



Paul J. Diodati
Director

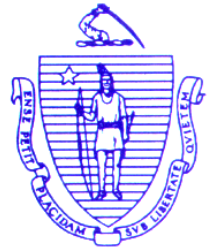
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Paul Tasha
15 Howland Street
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NOTICE OF FINAL AGENCY ACTION

Final Decision of the Director
Adjudicatory Proceeding
Matter of Paul Tasha
Docket No. CCLP-2284-13-DM

Dear Mr. Tasha:

Having reviewed the entire record of the above-referenced adjudicatory proceeding I hereby concur with and adopt the attached **FINAL DECISION** of the Administrative Law Magistrate dated January 23, 2015 as my final decision in this matter.

Accordingly, coastal commercial lobster permit #2284 for the taking of lobsters by means of traps shall not be renewed and will be removed from the fishery.

My decision constitutes final agency action for purposes of your rights to judicial review. In accordance with G.L. c.30A, §14 you have thirty days from your receipt of this **Final Decision** to file an appropriate action in the Superior Court.

Regards,

A handwritten signature in black ink that reads "Paul J. Diodati". The signature is written in a cursive style with a large, stylized "P" and "D".

Paul J. Diodati
Director

Enc. **FINAL DECISION**

At the conference the agency representative Deputy Director Dan McKiernan and the

attorney for Tasha Steven Ouellette stated that notwithstanding their best efforts they were unsuccessful in their attempts to settle, resolve or agree on any of the issues in this proceeding or the underlying basis for the proposed agency action. The parties agreed at the conference to the use of pre-filed written direct and rebuttal testimony ("PFT") in lieu of limiting the number of witnesses called to testify at the hearing, in particular character witnesses.

On December 3, 2013 I issued a Pre-Hearing Conference Report which established the specific issues to be adjudicated, closed the period of discovery, conditioned the use of e-filing, did not disallow the use of character testimony, but rather required pre-filed written direct and rebuttal testimony ("PFT") for all witnesses that the parties intended to call.

On March 7, 2014, a hearing was held for the purpose of cross-examining those witnesses with PFT. Counsel for Tasha cross-examined agency witnesses McKiernan, Story Reed ("Reed") and Derek Perry ("Perry"). Agency representative Kevin Creighton ("Creighton") cross examined the respondent.¹ After closing statements both parties filed their recommended findings of fact and conclusions of law.

I issued a Tentative Decision on December 17, 2014. Respondent's representative filed written objections to the Tentative Decision on January 17, 2015. The respondent's written objections are contained in the record of this proceeding and I have addressed them where appropriate within this Final Decision.

II. BACKGROUND

Section III., ¶7 of the December 3, 2013 Pre-Hearing Conference Report determines the issues to be adjudicated in this proceeding and thus dictates in large measure the substantial evidence that is necessary to establish relevant factual findings. An Administrative Law Magistrate presiding at an adjudicatory hearing, studying the evidentiary documents, reading the

¹ Deputy Director Daniel McKiernan, with almost 30 years of fishery management experience, was representing the agency in this proceeding. On his own motion Mr. McKiernan recused himself from this role and was replaced by agency representative Kevin Creighton. The accompanying affidavit to the motion for recusal stated that it was based on a public petition being circulated by the respondent seeking "... To Stop Div. of Marine Fisheries Abuse of Power and Misconduct." The respondent's public petition sought signatures of individuals to "... petition [specifically named state legislators] for the suspension of Daniel McKiernan ... from his position [agency deputy director] for a variety of reasons ..." I will not recite the actual allegations contained in the "variety of reasons" simply because the petition is without foundation. It is clearly designed to intimidate, coerce and threaten the economic and professional life of a public servant whose duties and responsibilities include representing the agency at adjudicatory proceedings. I have been an Administrative Law Magistrate for over 35 years. Mr. McKiernan has appeared before me for well over fifteen of those years as agency representative. I can say without reservation that Mr. McKiernan's integrity, truthfulness and professionalism are above reproach. I can think of no instance whatsoever that might call into question his truthfulness, character, judgment or behavior. Mr. McKiernan's own motion recusing himself as agency representative in this proceeding belies the respondent's petition.

