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Director

Commonwealth of Massachusetts

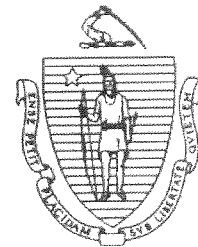
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May 12, 2011

Mr. Timothy J. Powers
1040 Old Falmouth Road
Marstons Mills, MA 02648

RE: **Final Decision**

IN THE MATTER OF: Timothy J. Powers and Coastal Commercial Lobster Permit
No. 004814; Adjudicatory Proceeding; Docket No. CCL-004814-10-PD

Dear Mr. Powers:

I adopt the attached May 9, 2011 Recommended Final Decision dated as my **FINAL DECISION** in the above-referenced adjudicatory proceeding. Therefore, coastal lobster permit No. 004814 and all attached regulated fishery authorizations is and are hereby revoked.

Pursuant to G.L. c.30A, §14(1), you have thirty days from the receipt of this **FINAL DECISION** to seek judicial review in Superior Court.

Paul J. Diodati

Director

Attachment

cc: Sgt. Philip Desroches
Dan McKiernan
Jared Silva

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. CCLP-004814-11-DM

)
IN THE MATTER OF:)
)
)
TIMOTHY J. POWERS and)
COASTAL COMMERCIAL)
LOBSTER PERMIT ID #004814,)
AND ALL AUTHORIZATIONS)
_____)

RECOMMENDED FINAL DECISION

I. INTRODUCTION

An adjudicatory hearing was held on Wednesday, December 14, 2011, at 1:00 p.m. in the Hearings Room of the Massachusetts Department of Fish and Game, Suite 400, 251 Causeway Street, Boston, MA.

In attendance were the respondent Timothy Powers, witness for the respondent Lee Sunderland, petitioner Environmental Police Sergeant Philip Desroches, and the Division of Marine Fisheries (DMF) Deputy Director Daniel McKiernan. The purpose of the hearing was to allow Mr. Powers an opportunity to show cause why lobster permit #004814, and all authorizations, issued to him by the DMF Director should not be suspended or revoked based on the petitioner's enforcement report and notice of claim for an adjudicatory proceeding which contained allegations that he violated multiple marine fishery laws of the Commonwealth. The allegations in the form of a police report with numerous attachments were provided to the respondent by including them in the order to show cause.

II. FINDINGS OF FACT

Having heard the testimony of Mr. Powers and Sgt. Desroches, observed their

demeanor, and studied the exhibits introduced at the hearing, I hereby make the following findings of fact.

1. The respondent Timothy J. Powers resides at 1040 Old Falmouth Road in Marstons Mills. *Exhibit O.*

2. He holds a 2011 coastal commercial lobster permit ID #004814 issued by the DMF Director. *Exhibit O.*

3. Lobster permit 004814 authorizes the commercial harvest of lobsters by Mr. Powers from waters under the jurisdiction of the Commonwealth including waters within Lobster Conservation and Management Area (LCMA) #1. *Exhibit O.*

4. The coastal commercial lobster fishery is a limited entry fishery and the Director is prohibited from issuing any new permits except as otherwise authorized by the statute. G.L. c.130, §38B.¹

5. LCMA #1 are those waters within an area defined and set forth in 322 CMR §6.33.

6. Scorton Ledge is an area within waters under the jurisdiction of Massachusetts off the coastline of the Town of Sandwich and within the Right Whale Critical Habitat Area. *Testimony of Sgt. Desroches; Request for Adjudicatory Proceeding.*

7. Waters of the Right Whale Critical Habitat are located in Cape Cod Bay, defined and depicted on a chart set forth in 322 CMR 12.00.

8. On or about May 11, 2007 Environmental Police Officer Gus Lunedei and Sgt. Desroches responded to a complaint that Mr. Powers was setting improperly marked lobster gear in Scorton Ledge by conducting a patrol of those waters. *Exhibit A.*

9. During their patrol Officer Lunedei and Sgt. Desroches located a lobster buoy connected to a trap within the waters of Scorton Ledge belonging to Mr. Powers.

