



Paul J. Diodati
Director

Commonwealth of Massachusetts

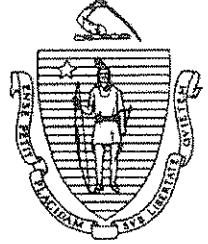
Division of Marine Fisheries

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August 6, 2013

NOTICE OF FINAL AGENCY ACTION

Final Decision of the Director
Adjudicatory Proceeding
Docket No. CLP-614013-DM

Thong M. Le
9 Henshaw Street
Woburn, MA 01801

RE: *In the Matter of Thong Le* and Coastal Commercial Lobster Permit #6140 with Regulated Fishery Permit Endorsements

Dear Mr. Le:

Having reviewed the record of the above-referenced Adjudicatory Proceeding I hereby concur with and adopt the findings of fact, conclusions of law and recommendation of the Administrative Law Magistrate as set forth in his Final Decision dated August 5, 2013 as my **Final Decision** in this proceeding.

Therefore, coastal commercial lobster permit #6140 and all regulated fishery permit endorsements are hereby revoked. Upon receipt of this letter you are required to return coastal commercial lobster permit #6140 to this agency by mail or surrender it to any Environmental Police Officer.

My decision constitutes **Final Agency Action** for purposes of G.L. c.30A, §14. You have thirty days from your receipt of my **Final Decision** to seek judicial review pursuant to G.L. c.30A, §14.

Sincerely,

Paul J. Diodati
Director

Final Decision
cc: Dan McKiernan
Roger Thurlow

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET CLP-6140-13-DM

IN THE MATTER OF:

THONG LE and COASTAL
COMMERCIAL LOBSTER
PERMIT ID # 6140 with ALL
REGULATED FISHERY
PERMIT ENDORSEMENTS

FINAL DECISION

This is an adjudicatory proceeding conducted by the agency under authority of G.L. c.30A, §13, G.L. c.130, §80, 322 CMR §7.01(9) and in accordance with the Formal Rules of Adjudicatory Practice and Procedure, 801 CMR §1.01, et seq. A Notice of Proposed Agency Action dated September 14, 2013 was served on the respondent (Mr. Le). By letter dated September 28, 2012 Mr. Le requested a hearing regarding the proposed permit sanctions.

On February 15, 2013 a hearing was held to adjudicate charges filed with the agency by the Massachusetts Environmental Police alleging violations of the marine fishery laws of the Commonwealth by Mr. Le. Present at the hearing were agency Deputy Director Dan McKiernan, Environmental Police Officers (ELE) Mark Griffin, Michael Lees, Cynthia Kalkwarf, the respondent Mr. Le and a Vietnamese interpreter supplied by the agency.

The hearing was electronically recorded. All witnesses were administered the oath. The record of the proceeding consists of notices, letters, petitions, photographs, ELE reports 10-156-AR, 11-117-AR, 11-353-OF, 11-454-OF and testimony.

In accordance with 801 CMR §1.01(11)(c)(1) a Tentative Decision was issued on July 3, 2013. No written comments or objections to the Tentative Decision were filed by either party.

I. BACKGROUND

Numerous good faith attempts were made by the parties to reach a settlement of this matter without success. Although the agency supplied a Vietnamese interpreter, and she remained throughout the hearing, Mr. Le was fluent enough in English to dispense with the assistance of translation.

Mr. Le admitted to the charges as contained in ELE reports 10-156-AR, 11-353-AR and 11-454-OF, and to the testimony of ELE Officers Lees, Kalkwarf and Griffin. Mr. Le did testify that the established lobstermen in his fishing community interfered with his lobster fishing activities by such means as cutting his trap lines, buoy lines and scuttling his lobster boat in a continuing effort to prevent his participation in the lobster fishery. While this Magistrate is sympathetic to Mr. Le's plight, the deplorable actions used by other lobstermen to stop Mr. Le from harvesting lobsters is of little relevance to the issue of Mr. Le's guilt or innocence of the ELE charges and the issues to be adjudicated.