PFT and observing the demeanor of witnesses being cross-examined need not follow the rules of evidence observed by courts.² Agencies generally have wide discretion in ruling on evidence.³ Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.⁴ Parties must produce "competent evidence from a credible source" sufficient to meet the substantial evidence burden of proof.⁵

III. FINDINGS OF FACT

1. On March 28, 2013 Tasha renewed lobster permit ID #2284 which includes regulated fishery permit endorsements for dogfish, fluke, striped bass, SW groundfish and shellfish.

2. Lobster permit ID #2284 with regulated fishery permit endorsements issued to Tasha expired on December 31, 2012.

3. Tasha has been a commercial lobsterman for 44 years using primarily the technique of SCUBA diving for lobsters to catch and take them by hand as opposed to the use of lobster traps and is known as a commercial lobster diver.

4. Tasha has been actively involved in fishery management issues since the late 1990s and has worked with federal, state and local officials for improvements to shellfish management, enhancing fishery habitat and the importance of protecting eel grass from damage or destruction.

5. Tasha has no history of marine fishery violations and his character is not in issue.

6. Lobster permit ID #2284 authorizes Tasha to catch and take lobsters for commercial purposes from waters within the Outer Cape Lobster Conservation and Management Area ("outer cape LCMA") as that area is defined in 322 CMR §6.33.

7. The waters south/south-east of Provincetown Harbor, including all waters of the harbor itself fall within both the outer cape LCMA and the right whale critical habitat.

² G.L. c.30A, §11(2); 801 CMR §1.01(10)(d)(2). For purposes of respondent's written objections disputing Findings of Fact #25-28 of the Tentative Decision it is enough to say that I found much of Tasha's direct and re-direct PFT as well as his answers to questions on cross examination to be irrelevant, immaterial, repetitious, inflammatory, non-responsive to the issues to be adjudicated and for the most part uncorroborated by any competent witness or exhibit.

³ *Rate Setting Commission v. Baystate Medical Center*, 422 Mass. 744 (1996).

⁴ *Matter of Cormier Construction Co.*, Final Decision, 1 DEPR 159, 160 (1994).

⁵ *Matter of Nelson*, 6 DEPR 120, 123 (1999).

8. Tasha's approved buoy colors are orange and gold.

9. The required 2012 monthly trip level commercial reports filed by Tasha state that he fished for lobsters by hand while SCUBA diving.

10. In 2013 the Provincetown Center for Coastal Studies (PCCS) with a grant from the National Fish and Wildlife Foundation undertook a fixed gear recovery project in Massachusetts to study and relieve lost, stolen, inactive, stored or abandoned fixed fishing gear left in the waters of the right whale critical habitat Cape Cod Bay off Provincetown, Truro and Wellfleet.⁶

11. The right whale critical habitat as defined in the protected species regulations at 322 CMR 12.00 is subject to comprehensive and demanding state and federal conservation requirements and restrictions to prevent the possibility of large endangered whales from becoming entangled in fixed gear.⁷

12. Derek Perry ("Perry") has been employed by the agency for approximately eight years with duties and responsibilities that include agency liaison to the Massachusetts Environmental Police ("OLE") for the enforcement of the lobster conservation and management laws.

13. Agency written approval as well as OLE authorization was provided to PCCS to conduct its study by locating, identifying and hauling from the water any fixed gear that was determined to be abandoned or any non compliant fixed gear determined to be in violation of the agencies' gear marking and gear modification requirements.

14. PCCS contracted with commercial fishermen to conduct the study with the use of the contracted fishermen's lobster boat during a four week period from March to April 2013.⁸

15. PCCS notified the agency and OLE when they located any marked or tagged fixed

⁶ Fixed fishing gear is by agency definition any bottom or sink gillnets or pots or traps that are set on the ocean bottom or in the water column and are usually connected to lines that extend to the water's surface. 322 CMR §12.01(6).

