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August 12, 2011

NOTICE OF FINAL DECISION

Christopher S. Papagelis
50 Valley Road
Nahant, MA 01908

In The Matter of: Christopher Papagelis and Coastal Commercial Lobster Permit
#4362; Docket No. CLP-4362-09-GD

Dear Mr. Papagelis:

Upon my review of the entire record in the above captioned Adjudicatory Proceeding, and having read and fully considered the attached recommendation of the Administrative Law Magistrate I have accepted his Recommended Final Decision.

In accordance with such recommendation coastal commercial lobster permit #4362 is hereby revoked. You are directed to surrender that permit to any Environmental Police Officer or by returning it to this agency at the above address.

My Final Decision constitutes final agency action for purposes of G.L. c.30A, §14. You have thirty days from your receipt of this **NOTICE OF FINAL DECISION** to seek judicial review of my decision.

Sincerely,

Handwritten signature of Paul J. Diodati in cursive.

Paul J. Diodati
Director

Attachment

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. CLP-4362-09-GD

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IN THE MATTER OF CHRISTOPHER
PAPAGELIS,
)
)
and
)
)
COASTAL COMMERCIAL LOBSTER
PERMIT ID No. 4362, INCLUDING ALL
APPURTENANT AUTHORIZATIONS

)

RECOMMENDED FINAL DECISION

I. BACKGROUND

This is an adjudicatory proceeding held in accordance with the provisions of G.L. c.30A, §§10 11, 12 and 13, and pursuant to the Standard Rules of Adjudicatory Practice and Procedure, 801 CMR §1.01. On November 13, 2009 Lt. Gary Duncan of the Massachusetts Environmental Police (“ELE”) filed a claim for an adjudicatory proceeding based on an enforcement report alleging violations of specified marine fishery laws by Christopher Papagelis (“respondent”).

On December 11, 2009 an agency action notified the respondent the Director of the Division of Marine Fisheries (“DMF”), under the authority of M.G.L. c. 130 § 80 and 322 CMR §7.01(7), established conditions and restrictions to coastal commercial lobster permit #4362 requiring, among other things, that the respondent return to the agency all of his 2009 trap tags. On December 28, 2009, an order was issued requesting the respondent appear and show cause why his coastal commercial lobster permit #4362

("permit") should not be suspended, revoked or not renewed based on the results of an internal permit audit, which discovered discrepancies in his permit renewal application forms and lobster catch reports for 2008 and 2009, and failure to return any of his 440, 2009 trap tags as ordered by the DMF Director.

On January 15, 2010, Attorney Stephen Smith filed an appearance on behalf of the respondent including four motions: request for continuance; request for pre-hearing conference; request for discovery and production of documents; and request for a more definite statement. The first two motions were allowed; the third and fourth were reserved for the pre-hearing conference. A notice continuing this matter to March 9, 2010 was issued on January 18, 2010.

On March 4, 2010 the respondent filed a second request for continuance which was allowed.¹ A pre-hearing conference was held on April 6, 2010 to discuss all matters relevant to the hearing. In attendance were the respondent and counsel, Dan McKiernan and Storey Reed both from the Division of Marine Fisheries. A Conference Report was issued on April 23, 2010. The report established a schedule for discovery, pre-hearing and dispositive motions, issues to be adjudicated, a hearing date and a time-line for the final decision.

During the months of May, June, July and August a hearing date was continued by motions of the respondent and ELE. On September 7, 2010 a status conference was

¹ Respondent and counsel appeared on March 9, 2010 notwithstanding his receipt of the notice of continuance, by explaining that "[a]t 8:26 p.m. on March 4th, I received by electronic message a Notice of Pre-Hearing Conference to be held on March 9, 2010. On Monday, March 8, 2010 I received an electronic message providing notice that the motion to continue the show cause hearing had been allowed and rescheduled to April 6, 2010." See March 11, 2010 letter from Attorney Smith to the Magistrate. Evidently respondent's counsel appeared on March 9, 2010 for what he thought would be the pre-hearing conference, believing that it was the adjudicatory hearing that had been continued rather than the pre-hearing conference.

held to discuss, among other issues, the possibility of settling some or all of ELE's claims.

