



David E. Pierce
Director

Commonwealth of Massachusetts

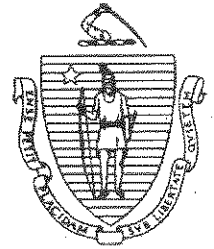
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January 4, 2016

David M. Botelho
22 Lexington Street
New Bedford, MA 02740

Re: **Matter of Botelho, Case No. CBP-167240-15-S0**
FINAL DECISION AND FINAL AGENCY ACTION

Dear Mr. Botelho:

I have attached the Magistrate's **FINAL DECISION** in the above referenced proceeding.

After a full review of the administrative record in this case and a thoughtful consideration of the Magistrate's findings and conclusions I have adopted the Magistrate's **FINAL DECISION**.

The record establishes your responsibility for multiple violations of the black sea bass recreational fishery conservation measures including possessing black sea bass during the closed season, possessing black sea bass less than the minimum size limit, possessing black sea bass well over the recreational possession limits and failure to comply with most if not all of the requirements imposed on for-hire recreational fishing that charge individual customers to recreational fish from a vessel such as yours. Black sea bass is a quota managed species that depends on fishermen strictly adhering to the regulatory requirements. Any violations have a negative impact on the black sea bass that Massachusetts' fishermen have access to under federal and interstate management plans.

I have, therefore, determined that charter boat permit ID #1415937 is hereby revoked and will not be renewed. In addition no new for-hire permit of any kind will be issued to you, any individual, corporation or business seeking one on your behalf or for use by the F/V *Ava May*. I am taking no action against commercial boat permit ID #167240 as a result of my final decision.

This letter constitutes Final Agency Action. Pursuant to G.L. c.30A, §14 you have the right to file a request for judicial review of my decision in a court of competent jurisdiction within thirty days of your receipt of this letter.

Regards,

A handwritten signature in cursive script, appearing to read "David E. Pierce".

David E. Pierce, PhD
Director

Magistrate's Final Decision

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET CBP-167240-15-S0

IN THE MATTER OF:)
)
DAVID BOTELHO and CHARTER)
BOAT PERMIT ID #1415937 AND)
COMMERCIAL FISHING BOAT)
PERMIT ID. #167240 INCLUDING)
REGULATED FISHERY PERMIT)
ENDORSEMENTS)
_____)

FINAL DECISION

I. INTRODUCTION

On Friday, July 31, 2015 I conducted a hearing in the above-captioned matter. In attendance were the respondent David Botelho and Environmental Police Officer Scott Opie. The issues for adjudication included multiple charges brought by the Massachusetts Environmental Police against Mr. Botelho for violations of both the recreational and commercial provisions of the black sea bass regulations of the Division of Marine Fisheries (322 CMR §6.28) all as specifically noticed in the Request for an Adjudicatory Proceeding.

The hearing was recorded by electronic device. Mr. Botelho and Officer Opie were sworn in and testified. Officer Opie who was allowed to read from his Police Report introduced documents, photos and other evidentiary items. Each party presented their case, was accorded an opportunity to cross-examine, and both gave brief closing statements. The record of the proceeding was compiled and is attached.

A Tentative Decision was issued on October 21, 2015. Although the parties had thirty days to file written comments and objections neither party did so.

This is a **FINAL DECISION** issued in accordance with the provisions of G.L. c.30A, §11(8) and 801 CMR §1.01(11)(d).

II. FINDINGS OF FACT

1. The Massachusetts Division of Marine Fisheries (DMF) issued David Botelho a 2015 Charter Boat permit ID #1415937 (for-hire vessel) and a 2015 boat permit (0-59') ID #167240 for the F/V *Avā May*, MA., Boat Reg. MS 2310 BB.

2. Mr. Botelho conducts a charter boat business under the name DMB Fishing Charters using the 27' *Ava May* out of Fairhaven.

3. On Monday, May 18, 2015 Officer Opie was on routine patrol in a Massachusetts Environmental Police cruiser.

4. On that date Officer Opie received a radio call from the officer in charge of the U.S. Coast Guard (USCG) Station at Woods Hole.