⁷ The northern right is listed and managed as an endangered species by agencies of both the Commonwealth and the United States. The right whale critical habitat is designated by agency regulations as a protective area for northern right whales that feed within the Bay during late winter early spring. Agency regulations prohibit the setting of lobster gear within the critical habitat in order to protect endangered right whales from potential entanglements with such fixed gear, in particular the vertical lines running from the buoy to the trap or trawl when feeding. *Id.* In January 2002 the federal district court dismissed by agreement of the parties a suit filed in 1996 under the Endangered Species Act after the Commonwealth adopted measures that significantly restrict and require the modification of all fixed gear, including lobster pots, in all waters under the jurisdiction of the Commonwealth to minimize the possibility of entanglements with right whales. *Strahan v. Cox*, 939 F.Supp. 963 (D. Mass. 1996); see also *Strahan v. Pritchard*, 473 F.Supp.2d 230 (D. Mass. 2007) in which the Commonwealth was required to file three early status reports with the court. The Commonwealth's second status report outlined enforcement of the protected species regulations including the results of a civil forfeiture case and criminal trial involving a gillnet fishermen using non-compliant gear. *Defendant's Second Status Report*, 3-4, October 1, 2008. At the conclusion of the three year period the court granted the Commonwealth's motion for summary judgment dismissing the plaintiff's case. Affirmed on appeal to the 1st Circuit, *Strahan v. Bowles, et al.*, No. 11-1822, February 17, 2012.

⁸ This time period was selected because it coincided with the January 15-March 15 period when fishermen are required to remove lobster traps from waters in the outer cape LCMA and the right whale critical habitat.

fishing gear determined by Perry to be abandoned, lost, stolen, derelict or not in compliance with agency gear modification requirements.

16. On March 12, 2013, during the right whale season Perry and the PCCS on board the contracted commercial lobster boat *F/V Resolve* were steaming on the 30' contour line in waters of the right whale critical habitat in Provincetown Harbor for the purpose of hauling buoys marked as single traps which posed an entanglement risk and are prohibited between January 1st and March 15th.

17. Perry could readily see twenty lobster buoys with Tasha's orange and gold colors and some showing Tasha's lobster permit number.

18. In addition to thirty other non-compliant lobster traps and related gear, Perry and PCCS hauled Tasha's twenty buoys including the twenty lobster traps that each buoy was individually attached to.

19. Inspection of the twenty traps and related gear by Perry confirmed that all traps, buoys and single lines were not in compliance with multiple agency fixed gear modification and identification requirements.

20. In addition to the other thirty non-compliant lobster traps and related gear Tasha's twenty non-compliant lobster traps and related gear were all removed from the water and taken directly to the MacMillan Pier in Provincetown for temporary storage.

21. Conducting a second survey of the gear Perry assisted by agency biologist Steven Wilcox confirmed the earlier conclusion that sufficient markings on the twenty lobster traps and related gear identified Tasha as their owner and that all twenty traps and lines were in violation of multiple gear marking and gear modification requirements for use in those particular waters on those particular dates.⁹

22. On March 13, 2013 with Tasha present Perry retrieved all fifty traps, including the twenty belonging to Tasha, from MacMillan Pier and transported them to the agency facility in New Bedford where they were secured by Perry and Wilcox.

23. At this time Tasha confirmed that the traps were his and said that he was transiting the area with the lobster traps on his boat and decided to set them just south of the Provincetown breakwater due to rough seas.

24. Tasha also said at this time that he later returned to the area where he set his traps to retrieve them but did not find them there and asked other commercial fishermen if they had seen them.

25. All twenty of Tasha's lobster traps recovered by Perry and PCCS were singled

⁹ The waters off Provincetown where Perry located and removed Tasha's buoys and traps from are within the outer cape LCMA and the right whale critical habitat. See 322 CMR §§6.33 and 12.00, respectively.

buoyed.¹⁰

26. All twenty of Tasha's lobster traps recovered by Perry and PCCS were not affixed with the required 2012 trap tag.

27. Eighteen of Tasha's twenty lobster traps recovered by Perry and PCCS were rigged with buoy lines that did not have a weak link capable of parting when subject to 600 pounds or more of pull pressure.