At the status conference, I was informed by respondent and ELE that they had reached an agreement on a resolution of all ELE claims identified as issues 3-8 for adjudication.² However, their agreement had not been reduced to writing at that time. In fact, at no time has a written agreement signed by the respondent and ELE been filed by the parties as required by 801 CMR §1.01(10)(a)(4).³

At the conclusion of the status conference the respondent was allowed a two-week period of time to enter into discussions with the agency concerning the remaining issues 1, 2 and 9 for adjudication and was provided with a date for the hearing. The time period for settlement talks, as well as a hearing date, was extended on numerous occasions. At the conclusion of this time period, I was informed by the agency and the respondent that an agreement would not be reached regarding issues 1, 2 and 9 for adjudication.⁴

On February 25, 2011 Attorney Smith filed his withdrawal as counsel for the respondent. On February 28, 2011 the respondent filed notification that he would be representing himself and requested a continuance of the hearing date. The hearing to

² The proposed agreement between the respondent and ELE presented and discussed at the status conference addressed six of the nine issues to be adjudicated. Issues 3-8 which formed the basis for ELE's claim for a hearing were covered by the parties' proposed agreement. Issues 1, 2 and 9 could not be covered by the proposed agreement as they constituted claims of the agency identified after an internal permit audit and issuance by the agency of the Notice of Permit Conditions and Restrictions. A resolution of issues 1,2 and 9 could only be agreed to by the respondent and agency

³ 801 CMR §1.01(10)(a)(4) provides in relevant part that the parties "... may consider ... the possibility of an agreement disposing of any or all issues in dispute... Those matters agreed upon by the Parties shall be reduced to writing and signed by them, and the signed writing shall constitute a part of the record."

⁴ By letter dated January 20, 2011, Deputy Director Daniel McKiernan notified respondent's counsel that the "remaining issues to adjudicate were discovered through an internal audit by the Division of Marine Fisheries (see December 11, 2009 letter from Director Diodati to your client) and will be resolved through the adjudicatory hearing process."

adjudicate issues 1, 2 and 9 was continued to April 26, 2011, and was held on that date with the respondent in attendance.⁵

II. ISSUES TO BE ADJUDICATED

The purpose of the hearing is to adjudicate the following:

1. Did the respondent falsify his 2009 permit application form for the renewal of his 2008 permit in violation of 322 CMR §7.01(5)(g)(b) and (14)(b), and §7.03(9)(b)?
2. Did the respondent falsify his 2008 lobster catch report in violation of G.L. c.130, §§21, 33 and 38B, and 322 CMR §3.07(1) and §7.03(9)(b)?
3. Did the respondent fail to comply with the conditions and restrictions as established by the DMF Director and made applicable to his permit on December 12, 2009 in violation of 322 CMR §7.01(7) and (9), and §7.01(14)(b) and (d)?

III. FINDINGS OF FACT

Having reviewed the evidence introduced at the hearing and having heard the respondent's testimony, I find the following facts:

1. The respondent Christopher Papagelis of 50 Valley Road in Nahant has held a coastal commercial lobster permit #4362 ("the permit") issued by DMF since approximately 2005.
2. The respondent's 2008 lobster catch report listed a 14' skiff, MS6050AN with no name as his primary vessel used to harvest lobsters.⁶

⁵ The hearing was initially scheduled for January 25, 2011. The respondent failed to appear at the hearing and a notice of default was issued. Respondent then filed an explanation for his absence stating that it was due to confusion over the hearing date and that he had medical issues affecting his health. On March 8, 2011, the default was vacated and a new hearing date for April 26, 2011 was scheduled.

⁶ While not a part of this proceeding or an issue to be adjudicated, DMF records show that the respondent's 2007 lobster catch report listed the 34' *Seafox*; MS6424SZ as his primary vessel used to harvest lobsters. ELE records show that the *Seafox* has at no time been owned or registered for use in Massachusetts by the respondent. The same ELE records show that from March 11, 2004 to April 19, 2006 the *Seafox* was owned

4. The respondent's 2009 lobster catch report listed the 40' *Katie M.* as his primary vessel used to harvest lobsters.

5. Where his 2009 lobster catch report form asked for the Massachusetts registration or the federal documentation number of his primary vessel something was scrawled on the form that is illegible and unreadable.