¹ See 322 CMR §7.03.

10. The lobster trap was not marked with the correct year's state waters lobster trap tag and the buoy was not marked with twin orange identification markers. *Exhibit A.*

11. Officer Lunedei and Sgt. Desroches issued Mr. Powers a non-criminal citation for using a lobster trap within waters of the Right Whale Critical Habitat that was not affixed with the correct year's state waters lobster trap tag, and a warning for using a buoy in the Right Whale Critical Habitat that was not marked with twin orange identification markers attached to the buoy's stick. *Exhibit B.*

12. On January 18, 2008, DMF issued an advisory notifying commercial lobstermen who set fixed lobster gear within waters of the Right Whale Critical Habitat Area, that they are required to modify their fixed lobster gear in accordance with 322 CMR §12.05(1) or remove their traps to reduce the risk of entanglement to right whales.

*1/18/08 Marine Fisheries Advisory Notice.*²

² The advisory notice contained the following specific information: "Below are the four existing state rules pertaining to lobster traps set in Cape Cod Bay Critical Habitat during the winter/early spring right whale season (Jan 1 - May 15):

Break-away features must be used in all buoy lines deployed on lobster gear. Lines must be fitted with a 500 lb weak link that meets the federal criteria found at the following website:

<http://www.nero.noaa.gov/whaletrp/plan/weak%20link%20techniques%20aug%202006.v.s2.pdf>

- a. Singles are not allowed. To minimize the number of vertical lines in the waters, traps must be set in 'trawls' of 4 or more pots; or in 'doubles' or 'triples where only one buoy line is used.
- b. Sinking groundline required between connecting pots. This became a year-round requirement in all state waters on January 1, 2007.
- c. Special seasonal buoy-marking scheme required to designate 'modified' lobster gear in Critical Habitat during January 1 - May 15:
 - a. Two-pot trawls or 'doubles' shall be marked with a single buoy, three-foot stick and twin orange markers visibly attached to the top of the buoy stick; and
 - b. All buoys marking either end of a trawl shall have twin orange markers visibly attached to the buoy stick in addition to the existing marking requirements already in effect.

This allows surveillance teams or law enforcement officers to identify the abandoned and/or un-modified gear for removal. Twin orange markers means 'a pair of identical orange flag-like strips of material that are clearly visible and attached to the buoy stick or high flyer.' These twin orange markers must be

13. On or about December 28, 2009, four days before the January 1 deadline for using properly marked fixed gear in the Right Whale Critical Habitat Area while patrolling Scorton's Ledge, Sgt. Desroches located fifteen improperly marked lobster buoys with the white with black buoy color scheme and/or permit number of Mr. Powers. *Testimony of Sgt Desroches; Exhibits C and D.*

14. Sgt. Desroches provided Mr. Powers with written notification that these fifteen buoys were found in the Right Whale Critical Habitat; provided the exact locations by latitude and longitude of where these lobster buoys could be located; reminded Mr. Powers about the fixed gear marking requirements for this critical area; and provided information on how Mr. Powers could obtain copies of the Right Whale Critical Habitat gear marking regulations. *Exhibit E.*

15. On or about January 28, 2010, while patrolling waters within the Right Whale Critical Habitat, Sgt. Desroches and Lt. Earl Burns located, recovered and inspected a ten trap lobster trawl, as well as two lobster traps from a second lobster trawl all belonging to Mr. Powers. *Testimony of Sgt. Desroches; Request for Adjudicatory Proceeding.*

16. None of these twelve traps recovered on that date were affixed with the correct year's state waters lobster trap tag. None of the trawl end line buoys were affixed with twin orange markers attached to their stick end. None of the buoy lines were marked with a four inch red mark midway on the buoy line. None of the traps were baited. The second trawl line was entangled with other traps, and the ground line parted making a full inspection of that trawl impossible. The buoy lines and traps had heavy growths of seaweed and mussels on them indicating that they had remained in the water for a

removed from all buoy sticks after May 15 and before June 1 and fishermen may not re-attach them until after November 30 of each."

considerable length of time. *Testimony of Sgt. Desroches; Request for Adjudicatory Proceeding; Exhibit F, Report.* 17.