5. Officer Opie was informed by Chief Desirey that the USCG had a patrol boat at that moment in the vicinity of Buzzards Bay at 41° 38.12N and 070° 44.15W conducting an at-sea inspection of the *Ava May*.¹

6. Officer Opie was also informed by Chief Desirey that the captain of the *Ava May* Mr. Botelho had stated that he had finished the fishing trip and was about to return to Earl's Marina on West Island in Fairhaven, MA.

7. Officer Opie requested Chief Desirey to have the USCG follow the *Ava May* to Earl's Marina in Fairhaven upon completion of their inspection.

8. Environmental Police Officers Opie and Daniel Haynes (the Officers) met the USCG and the *Ava May* at Earl's Marina on West Island in Fairhaven.

9. The officers introduced themselves to Mr. Botelho and told him they would be conducting a state inspection of the *Ava May*, its the catch of fish on board and DMF permits held by Mr. Botelho.

10. In response to the Officers questions, Mr. Botelho stated that he had completed a recreational for-hire fishing trip and that he had black sea bass and scup onboard.

11. Mr. Botelho was a recreational fisherman operating a DMF permitted for-hire vessel to carry paying customers for the purpose of recreational fishing.

12. Upon request of the Officers Mr. Botelho was unable to produce either a USCG captain's license or a DMF charter boat permit.²

13. The 2015 boat permit (0-59') ID #167240 issued to Mr. Botelho did not have an endorsement for the commercial black sea bass regulated fishery.

14. Mr. Botelho declared that the black sea bass were stored in several coolers both on the deck and inside the cuddy cabin of the *Ava May*.

15. The officers removed the total catch of black sea bass from the *Ava May* and laid them on the dock.

16. Officer Opie counted one hundred and seven black sea bass.

¹ This area is located within waters under the jurisdiction of the Commonwealth. *Ad Notice*.

² Mr. Botelho was in fact the holder of a for-hire Charter Boat permit ID #1415937 issued by DMF but did not have it on his person or onboard.

17. Officer Opie measured all of the black sea bass and found that nineteen were less than the minimum recreational size limit of 14" in total length.

18. There were no visible and accessible fish measuring devices required to be placed onboard the *Ava May* to be used by the charter boat customers to measure the size of any black sea bass they may catch.

19. Officer Haynes escorted the four customers off the *Ava May* and onto the dock.

20. When asked by Officer Haynes, all four customers stated that they were unaware of a recreational season for black sea bass, or that the recreational season for black sea bass was closed, or the existence of any possession and size limits for the recreational harvest of black sea bass.³

21. Based on Finding No. 20 above it is reasonable to conclude from this that Mr. Botelho did not verbally inform the four customers of the minimum size and possession limits for the recreational take of black sea bass. On May 18, 2015 the recreational black sea bass season was closed and not scheduled to be re-opened until May 27, 2015.

22. Using DMF port sampling data the Officers determined that the average black sea bass harvested and landed in Massachusetts during the commercial fishing season weighs approximately 1.72 lbs.

23. Using this average the Officers estimated that the 104 black sea bass found on board the *Ava May* weighed a total of approximately 184 lbs.

24. One hundred and eighty four lbs. of black sea bass is a commercial quantity within the meaning of 322 CMR §6.28(4)(a)(2).⁴

25. The officers measured each of the black sea bass and found that nineteen of them measured less than 14" in total length not including the tail tendril.

26. Black sea bass is a species of fish that is pervasively regulated at the state, interstate and federal levels of fishery management.⁵

27. The record shows that Mr. Botelho fully cooperated with the Officers, assisted them in their inspection of the *Ava May* and its catch and permits and responded to all of their

³ The Officers learned that Mr. Botelho did not hold a valid USCG captain's license for 2015, but he was issued a DMF for-hire Charter Boat permit for the *Ava May* to carry paying customers for recreational fishing.

⁴ If the commercial possession and landing limit for black sea bass taken by hook and line is 150 lbs. per trip or 24 hour period pursuant to 322 CMR §6.28(4)(a)(4), it stands to reason that 184 lbs. of black sea bass is a commercial quantity. *Ad. Notice.*

⁵ The Atlantic States Marine Fisheries Commission (ASMFC) and the Mid-Atlantic Fisheries Management Council manages the black sea bass fishery. The management program divides a total annual quota between the recreational fishery (51%) and the commercial fishery (49%). Recreational fishery management measures include the same combination of minimum size limits, bag limits and fishing seasons for the entire coast. The commercial black sea bass quota is managed with seasonal and gear specific trip limits, no fishing days and seasonal allocations of the quota. G.L. c.130, §21; G.L. c.130, App., Parts I-IV; 322 CMR §6.28; asmfc.org; *Summer Flounder, Scup and Black Sea Bass Fishery Management Plan.*

questions.