6. The respondent's 2008 permit renewal form lists the 34' *Seafox*, MS6424SZ as his boat name.

7. DMF issued and renewed a permit to the respondent in 2007, 2008 and 2009 for use by him aboard the 34' *Seafox*, MS6424SZ.

8. ELE boat registration records show that Justin V. Mahoney of 7 Cottage Street in Nahant owned and registered the 34' *Seafox* in March 11, 2004, with the registration expiring on April 19, 2006.

9. ELE boat registration records do not show that the 34' *Seafox* was at any time after April 19, 2006 owned and registered for use in Massachusetts by the respondent.⁷

10. From 2000 through 2009 Justin V. Mahoney held coastal commercial lobster permit DMF ID No. 6118 authorized for use aboard his 40' vessel *Katie M.*, FD1188666.

11. Justin V. Mahoney's 2008 lobster catch report states that the 40' *Katie M.*, 1188666, was his primary vessel used to harvest lobsters.

12. ELE boat registration records show that Joshua W. Mahoney of 15 Trager Road in Marblehead owned and registered the 14' skiff, MS6050AN with no name.

13. From 2000 through 2009 Joshua W. Mahoney of 16 Trager Road,

by and registered to Justin V. Mahoney.

⁷ Motorboat owners are required by G.L. c.90B, §3 to register their motorboat with ELE. In the alternative, the owner of a motorboat may document it with the United States Coast Guard.

Marblehead held coastal commercial lobster permit DMF ID No.2773 authorized for use aboard his 32' *Madeline Sue*, MS7362ZB.

14. Joshua W. Mahoney's 2008 lobster catch report states that he used his 14' skiff 100% of the time as a vessel tender for his primary vessel the 32' *Madeline Sue*, MS7362ZB.⁸

15. The respondent did not indicate on either his 2008 or 2009 lobster catch report that he had changed the fishing vessel associated with the permit.

16. DMF relied on the veracity and accuracy of the information provided by the respondent in his lobster catch reports and permit renewal forms to renew his permit in 2007, 2008 and 2009.

17. DMF relied on the veracity and accuracy of the information provided by the respondent in his 2008 lobster catch report and 2008 permit renewal form as the basis for their determination that he qualified to fish no more than 800 lobster traps and authorized him to obtain no more than 880 trap tags for 2009.⁹

18. The respondent purchased 440 trap tags for 2009.

19. Shortly thereafter DMF conducted an internal audit of individual fisherman's permits, applications, vessel registrations and catch reports including those of the respondent, Justin V. Mahoney and Joshua W. Mahoney.

20. The respondent's 2008 lobster catch report contained false and misleading

⁸ A "tender" is a dingy, row boat, skiff or other small craft used to transport people and supplies from the dock to the larger vessel which is moored in deeper harbor waters.

⁹ An official Massachusetts tag is required by 322 §§6.13 and 6.31 to be affixed to all lobster traps placed or set in waters under the jurisdiction of the Commonwealth and in accordance. DMF determines the number of trap tags that an individual fisherman qualifies for based on their lobster catch reports and other relevant data. The fisherman is then authorized by DMF to purchase that number of trap tags and affix a tag to each lobster trap that he places or sets in Massachusetts waters.

information by listing the 14' skiff, MS6050AN as his primary vessel to harvest lobsters because the 14' skiff was being used as a vessel tender 100% of the time by Joshua W. Mahoney.

21. The respondent's 2009 lobster catch report contained false and misleading information by listing the 40' *Katie M* as the primary vessel used to harvest lobsters because the *Katie M* in 2009 was owned and operated by Justin V. Mahoney as the primary vessel used to harvest lobsters.

22. The respondent's 2008 and 2009 lobster catch report contained false and misleading information by failing to state where indicated on the form that the respondent had changed his primary vessel used to harvest lobsters.