On or about February 2, 2010, while patrolling within the Right Whale Critical Habitat, Sgt Desroches located and recovered from a number of entangled trawl lines, twenty lobster traps belonging to Mr. Powers. *Testimony of Sgt. Desroches; Request for Adjudicatory Proceeding; Enforcement Report.*

18. Upon inspection, none of these twenty traps were affixed with the correct year's state waters lobster trap tag. None of the end line trawl buoys were marked with twin orange markers attached to their stick end. None of the buoy lines were marked with a four inch red mark midway on the buoy line. None of the traps were baited. The buoy lines and traps were encrusted with extensive seaweed and mussel growth indicating that they had remained in the water for a considerable length of time without being fished or otherwise attended to. *Testimony of Sgt. Desroches; Request for Adjudicatory Proceeding; Exhibit J.*

19. During February and May 2010, Sgt. Desroches and other Officers from the Environmental Police recovered from waters within the Right Whale Critical Habitat an additional thirty-eight lobster traps from a number of trawls belonging to Mr. Powers. *Testimony of Sgt. Desroches; Request for Adjudicatory Proceeding.*

20. Upon inspection, none of these thirty-eight lobster traps were affixed with the correct year's state waters lobster trap tag. Seven of the trawl end line buoys were not affixed with twin orange markers attached to their stick end. None of these traps were baited. The buoy lines and traps themselves were encrusted with extensive seaweed and mussel growth indicating that they had remained in the water for a considerable length of time without being fished or otherwise attended to. *Testimony of Sgt. Desroches; Request for Adjudicatory Proceeding.*

21. On or about April 28, 2010, Mr. Powers filed with DMF a falsified 2009 Coastal Lobster Catch Report in which he falsely reported not catching any lobsters during 2009. *Exhibit M; Testimony of Sgt. Desroches.*

22. DMF statistical records from the Standard Atlantic Fisheries Information System (SAFIS) files contradict Mr. Power's 2009 lobster catch report and show that between April and November 2009, Mr. Powers landed, and sold to Joe's Lobster Mart and the Chatham Fish and Lobster Co., Inc., approximately 7,751 pounds of lobster.³ *Exhibit N; Testimony of Sgt. Desroches.*

23. The improperly marked lobster buoys, buoy lines, traps and trawl lines belonging to Mr. Powers were impounded by the Environmental Police and held at their coastal impound area in Hingham as evidence to be used in criminal, civil or administrative enforcement actions. *Testimony of Sgt. Desroches.*

24. Before any enforcement actions had been taken, Mr. Powers, without notice to, authority of or assent from the Environmental Police, entered upon and within the ELE impound area and removed all of his non-compliant lobster buoys, buoy lines, traps and trawl lines that were stored there. *Testimony of Sgt. Desroches.*

III. CONCLUSIONS OF LAW

I have applied the following conclusions of law in reaching my recommended final decision.

1. G.L. c.130, §33 requires that all persons issued a coastal commercial lobster permit, and every person who owns a boat and lobster traps that are used for fishing purposes file a written report, on oath, to the director, the number lobsters and the value of lobsters taken by him in pots or traps every month or once for each twelve months at the conclusion of the fishing year.

³ A link to the SAFIS data reporting system is located on the DMF web site at <http://safis.accsp.org>.

2. It is a violation of G.L. c.130, §33 for any person issued a coastal commercial lobster permit to knowingly or willingly file a false report with the DMF Director of the number of pounds and the value of lobsters taken.

3. G.L. c.130, §38A requires that all persons issued a coastal commercial lobster permit use lobster buoys that are painted in the color scheme selected by such person and approved by the DMF Director.

4. G.L. c.130, §38B requires that all persons issued a coastal commercial lobster permit document their catch and sale of lobsters at such times and upon such forms as may be determined by the DMF Director.

5. It is a violation of G.L. c.130, §38B to falsify any lobster catch report filed with the DMF Director documenting the catch and sale of lobsters.