28. Botelho did not dispute the testimony of Officer Opie, the contents of the police report, the photos entered into evidence or the charges and issues for adjudication as noticed in the Request for an Adjudicatory Proceeding.

III. CONCLUSIONS OF LAW

1. 322 CMR §6.28(1) defines a recreational fishermen as any fishermen fishing for purposes of personal or family use by angling.

2. 322 CMR §6.28(1) defines a for-hire vessel as any vessel issued a permit pursuant to 322 CMR §7.10(5)(a) to carry paying customers for the purpose of recreational fishing.

3. 322 CMR §7.10(5)(a)(1) defines a for-hire vessel having a capacity to carry up to six persons as a Charter Boat.

4. 322 CMR §7.10(2)(a) defines recreational fishing as the non-commercial taking or attempted taking of finfish for personal or family use, sport, or pleasure, and which are not sold, traded or bartered.

5. 322 CMR §7.10(4)(c) exempts those paying customers on a for-hire fishing vessel from obtaining any individual permit that may otherwise be required by provisions of G.L. c.130 or 322 CMR provided that the for-hire fishing vessel owner or operator is permitted pursuant to 322 CMR §7.10(5)(a).⁶

6. It is a violation of 322 CMR §6.28(5)(b)(1) for a recreational fisherman to possess or land any quantity of black sea bass during the closed recreational season of August 28th through May 22nd.

7. It is a violation of 322 CMR §6.28(5)(a) for a recreational fisherman to possess any black sea bass less than 14".

8. It is a violation of 322 CMR §6.28(b)(2) for a recreational fishermen to possess more than 8 black sea bass per calendar day.

9. It is a violation of 322 CMR §7.10(5)(b)(i)(1) for a for-hire Charter Boat owner or operator not to provide verbal notice to all recreational passengers onboard describing what the legal size limits and possession limits are for the applicable species of fish that will be taken.

10. It is a violation of 322 CMR §7.10(5)(c) not to have measuring devices that are visible and accessible to patrons onboard a for-hire recreational fishing vessels.

11. It is a violation of G.L. c.130, §2 and 322 CMR §7.01(14)(g) for a permit holder not

⁶ In this case Mr. Botelho was the holder of a for-hire permit DMF #1415937 in the Charter Boat category (six person capacity). See Finding of Fact No. 1, *infra*. Thus, the four paying customers on board the *Ava May* are exempt from any permit requirements but not from other applicable recreational fishing requirements for black sea bass such as possession limits and minimum sizes. See 322 CMR §7.10(5).

to produce his/her permit upon demand of an Environmental Police Officer.⁷

12. 322 CMR §(5)(g)(2) states that the permit holder's signature on his/her permit constitutes a statement that the applicant and all individuals conducting the activity under authority of the permit have read and are familiar with all applicable statutes contained in G.L. c.130, all applicable regulations contained in 322 CMR and agree to fully comply therewith.

IV. DISCUSSION

Mr Botelho does not dispute his fishing activities of May 18, 2015. He does not dispute the violations of the Commonwealth's black sea bass regulations. He does not dispute the testimony or the contents of Officer Opie's police report or any other fishing activities that took on May 18, 2005 when he and his four paying customers conducted a recreational fishing trip onboard the *Ava May* for a recreational fishing trip in Massachusetts waters.

Mr. Botelho's only reply, which he understood did not constitute a legal defense to the charges, were that he was unaware of the Commonwealth's recreational fishing regulations governing the black sea bass fishery including the closed season, the minimum size and possession limits.⁸ The four customers onboard were also unaware of these regulations.⁹ Certainly not a satisfactory response from a for-hire charter boat operator whose business is to take paying customers out for a day of recreational fishing. For obvious reasons, the holder of a for-hire charter boat recreational permit should be held to a higher standard than his paying customers who are temporarily visiting and/or vacationing in Massachusetts.