II. FINDINGS OF FACT

Having heard the testimony of the witnesses, and upon review and study of the written record of this case, I hereby find the following facts:

1. Mr. Le is a commercial fishermen and the holder of coastal commercial lobster permit ID #6140 with endorsements including Lobster Management Area (LMA) 1.
2. Other commercial fishermen in the area were interfering with Mr. Le's fishing activities by cutting the line that connects buoys with the lobster trap trawl lines that were being used by Mr. Le, and by scuttling his boat.
3. On October 20, 2010, Mr. Le was in possession of 24 undersized lobsters less than the minimum size limit of 3¼" and 16 v-notched female lobsters.
4. Mr. Le had on board his boat the proper device used to measure the size of lobsters and was able to show ELE that he knew how to properly use the device to determine the legal size limit of a lobster.
5. On October 20, 2010, Mr. Le was fishing for lobsters in waters under the jurisdiction of Commonwealth without the required display of buoys painted in a color scheme approved by the Director of *Marine Fisheries*.

6. On October 20, 2010 Mr. Le failed to display a coastal commercial lobster permit to ELE Officers upon their request.

7. On November 24, 2011 Mr. Le was in possession of 2 v-notched female lobsters.

8. On November 24, 2011 Mr. Le was fishing for lobsters in waters under the jurisdiction of Commonwealth using positively buoyant groundline.

9. On September 7, 2012 Mr. Le intentionally interfered with a routine ELE inspection of his lobster gear and catch by attempting to hide his catch of lobsters through the actions of his crewman who deliberately cut the rope tied to a "fish/lobster car" in the water which contained his daily catch of lobsters.¹

10. On September 7, 2012 Mr. Le's fish/lobster car was not marked with his coastal commercial lobster permit number.

11. On September 6-7, 2012 Mr. Le was fishing for lobsters in waters under the jurisdiction of Commonwealth using positively buoyant groundline.²

12. On September 7, 2012 Mr. Le was in possession of 31 undersized lobsters less than the minimum size limit of 3¼", 4 v-notched female lobsters and 1 mutilated v-notched female lobster.

13. ELE officers Lees, Kalkwarf and Griffin advised Mr. Le, who understood, on many occasions about the specific provisions of those marine fishery laws that he was running afoul of.

III. CONCLUSIONS OF LAW

1. It is a violation of 322 CMR §1.01 the owner or operator of any fishing vessel to not comply with or otherwise facilitate the inspection of the vessel, its gear, and/or catch by an ELE officer.

2. It is a violation of G.L. c.130, §38 for the holder of a commercial lobster permit to not carry it on his person or post it on his vessel at all times when fishing for lobsters.

¹ G.L. c.130, §1 defines "fish car" as a box or other contrivance whether floating or sunken which is used for keeping fish and lobsters alive; 322 CMR §6.14 defines a lobster car as any container, enclosure, crate or other container or contrivance designed to hold and store lobsters.

² Since January 1, 2007 groundline used with lobster traps must be "negatively" buoyant line. It has been unlawful for the past 7 years to use "positively" buoyant line. Commonly referred to as sinking groundline, negatively buoyant line replaces the old surface or floating line which was banned because it presented a potential threat to endangered large whales such as the right whale of becoming entangled in the fishing gear. Ad.Notice.

3. It is a violation of G.L. c.130, §2 and 322 CMR §7.01(14)(g) for a commercial fisherman to fail to produce a commercial fishing permit issued to him by the Director of *Marine Fisheries* upon the demand of ELE.

4. It is a violation of G.L. c.130, §38A for commercial lobstermen to not identify themselves, their boat and their lobster gear by the prominent display of buoys painted in a color scheme approved by the Director of *Marine Fisheries*.

5. It is a violation of 322 CMR §6.01(1)(a)(1) for a coastal commercial lobster permit holder authorized to fish in LMA 1 to possess any lobsters which are less than the minimum size of 3¼”.

6. It is a violation of 322 CMR §6.02(e)(1) for a coastal commercial lobster permit holder authorized to fish in LMA 1 to possess any female lobster whose flipper bears a v-shaped notch of any size with or without setal hairs.

