commonwealth, as set forth at G.L. c. 130 and 322 CMR, shall result in DMF immediately initiating a due process hearing to permanently revoke the Respondent's Coastal Lobster Permit DMF ID #1302 and all appurtenant permit endorsements.
5. The Agency agrees that if the Respondent applies to transfer his Coastal Lobster Permit DMF ID #1302, that the Director will not deny the permit transfer, pursuant to 322 CMR 7.03(6)(b), as not being in the best interest of the Commonwealth based on the alleged violation set forth in this matter.
6. The Respondent acknowledges that his alleged violations of G.L. c. 130, §§41, 41A and 44 and 322 CMR §§ 6.02(4) and 6.02(5)(e)(3) may serve to increase the severity of any future violation

of the Commonwealth's marine fisheries laws and regulations, which may result in the revocation of all or some of his remaining commercial fishing permits and regulated fishery permit endorsements.

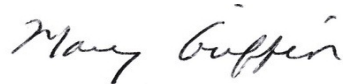
7. The parties agree that if the Director approves this written settlement agreement then they have waived whatever rights they may have to a hearing and any further administrative review of this matter before DMF or judicial review to the Courts.

Decision

The Director's adoption of this RFD in its entirety shall constitute a full resolution of this matter. Petitioner DMF shall voluntarily dismiss the claim for an adjudicatory proceeding and Respondent shall waive any rights he may have to judicial review of the Director's Final Decision.

Having reviewed the administrative record and the allegations in the Request for an Adjudicatory Hearing and Order to Show Cause, I have concluded that the written agreement above is a fair, just and speedy resolution of this proceeding. Moreover, it contains remedial measures, including a three-month permit suspension, to prevent future violations by the Respondent of conservation requirements for lobster, while incentivizing greater compliance with lobster and other fishery management regulations going forward.

It is therefore my recommendation that the Director adopt this RFD in its entirety as his Final Decision in this adjudicatory proceeding.



Date: March 18, 2021

Mary Griffin, Esq., Presiding Officer
MA Department of Fish and Game
251 Causeway Street, 4th Floor
Boston, MA 02114

Administrative Record

NOTICE

This is a Recommended Final Decision of the Presiding Officer. This Decision is therefore not a Final Decision of the Director and may not be appealed to the Superior Court pursuant to G.L. c. 30A. Because this is a Recommended Final Decision of the Presiding Officer, no party shall file a motion to argue, renew, or reargue this Decision or any portion of it and no party shall communicate with the Division Director regarding this decision, unless the Division Director, in his sole discretion, directs otherwise. The Director's Final Decision shall be made in accordance with G.L. ch. 30A, § 11 and 801 CMR 1.01(11)(d).

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

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. CCLP-1302-JS-20

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ENDORSEMENTS)

Respondent)
_____)

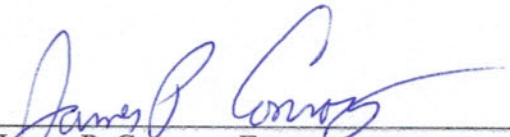
AGREEMENT OF THE PARTIES

The parties hereby agree to the following disposition in this matter:

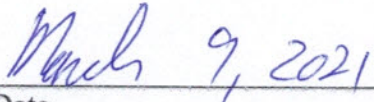
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 - d. Respondent agrees to contact the Agency Representative by November 2, 2021 via e-mail (jared.silva@mass.gov) or phone (617-634-9573) to determine how to return all used and unused 2021 trap tags to the Division of Marine Fisheries for disposal.
 - e. Not reset his lobster trap gear until that time in 2022 when lobster trap gear may be lawfully set in the Outer Cape Cod Lobster Conservation Management Area, pursuant to the seasonal closure of the Outer Cape Cod Lobster Conservation Management Area at 322 CMR §6.02(7)(a) and the seasonal commercial trap

gear haul-out period at 322 §CMR 12.04(2).

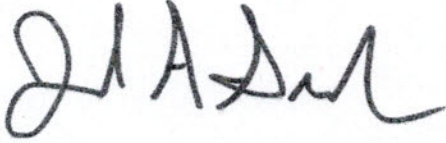
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6. The Respondent acknowledges that his alleged violations of G.L. c. 130, §§41, 41A and 44 and 322 CMR §§ 6.02(4) and 6.02(5)(e)(3) may serve to increase the severity of any future violation of the Commonwealth's marine fisheries laws and regulations, which may result in the revocation of all or some of his remaining commercial fishing permits and regulated fishery permit endorsements.
7. The parties agree that if the Director approves this written settlement agreement then they have waived whatever rights they may have to a hearing and any further administrative review of this matter before the Division or judicial review to the Courts.



James P. Connors, Esq.
Attorney for the Respondent



Date



Jared A. Silva
Agency Representative
MA Division of Marine Fisheries

March 9, 2021

Date


SERVICE LIST

*Matter of Darrell Rushnak and Coastal Commercial Lobster Permit DMF
ID# 1302*

DOCKET NO. CCLP-1302-JS-20

1. Settlement Agreement

The above document was sent via email to: julia.kaplan@mass.gov

Attest: 
Jared Silva, Agency Representative
Division of Marine Fisheries
Administrative Law Section
251 Causeway Street, Suite 400
Boston, MA 02114
julia.kaplan@mass.gov

Date: March 10, 2021

PARTIES

Respondent's Attorney
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