While the owner or operator of the for-hire charter boat and the customers who pay to enjoy a day of recreational fishing are severally and jointly liable for violations that occur during a recreational fishing trip, the law recognizes the inherent authority of the Environmental Police to exercise their discretion in determining whether or not to issue any citations and, if they do, what type of citation they will issue - criminal or non-criminal - to whom they will be issued - and for what violation(s). Thus, in my view Officer Opie appropriately issued written warnings to the four passengers from New York. Equally appropriate were the four criminal citations issued to Mr. Botelho who should be held strictly accountable for the violations of the black sea bass regulations that occurred onboard his for-hire charter boat on May 18, 2015.¹⁰

Finally, my discussion of the events of that day must emphasize the fact that at all times during the inspection of the *Ava May* Mr. Botelho fully cooperated with the Officers, assisted them in their inspection of the *Ava May*'s catch and permits, responded to all their questions and made no attempt to conceal, mislead or interfere with the Officer's exercise of authority including their seizure of the 407 lbs. of black sea bass.

⁷ Put another way, in order to comply with these provisions the permit holder must carry upon his/her person or have on board his/her fishing vessel all required fishing permits, endorsements and authorizations.

⁸ Ignorance of the law is no defense.

⁹ Charter boat captains, owners and other operators are required by 322 CMR §7.10(5)(b)(i)(1) to inform the paying customers of the specific fishery management regulations of the Commonwealth that apply to their fishing activities during the for-hire recreational fishing trip.

¹⁰ Mr. Botelho operates a for-hire recreational fishing business. He was aware of the DMF permitting requirements applicable to for-hire recreational fishing vessels such as his. To the contrary, the regulations hold the owner or operator to a higher standard of compliance than the paying customers (which in most cases including this one are from other states and visiting or vacationing in Massachusetts) simply because that is their *business*.

In addition, I was able to see Mr. Botelho's demeanor and hear his testimony at the hearing which also supports the record of his cooperation with law enforcement. This is no small fact to be dismissed as behavior that is expected of commercial or recreational fishermen, especially a recreational for-hire charter boat operator who is the subject of an at-sea boarding or dock inspection by the Environmental Police.¹¹

We are in a new era of federal, interstate and state fishery management where recreational fishing is now a regulated activity; where once the unburdened independent recreational fisherman is now responsible for complying with permit requirements, recreational seasons, minimum sizes, possession limits, landing quotas and reporting of catches. In the interests of resource sustainability, heretofore unavailable and long overdue fishery data and statistics will now be available from the recreational sector for use by fishery managers allowing for better science and a clearer understanding of stock assessments. Recreational saltwater fishing has long been an important activity in the Commonwealth since the first European settlers hooked a striped bass to be cooked for the family meal. Recreational for-hire charter boats have a long history and have played an important historical role in Massachusetts tourism. They have been responsible for the creation of seasonal and other full time jobs while providing coastal cities and towns with an important economic stimulus from spring to fall.

IV. CONCLUSION

On May 18, 2015 Mr. Botelho was conducting a for-hire recreational charter boat operation with four paying customers on board. He failed in his responsibility to explain the recreational restrictions that apply to the recreational black sea bass fishery; he failed to have measuring devices onboard the *Ava May* for use by the fishing customers; and he violated four important recreational fishing measures for the black sea bass including multiple counts of minimum size violations, possession and landing limits.¹²

Mr. Botelho's cooperation with law enforcement, assistance with the at-sea and dock inspections and his demeanor at the hearing are all facts that I recommend the Director take into account when deciding what, if any, sanctions he decides to impose on Mr. Botelho's permits.

Date: 1/4/16

By: DC Hoover

David C. Hoover, Esq.
Administrative Law Magistrate

¹¹ The Massachusetts Office of Law Enforcement and the Environmental Police of its Coastal Bureau have the additional responsibilities of enforcing an entirely new suite of regulations governing recreational fishing and recreational fishermen.

¹² Officer Opie, who performed in a professional manner at all times, opined in his narrative that an argument could be made for charging the respondent with violations of the commercial black sea bass regulations as well. Well that may well turn out to be true, I query whether there would exist a constitutional issue of double jeopardy. However, I'll leave that matter for another day and another case where the facts are conducive and suitable for a review and discussion of constitutional issues.