7. It is a violation of 322 CMR §6.02(3)(c) for any person to possess a female lobster that is mutilated in a manner that could hide, obscure or obliterate a v-shaped notch of the flipper.

8. It is a violation of 322 CMR §12.03(1) for any person to fish fixed fishing gear (including lobster pots) with groundline (line or rope) floating at the water's surface or with line that is otherwise positively buoyant groundline.

9. The coastal commercial lobster fishery is a limited entry fishery, and the coastal commercial lobster permit is a limited entry permit. G.L. c.130, §38B.

IV. DISCUSSION AND CONCLUSION

Mr. Le did not dispute the testimony of ELE officers Lees, Kalkwarf and Griffin or to the charges contained in ELE reports 10-156-AR, 11-353-AR and 11-454-OF. To the contrary, he readily admitted to the charges and testimony of the officers. Mr. Le's testimony about the difficulty he was experiencing with other lobstermen in the area may be seen as a reason or excuse for not complying with the required marine fishery laws, but it is not a defense. However despicable and illegal the conduct of other fishermen may be, it is Mr. Le's own conduct that is in issue here. It may be that Mr. Le has recourse in the civil courts of the Commonwealth to seek recovery for the economic harm done to him by other fishermen.

Continued and multiple violations of the marine fishery laws undermines the fishery management efforts of *Marine Fisheries* and has a negative impact on the resource and the industry that depends on a continually sustainable stock of that resource.³ Repeated violations by the same person may create a compliance disincentive to other commercial fishermen and/or lead to violence or property damage. The only effective and permanent action available to the Director to stop and prevent recurring or multiple violations of marine fishery laws by a permit holder is through the fishing permit itself, specifically, by its revocation. Although harsh, the revocation of a commercial fishing permit is a necessary and appropriate remedy available to the Director to stop multiple, recurring violations or in cases that establish a pattern of non-compliance by the permit holder.

The Director's authority to issue a permit includes the authority to revoke that permit. G.L. c.130, §80; *Burgess v. Mayor and Aldermen of Brockton*, 235 Mass. 95 (1920); *Connerty v. Metropolitan District Commission*, 398 Mass. 140 (1986). Revocation of permits issued by the Director are subject to due process and the adjudication requirements of G.L. c.30A, §11. The Director appoints an Administrative Law Magistrate and adjudicatory hearings are conducted in accordance with the Formal Rules of Adjudicatory Practice and Procedure to provide a permit holder with the full panoply of due process requirements. 322 CMR §7.01(9).

Revoking a commercial fishing permit is necessary and appropriate in cases that pose a threat to the public health, welfare and safety: *Matter of Reed*, SP-0001-10-DH, October 13, 2010 (revocation of commercial shellfish permit where repeated violations of contaminated shellfish laws pose public health threat). Revoking a commercial fishing permit is necessary and appropriate in cases that pose a threat to endangered species of large whales or where marine fishery violations occur in the Right Whale Critical Habitat: *Matter of Young*, CLP-7265-08, August 25, 2008 (revocation of commercial lobster permit where holder is repeatedly made aware of gear requirements in the right whale critical habitat but chooses not to comply); *Matter of Merenda*, BP-053530-08-KR, May 1, 2009 (revocation of commercial fishing permit necessary where holder repeatedly demonstrates unwillingness or inability to comply with marine fishery laws); *Matter of Powers*, CCL-004814-10-PD, May 12, 2011 (revocation of commercial lobster permit where record establishes deliberate, repeated non-compliance by

³ The American lobster is the Commonwealth's "most economically important fishery conducted within the territorial waters ..." 322 CMR §7.01(12), 322 CMR §7.03(1).

holder notwithstanding ELE reminders, warnings, citations and impoundment of non-compliant lobster gear). Revoking a commercial fishing permit is appropriate where the holder knowingly and willfully violates marine fishery laws: *Matter of Ferent*, CLP-0909-08, March 31, 2009 (non-renewal of commercial lobster permit where holder willfully continued fishing knowing it violated his written agreement not to fish, permit conditions and restrictions not to fish and while the fishing permit was temporarily suspended).