23. Based on the DMF permit audit results the DMF Director notified the respondent by letter dated December 11, 2009 that three conditions, including the immediate return of all his 2009 trap tags, and two restrictions were made applicable to the respondent's 2009 permit.¹⁰

24. At no time relevant to this proceeding did the respondent return any of the 440 trap tags in accordance with the DMF Directors December 11, 2009 order.

IV. CONCLUSIONS OF LAW

The following conclusions of law apply to this proceeding:

1. In order to harvest, possess or land lobsters in Massachusetts a person must

¹⁰ The conditions to permit #4362 (DMF ID No.2618) were: (1) return of all 440 trap tags to the Environmental Police; (2) authorization to haul his lobster traps under supervision of the Environmental Police to access, remove and return the trap tags; and (3) provide DMF with a new buoy color scheme differentiating the identification of respondent's buoy colors from those of Mr. Mahoney. The restrictions were: (1) authority of permit ID No. 2618 was temporarily void until such time as respondent complied with these three conditions and the Director had issued a determination of compliance based on Environmental Police inspection of his lobster gear; and (2) fishing or attempting to fish for lobsters was prohibited until such time as the respondent was in compliance with the three permit conditions.

have a coastal commercial lobster permit issued to him by DMF. G.L. c.130, §§38, 38B, 80 and 322 CMR §7.01(2)(a).

2. The coastal commercial lobster permit is a limited entry fishery permit first established in Massachusetts by legislation passed in 1975 and amended in 1980. G.L. c.130, §38B.

3. Individuals applying for the renewal of their lobster permit must file a lobster catch report setting forth the catch history for the prior year, signed under the pains and penalties of perjury. G.L. c.130, §§21 and 38B,

4. It is a violation of 322 CMR §7.01(14)(b) to falsify any application form, documentation or letters of support in conjunction with any application form.

5. It is a violation of 322 CMR §7.01(14)(d) to fail to comply with any permit condition or restriction established by the DMF Director pursuant to 322 CMR §7.01(7).

6. The renewal or transfer of coastal commercial lobster limited entry permits is governed by the provisions of 322 CMR §§7.03 and 7.06.¹¹

¹¹ 322 CMR §7.03(1) provides as follows: "The purpose of 322 CMR 7.03 is to regulate the number of lobster traps on a regional and individual basis to prevent over-fishing within each Lobster Conservation Management Area (LCMA) managed by the Commonwealth through the ASMFC, and to establish a process to enable the transfer of existing commercial lobster permits and traps pursuant to M.G.L. c. 130, § 38B, and St.1992, c 369.

The American lobster fishery is the Commonwealth's most economically important fishery. To meet conservation goals of the interstate plan specific to the nearshore waters around eastern Cape Cod and southern New England, the Outer Cape Cod Lobster Conservation Management Area (OCCLCMA) and Lobster Conservation Management Area 2 (LCMA 2) were developed, respectively. 322 CMR 7.03 details the effort control plans for the OCCLCMA and LCMA 2 comprised of trap limit programs and transfer programs as well as the transfer regulations for the remainder of the coastal lobster fishery conducted in LCMA 1.

The transfer program for the coastal lobster fishery conducted in LCMA 1 allows permit holders to transfer their permits along with lobster related business assets under the historical transfer criteria developed for the coastal lobster fishery. Beginning in 2004, the only permit transfers allowed between LCMAs are those involving the transfer of a permit to an LCMA under management of an effort control plan. This will enable commercial fishermen to retain the maximum flexibility in the conduct of their businesses while ensuring conservation goals of any area-specific effort control plans are not compromised by increases in traps fished."

7. The American lobster fishery is regulated by DMF in accordance with the Atlantic States Marine Fisheries Commission's (ASMFC) Lobster Management Plan (LMP). G.L. c.130, App. §§1- 5; 322 CMR, §7.03.

8. It is a violation of 322 CMR§7.01(j) to fish with more than one lobster permit on a single vessel.

9. It is a violation of G.L. c.90B, §2 to operate any boat in Massachusetts waters that is not validly registered with ELE.