28. All twenty of Tasha's lobster traps recovered by Perry and PCCS were rigged with buoy lines that did not have a weak link capable of parting when subject to 500 pounds or more of pull pressure.¹¹

29. All twenty of Tasha's lobster traps did not have rectangular escape vents 2" x 5 $\frac{3}{4}$ " in measured size or two circular vents at least 2 $\frac{5}{8}$ " diameter or larger in measured size.

30. Eleven of Tasha's twenty lobster traps were rigged with buoy lines that did not bear a four-inch red mark midway through the buoy line, as required for all lobster traps used under authority of a commercial lobster permit authorized for use in the outer cape LCMA area.

31. Based on Perry's determination and report to McKiernan that the twenty traps belonged to Tasha and that none of them were in compliance with fixed gear marking and fixed gear modification requirements Storey Reed ("Reed") of the agency's fisheries statistics program conducted an audit of Tasha's catch reports.

32. All commercial fishing permit holders are required to complete, sign under the pains and penalties of perjury and file with the agency on a timely basis accurate catch reports.¹²

33. Reed's audit of Tasha's 2012 monthly trip level commercial reports showed that the information contained in Tasha's Trip level commercial reports one directly contradicted the information contained in the 2012 supplemental catch report.

34. Tasha filed monthly trip level commercial reports with the agency stating that he did not fish with any lobster traps during the months of September, October, November and December 2012.

¹⁰ Single buoyed means that each individual lobster trap is attached to a single vertical line which is connected to a standard floating buoy.

¹¹ Weak links are defined in the protected species regulations as a breakable section or device that will part when subjected to specified poundage of pull [500 or 600 pounds] pressure and after parting, will result in a knot-less end, no thicker than the diameter of the line, the so-called "bitter end" to prevent lodging in whale baleen." 322 CMR §12.02(19).

¹² It is a primary responsibility of all commercial fishing permit holders to submit statistical reports to the agency in two forms: (1) a trip level commercial report every 30 days; and (2) a single supplemental catch report at the end of the year. All such reports must contain specific information on the species, dates, times, locations, sizes or weight of catch and the buyer. Accurate and timely statistical reports are critical for the management of any fishery resource not the least of which is the lobster fishery. G.L. c.130, §21; 322 CMR §3.04, §4.13, §§6.01-6.02, §§6.12-6.14, §§6.25-6.26, §§6.31-6.33, §7.03, §12.03 and §12.05-12.09.

35. Tasha filed a supplemental catch report for 2012 stating that he fished thirty single-buoyed lobster traps during the months of September, October, November and December 2012.

36. Tasha's 2012 monthly catch reports and his 2012 supplemental catch report directly contradict one another and establish *ipso facto* that one of them is false - they both cannot be correct.

37. Tasha made no effort to clarify these reporting contradictions to the agency.

IV. CONCLUSIONS OF LAW

1. G.L. c.130, §1 defines the verb "to fish" in all of its moods and tenses as taking or attempting to take fish by any method or means, whether or not such method or means results in their capture.¹³

2. 322 CMR §12.02(12) defines "pot" as any lobster or fish trap placed on the ocean bottom.

3. 322 CMR 12.02(16) defines the verb "[t]o abandon" to mean leaving fixed gear which includes lobster traps in the water without hauling them at least once every 30 days or in the case of prohibited areas during the prohibited period of time.

4. Tasha knowingly submitted a false statistical report in violation of G.L. c.130, §21.

5. All waters of Cape Cod Bay off the coast of Provincetown, Truro and Wellfleet, which include the waters where Tasha said he set his traps as well as the waters where his traps were actually located by Perry and PCCS are waters within the outer cape LCMA and the right whale critical habitat. 322 CMR §6.33; 322 CMR §12.04(1)(A).

6. Tasha violated the provisions of 322 CMR §4.13(3)(b)(iii) by setting twenty single lobster traps with single buoy lines that did not bear a four inch red mark midway on the buoy line.

7. Tasha violated the provisions of 322 CMR §6.02(1)(a)(2) by using, maintaining, abandoning or fishing lobster traps in the outer cape LCMA with vents which did not measure at least 2 inches by 5¾ inches or two circular vents that measure at least 2⅝ inches.