Revoking a commercial fishing permit is necessary and appropriate in cases involving the proper exercise of the responsibilities and duties of the Director. Not to revoke a commercial fishing permit in cases such as this could be construed as a failure of the Director to uphold his oath of office to “faithfully and impartially discharge and perform all the duties incumbent on me as the [Director of the Massachusetts Division of Marine Fisheries] according to the best of my abilities and understanding, agreeably to the rules and regulations of the Constitution and the laws of the Commonwealth.”⁴

The record in this case establishes that Mr. Le was found by ELE officers on separate and multiple occasions in possession of a total of 56 short lobsters and 5 v-notched female lobsters. Mr. Le had the appropriate lobster measuring device and knew how to use the device to determine the legal size limit of lobsters. Notwithstanding ELE advice, warnings, citations and gear impoundments, Mr. Le continued to use positively buoyant groundline on lobster trawls creating a risk of entanglement to large endangered whales.⁵ More pointedly, Mr. Le failed to comply with the most basic and elemental obligations required of a permitted commercial fishermen in the Commonwealth - that is, at all times to have and present their commercial fishing permit to ELE upon request; to assist ELE with routine inspections of the boat, gear, catch and permits; and to publicly mark all fishing vessels, fishing gear, buoys, traps, trawls and

⁴ Mass. Const. Pt. 2, c. 6, art. 1; Mass. Const. amend. 6; G.L. c.30, §11.

⁵ 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 had adopted measures that restricted and modified fixed gear, including lobster pots in Massachusetts waters to minimize the possibility of entanglements with right whales. *Strahan v. Coxe*, 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 status reports with the court. The 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, and the Director’s revocation of a coastal commercial lobster permit where the respondent was using positively buoyant groundline; *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.

line with the appropriate and required information that identifies the individual owner or operator which in turn allows for the exercise of safe, effective and accurate ELE enforcement responsibilities during their routine but oftentimes difficult ocean patrols.

The record of this proceeding represents one of those cases where revocation of the commercial lobster permit and all regulated fishery permit authorizations is a necessary and appropriate agency action and a proper exercise of the responsibilities and duties of the Director of *Marine Fisheries*.

IV. RECOMMENDATION

Based on all of the above, I am recommending that the Director of *Marine Fisheries* revoke the limited entry coastal commercial lobster permit ID. # 6140 and all regulated fishery permit authorizations and endorsements.

Dated: 8-5-2013

By: 

David C. Hoover, Esq.
Administrative Law Magistrate
Department of Fish and Game



Paul J. Diodati
Director

Commonwealth of Massachusetts

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August 19, 2013

AMENDED NOTICE OF FINAL AGENCY ACTION WRITTEN AUTHORIZATION TO REMOVE TRAPS AND FISHING GEAR

Matter of Le, Adjudicatory Proceeding

Docket No. CLP-614013-DM

Thong M. Le
9 Henshaw Street
Woburn, MA 01801

Dear Mr. Le:

This letter amends my August 6, 2013 **NOTICE OF FINAL AGENCY ACTION** by providing you with this **WRITTEN AUTHORIZATION** to remove all of your lobster traps and any other fishing gear owned, set or fished by you within waters under the jurisdiction of the Commonwealth within seven (7) days from the date of your receipt of this authorization or August 27, 2013, whichever is longer. This **WRITTEN AUTHORIZATION** is subject to the conditions that (1) any lobsters contained within traps or fishing gear being removed from the water are required to be returned to the sea immediately; (2) all lobster traps and gear removed shall be inspected by the Massachusetts Environmental Police; and (3) all trap tags in your possession or attached to your traps shall be surrendered to the Massachusetts Environmental Police.

Furthermore, you have failed to surrender revoked coastal commercial lobster permit #6140 to this office or to the Environmental Police as required by my August 6, 2013 **NOTICE OF FINAL AGENCY ACTION**. Continued failure to do so subjects you to further enforcement actions including arrest, criminal and civil prosecutions and payment of additional fines and penalties.

Sincerely,

Handwritten signature of Paul J. Diodati in black ink.

Paul J. Diodati
Director

cc: Dan McKiernan
Len Roberts