V. DISCUSSION

This case involves the coastal commercial lobster fishery and limited entry lobster permits, both of which are comprehensively regulated by DMF pursuant to the ASMFC's interstate LMP. The American lobster fishery is the most economically important fishery conducted in Massachusetts. While DMF prevents overfishing of the lobster resource in many ways the two methods relevant here include: (1) limiting the number of traps which may be used by an individual and establishing overall limits on the the number of traps which may be used within the lobster conservation and management areas set forth in the LMP and DMF regulations; and (2) regulating the number of individuals who may participate in the fishery through a limitation on the issuance and transfer of lobster permits.

The first method limiting the number of traps an individual may use is accomplished through the trap tag program which requires all lobster traps be affixed with a tag identifying the owner of the trap. The regulatory number of trap tags an individual may obtain is set at 0-800, with an additional 80 for use as replacements for lost traps/tags. This effectively limits a lobsterman to the use of no more than 800 lobster

traps and has the effect of capping fishing effort.

The second method limiting the number of individuals who may participate in the fishery include G.L. c.130, §38B and of 322 CMR 7.03. Before holders of a coastal lobster permit may transfer their permit, they must document their fishing history and demonstrate they *actively* fished the permit in four of the past five years. An individual is required to provide past year's harvest and sale of lobsters on their lobster catch report filed every year in conjunction with their renewal application in order to renew a permit. DMF relies on the accuracy and honesty of the completed renewal and catch reports as filed, but does conduct random audits to confirm the data provided. Permits that are not renewed, transferred or actively fished are retired from the fishery

The respondent falsified his 2009 lobster catch report by claiming that he used the 40' *Katie M* to harvest lobsters. The 40' *Katie M* is owned not by the respondent, but rather by another lobsterman from Nahant. The respondent falsified his 2008 catch report by claiming that he used the 14' skiff with no name, registration MS6050AN. According to Joshua W. Mahoney's 2008 lobster catch report that 14' skiff was used by him 100% of the time as a tender for his primary vessel the 32' *Madeline Sue*, registration MS7362ZB. DMF records show that the respondent also falsified his 2007 catch report by claiming that he used the 34' *Seafox* which was in fact last owned and registered to Justin Mahoney. In fact, the DMF permit inventory for the respondent shows that he was issued a lobster permit for the years 2005-2009 for use aboard the 34' *Seafox* which, after April 19, 2006, was never a registered or documented vessel.

DMF relied to its detriment on the respondent's 2008 and 2009 lobster catch report when it determined that he qualified to obtain up to 880 trap tags. The evidence

shows that the respondent was not harvesting lobsters during 2006-2009 using either the non-existent *Seafox*, or a 14' skiff or the F/V *Katie M*. The evidence also establishes that the respondent did not return the 440 lobster trap tags as ordered by the Director, and offered no rational explanation as to why he did not, and where those trap tags were.

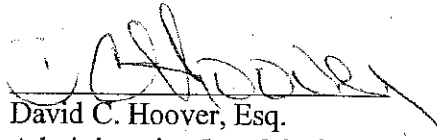
VI. CONCLUSION AND RECOMMENDATION

The American lobster fishery has been a limited entry fishery since 1975. The American lobster fishery is pervasively regulated throughout the northeast pursuant to the ASMFC's LMP. The plan's conservation measures are based on controlling fishing effort through area prohibitions, trap limitations and permit restrictions. Permits that are not renewed or transferred, or are unlawfully used contrary to lobster conservation and management measures and the Director's conditions and restrictions are retired from the fishery.

Based on the findings and conclusions set forth above, questions 1, 2 and 3 are all answered in the affirmative. DMF improperly and unknowingly issued permit #4362 based on renewal and catch report forms that had been falsified by the respondent. Permit #4362 was used by the respondent contrary to and in violation of lobster conservation measures and conditions and restrictions established by the Director.

I recommended that permit #4362 be revoked and retired from the fishery.

Dated: July 29, 2011


David C. Hoover, Esq.
Administrative Law Magistrate