8. Tasha set, stored or abandoned in waters of the outer cape LCMA as defined in 322 CMR §6.33(b)(2) during the period January 15th through March 15th in violation of 322 CMR §6.02.

9. Tasha violated the provisions of 322 CMR §6.31(1)(a)(1) by fishing lobster traps in waters under the jurisdiction of the Commonwealth during 2012 that were not affixed with a

¹³ When a commercial fisherman under authority of an agency lobster permit sets lobster traps in ocean waters it is an act specifically designed to take or attempt to take lobsters. *Ad. Notice.*

2012 state waters lobster trap tag permanently attached to the trap bridge or central cross-member.

10. As used in the protected species regulations the term “to fish” means to use, set, maintain, leave in the water or haul gillnets or pots/traps to harvest, catch, or take any species of fish or lobster. 322 CMR §12.02(17).

11. G.L. c.130, §1 defines fish to include lobsters.

12. Waters under the jurisdiction of the Commonwealth include all inland waters including the inland waters of Cape Cod Bay.¹⁴

13. Tasha violated the provisions of 322 CMR §12.03(2) by abandoning fixed gear (single lobster traps) in waters under the jurisdiction of the Commonwealth.

14. Tasha violated the provisions of 322 CMR §12.05(1)(a) by abandoning single buoyed lobster traps with floating vertical lines in the right whale critical habitat during the fixed gear seasonal closure of January 1st through May 15th.

15. Tasha violated the provisions of 322 CMR §12.06(2) by setting lobster traps in waters under the jurisdiction of the Commonwealth with buoy lines that were not equipped with a weak link that will part when subjected to 600 pounds or less of pull pressure.

16. Tasha violated the provisions of 322 CMR §12.06(3)(a) by setting lobster traps in waters of the right whale critical habitat between January 1st through May 15th with buoy lines that were not equipped with a weak link that will part when subjected to 500 pounds or less of pull pressure along the buoy line.

17. It is unlawful for any commercial fishing permit holder to fish, store or abandon single pots in waters of the right whale critical habitat during the period January 1st through May 15th.

18. All of Tasha’s twenty lobster traps and related gear were located and retrieved by Perry and PCCS from waters that are located within both the right whale critical habitat area and the outer cape LCMA.

V. DISCUSSION

The American lobster fishery (*Homarus americanus*) is pervasively regulated in Massachusetts.¹⁵ Waters under the jurisdiction of the northeast states and the United States have

¹⁴ *United States v. Maine* (Massachusetts Boundary Case), 452 U.S. 429 (1981). G.L. c.1, §3.

¹⁵ The American lobster (*Homarus americanus*) is managed through the plan process by the Atlantic States Marine Fisheries Commission (“ASMFC”) which the Commonwealth is a signatory member. The agency is a member of the ASMFC Lobster Conservation Management Team. The ASMFC develops regional lobster management plans containing specifications for the management of the lobster fishery. The signatory states in the northeast implement

been divided into three recreational lobster areas and seven LCMA's. Commercial fishing permits may be endorsed for use in a particular LCMA based on historical fishing effort. There are different conservation and management measures for each LCMA. The outer cape LCMA is managed under a strict effort control plan that determines the specific number of trap tags and thus the number of traps that each commercial fisherman is authorized to fish based upon past landings. An overall cap on fishing effort limits the number of trap tags and thus the number of traps which may be fished to no more than 800. Tasha is authorized 535 sequentially numbered trap tags and thus is limited to the use of no more than 535 traps in the outer cape LCMA.¹⁶

A. Lobster Trap Tags. Tasha's PFT states that he ordered his 2012 trap tags and that that they were shipped to him on July 19, 2012. Tasha does not state that he actually affixed the 2012 tags to his lobster traps. Perry's PFT states that none of Tasha's twenty traps were affixed with a 2012 trap tag. The regulatory violation is not for a failure to order trap tags or failure to have such tags shipped. The violation is for failure to affix a tag to each lobster trap, in this case twenty, prior to setting or placing that trap in ocean waters.

B. Trap Escape Vents. Traps authorized for use by commercial fishermen in the outer cape LCMA are required to have two rectangular escape vents that measure at least 2" by 5 $\frac{3}{4}$ " or two circular escape vents that measure at least 2 $\frac{5}{8}$ ". The twenty traps which were set by Tasha and recovered by Perry and PCCS in waters of the outer cape LCMA had escape vents that were smaller than these sizes in violation of 322 CMR §6.02(1)(a)(2).¹⁷

C. Weak Link. All lobster traps set in any waters of Massachusetts are required to have a "weak link" at some point on the line that connects the trap to the buoy. This weak link is designed to break when subject to 600 pounds or more of pull or pressure. Traps that are set in the right whale critical habitat are required to have a "weak link" at some point on the line that connects the trap to the buoy buoy. This weak link is designed to break when subject to 500 pounds or more of pull or pressure. The "weak link" parts from the buoy which prevents the gear from becoming entangled on any part of a large whale that may come in contact with it.

All twenty of Tasha's traps recovered by Perry and the PCCS did not have the 500 pound weak link required for traps set in the right whale critical habitat. Eighteen traps did not have the

these specifications by individual state rulemakings and enforce the rules through the state's marine fisheries law enforcement agency. *Ad. Notice*. <http://www.asmfc.org/species/american-lobster>.

¹⁶ See Tasha Permit Inventory.

¹⁷ All of Tasha's twenty traps had smaller escape vent openings - Perry measured them to be approximately 1 15/16" by 5 3/4" rectangular or 2 5/8" circular. Perry Enforcement Report, p.2.

600 pound weak link required of traps set in all other waters under the jurisdiction of the Commonwealth. In effect, none of Tasha's single trap lines were modified with a weak link designed to break if it comes into contact with large whales.

D. Marking Buoy Lines. All lobster traps set in the outer cape LCMA are required to have all vertical lines that are attached to the buoy clearly identified as outer cape LCMA gear by means of a four-inch red mark midway through the vertical line. Eleven of Tasha's twenty traps recovered by Perry and the PCCS had single vertical lines, each attached to a buoy, all of which were missing the mandatory four-inch red marking 322 CMR 4.13.

E. Seasonal Closure. The outer cape LCMA has a seasonal closure that coincides with the winter arrival of the northern right whale. Specifically, all traps set in the outer cape LCMA must be removed no later than January 15th and may not be reset in this area until after March 15th. Tasha's twenty traps were recovered from the outer cape LCMA by Perry and PCCS on March 12th. Tasha was required by 322 CMR §6.02(5)(a) to remove all lobster traps from waters of the outer cape LCMA during the seasonal closure. In addition, it is unlawful for a fisherman authorized to fish traps in waters of the outer cape LCMA to abandon any lobster traps in these waters during the seasonal closure.

In effect there are three sub-requirements at play here – two prohibitory and one affirmative. The first prohibits setting, fishing or abandoning traps in the outer cape LCMA between January 15th and March 15th. There is no evidence that Tasha undertook either of these three activities during this time nor is the agency alleging that he did. The second requires that any traps set in this area be removed prior to January 15th. That requirement was clearly not complied with. The third prohibits abandoning any traps set in this area from January 15th through March 15th. Tasha had seven months to locate and remove from these waters all thirty traps he set as required. He failed to do so.

F. Abandoning Lobster Traps. Relevant portions of Tasha's PFT are significant not for what he states, but rather for what he doesn't state. At no point in either his direct or redirect PFT does Tasha provide the dates, areas, amount of actual time spent or any other particulars that would tend to establish the fact that he or any other person on his behalf actually conducted a meaningful search for the thirty traps that he set. Moreover, Tasha provides no corroborating testimony that he actually set them in waters on the 65' contour south east of Long Point as he states. To the contrary, Tasha's PFT contradicts his recommended findings of fact regarding the

area where he claims to have set his traps when he states that “I set 30 traps east of Long Point in approximately 65 feet of water, east southeast along the 65 foot contour.”¹⁸ Tasha’s Request for Findings of Fact states that “... he set 30 single lobster traps along the 10 fathom edge ...”¹⁹

This contradiction further muddies the waters surrounding the actual location where Tasha set his traps, which in turn confuses the actual location(s) where Tasha might have or should have searched for his traps. Tasha states that “a few days later, [after setting the traps in the end of August] Tom Scherer and I went out and were unable to find any of the traps.”²⁰ Tom Scherer, a commercial lobsterman who fishes out of Provincetown states in his PFT that “*I believe Paul set some lobster traps in August. He told me they were East of Long Point. At some point in September I assisted Paul in looking for his traps in this area on one day. After that we would be fishing in his boat and made some swings looking for his traps in that area, but never located any.*”²¹

Tasha goes on to say that “I never thought to look in the area where they [his lobster traps] were actually found ...” which was “about 1½ miles from where I had set it.”²² He concludes by stating that “I fully intended to haul the gear in mid-November, but despite my best efforts to locate the gear and my inquiries to other fishermen, I was unable to locate and remove it.” These statements in no way give rise to the conclusion that Tasha actually conducted or undertook a meaningful, determined or thoughtful search for his traps which in turn falls far short of a finding that he conducted anything remotely resembling a search and removal of his traps. To be sure, whatever search efforts were undertaken by Tasha was admittedly abandoned by him with the intent of leaving his traps in the water during the seasonal closure in the outer cape LCMA.

While the regulation does not specifically speak to a search in so many words for traps set in the outer cape LCMA when it’s discovered that they are no longer at the location where they were initially set it is most assuredly implied in the regulation and is an expected activity of the fisherman to find his traps for purposes of removal during the seasonal closure. The regulation as worded does relieve Tasha from the regulatory responsibility of seeing that all the traps he set in this area are either removed or otherwise accounted for prior to January 15th. The

¹⁸ Affidavit of Paul Tasha, ¶7.

¹⁹ Respondent’s Recommended Findings of Fact, ¶2.

²⁰ Affidavit of Paul Tasha, ¶9.

²¹ Affidavit of Tom Scherer, ¶6, emphasis supplied.

²² Affidavit of Paul Tasha, ¶15.

conclusion to be drawn from Tasha's failure to conduct a meaningful search until his traps were located and removed whenever that time might be indicates an intention to leave the traps he set in the outer cape LCMA in the water during the seasonal closure. Clearly, under these facts thirty traps that Tasha set in these waters (twenty of these traps located and removed by Perry and PCCS) had been abandoned by Tasha.²³

In addition to the lobster conservation and management regulations applicable to these waters, the agencies' protected species regulations at 322 CMR 12.00 establish a number of spatial and temporal fixed gear restrictions within the right whale critical habitat area, a larger overlay to the outer cape LCMA. During the winter months when at least 60% of the endangered northern right whales are feeding in these particular waters off Provincetown, Wellfleet and Truro the agency and the Office of Law Enforcement regularly haul lobster traps and related fixed gear from this area to ensure that the Commonwealth is undertaking its responsibilities by making every effort to minimize any threat of fixed gear entanglement with large endangered whales. The regulations place the primary responsibility of fixed gear removal on the fisherman by requiring that they remove all their fixed gear in the area by January 15th and prohibit storing, leaving or abandoning any single buoyed lobster traps in this area between January 1st and March 15th. All twenty of Tasha's traps located by Perry and the PCCS in waters of the right whale critical habitat are single buoyed traps. Tasha had four months to remove the thirty lobster traps that he set in August. Perry's PFT states that Tasha's orange buoys were readily visible when the F/V *Resolve* came upon them along the 30' contour east southeast of the Provincetown Breakwater.²⁴ The twenty traps with single lines and single buoys that Tasha did not remove from these waters posed an entanglement threat to the endangered northern right whales and their calves during the winter/spring feeding in Cape Cod Bay.

Consistent with the lobster conservation and management plan and the Commonwealth's protected species regulations, commercial fixed gear fishermen allowed the privilege of harvesting lobsters from waters in Cape Cod Bay must exercise due diligence in keeping track of their fixed gear that they set in the right whale critical habitat especially when the winter/spring

²³ The birthing process of the northern right whales occurs off the coast of the south Atlantic states. The mothers and their calves migrate north to the Bay of Fundy stopping in Cape Cod Bay during the winter/spring months each year for rest and to feed on the large populations of plankton. These waters support up to 60% of the known population of northern right whales. <http://www.mass.gov/eea/agencies/dfg/dmf/programs-and-projects/protected-species.html>. Perry Enforcement Report, March 19, 2013, p.2

²⁴ Perry PFT, ¶¶7 and 8.

right whale feeding season rolls around every winter/spring in Cape Cod Bay. Fishermen are held strictly accountable for abandoning single buoyed lobster traps in the right whale critical habitat during the right whale feeding season between January 1st through May 15th and for their failure to ensure the removal of this gear during this period.²⁵

VI. CONCLUSION AND RECOMMENDATION

Paul Tasha was not a credible witness. His direct and re-direct PFT was not corroborated by any other evidentiary source. By his own admission he is a lobster fisherman who primarily harvests by hand with SCUBA diving gear and not by traps. This may very well explain his difficulty he has complying with the many regulations governing area, time, size, season, reporting and fixed gear marking and modification measures for the lobster trap fishery in waters of the outer cape LCMA and the right whale critical habitat.

Twenty non-compliant lobster traps that belong to Tasha were found in waters of the right whale critical habitat during an annual agency sweep of the area. These twenty traps and their single buoy gear violated multiple trap and gear marking, modification and identification requirements set forth in statute and regulation. Tasha set these twenty traps in the critical habitat area but did not remove them prior to the arrival of the right whale season. Tasha's written objections to the Tentative Decision offers another scenario for what could have happened to these traps after he set them. However, he offers no credible proof whatsoever to support any evidentiary findings that that these twenty traps were stolen from the waters where he set them, tampered with and then re-set by a rogue fisherman in waters at the entrance to Provincetown harbor visible for all to see. Tasha's own conjecture, hypothesis and the generalized statements in the affidavits of other commercial fisherman about the existence of rogue fishermen stealing and tampering with fishing gear is not substantial evidence in this proceeding.

This proceeding does not involve issues of commission that revolve around the actual performance of a particular act of fishing, real time fishing conduct or the physical activity of harvesting, taking, landing or selling lobsters. Rather, it involves issues of omission or the non-performance of an act that is otherwise required to be taken. The issues in this case revolve around the required removal of lobster traps and gear from the right whale critical habitat and the

²⁵ The coastal commercial lobster fishery is a limited entry fishery where no new permits have been issued since 1975 when G.L. c.130, §38B was enacted on an emergency basis. That section authorizes the Director to renew "existing commercial fishermen permit for the taking of lobsters in coastal waters held by any *qualified* person during the previous year. *Id.* See also 322 CMR §§7.03, and 7.06. *Matter of Le*, #CLP-6140-13-DM, October 15, 2010; *Matter of Merenda*, # BP-05350-08-KR, May 8, 2009 *Matter of Young*, #CCLP-7265-08, August 28, 2008;

outer cape LCMA during the right whale season.²⁶ Whether these twenty traps were being actively fished is not a necessary evidentiary finding to the issue of leaving, storing or abandoning non-compliant lobster traps in the right whale critical habitat.

Based on the evidentiary record in this case including exhibits, documents, photos, direct and re-direct PFT, observing the witnesses during cross examination, closing arguments and review of the parties' requests for findings of fact and conclusions of law, I am recommending that Tasha's coastal commercial lobster permit for the commercial lobster trap fishery not be renewed. I make no recommendation with regard to the renewal or non-renewal of that portion of Tasha's lobster permit that authorizes the commercial harvest of lobsters by hand and SCUBA gear or the renewal of other permit endorsements for hand harvesting fisheries such as shellfish, seaworms or surf clams.

Dated: January 23, 2015

By: [Signature]
David C. Hoover, Esq.
Administrative Law Magistrate

²⁶ See Pre-Hearing Conference Report, p.3 which provides that the issues to be adjudicated involve the act of maintaining, storing, abandoning or failing to remove from the water fixed lobster trap gear from certain waters of Cape Cod Bay during the right whale season.