6. It is a violation of 322 CMR §7.01(14)(b) to falsify any documentation filed in conjunction with any permit application form.

7. It is a violation of 322 CMR §7.03(9)(b) to submit any forms, including catch reports, or applications to DMF required by G.L. c.130, §38B that are false or incomplete.

8. The term “twin orange markers” is defined by 322 CMR §4.13(2)(d) to mean a pair of identical orange flag-like strips of material that are clearly visible and attached to the buoy stick or high flyer.

9. It is a violation of 322 CMR §4.13(3)(d) for those buoys that mark the end of a lobster trap trawl line within waters of the Right Whale Critical Habitat to not be affixed with twin orange markers visibly attached to the buoy stick or high flyer.

10. It is a violation of 322 CMR §4.13(3)(d) to not remove from those buoys that mark the end of a lobster trap trawl line within waters of the Right Whale Critical Habitat

the twin orange markers affixed to the buoy sticks or high flyers between May 15 and June 1.

11. It is a violation of 322 CMR §4.13(3)(b)(iii) for any person authorized by a DMF commercial lobster permit to fish in LCMA #1 with the use of any lobster trap trawl lines that are not marked with a four inch red mark midway on the buoy line.

12. It is a violation of 322 CMR §6.31(1)(a)(l) for any person authorized by a DMF commercial lobster permit to fish in waters under the jurisdiction of the Commonwealth to use any lobster trap in such waters that does not have a state waters lobster trap tag for the correct year permanently attached to the lobster trap bridge or central cross-member.

13. It is a violation of 322 CMR §6.31(1)(d)ii for any person authorized by a DMF commercial lobster permit to fish in LCMA #1 to not purchase the correct year's lobster trap tags from Stoffel Seals Corp. and permanently attach one to each lobster trap bridge or central cross-member before June 1 of each year that they are issued a lobster permit.⁴

14. It is a violation of 322 CMR §4.13(3)(d) to set, place or maintain lobster buoys which mark each of the two ends of a trap trawl which are not affixed with twin orange markers during January in the Scorton Ledge area within the Right Whale Critical Habitat.

15. It is a violation of 322 CMR §12.03(2) to abandon any fixed gear, including lobster pots or traps, in waters under the jurisdiction of the Commonwealth.

⁴ The actual wording of 322 CMR 6.31(1)(d)ii requires that state waters trap tags be purchased from "a manufacturer selected by DMF according to established competitive bidding practices." The vendor selected by DMF through the Commonwealth's competitive bidding process is Stoffel Seals Corp., of Nyack, NY. See http://www.mass.gov/dfwele/dmf/commercialfishing/2010_trap_tag_order_form.pdf.

16. The term “to abandon” is defined by 322 CMR §12.02(16) as leaving fixed gear, including lobster pots or traps, in the water without hauling them at least every 30 days; or leaving them in prohibited areas or during prohibited periods of time.

17. All buoys, pots, traps, and lobster cars that are not marked as required shall be removed from the coastal waters by any officer who is empowered to enforce this section and shall be held for up to six months. If the owner of any such buoy, pot, trap or lobster car fails to claim same within said six months it shall be confiscated and disposed of by the director of law enforcement or his designee for the best interest of the Commonwealth. G.L. c.130, §38.

18. The authority of the DMF Director to suspend, revoke or not renew a commercial lobster permit and its authorizations is contained in G.L. c.130, §80, and 322 CMR §7.01(9).

IV. DISCUSSION

With two exceptions, Mr. Powers did not dispute either the testimony of Sgt. Desroches or his exhibits, and admitted to the following:

- he did not have the required trap tags affixed to his traps during the years 2008, 2009 and 2010;
- he did not mark his end buoys with orange flags;
- his 2009 lobster catch report filed with DMF was incorrect because he had lost his sales receipts;
- he entered the ELE impound area without authorization and took the lobster traps that he said belonged to him; the traps which in fact had been removed from the water and impounded pursuant to G.L. c.130, §38.

The first exception taken by Mr. Powers to the case presented by Sgt. Desroches concerned his (Mr. Powers) compliance with the trap tag requirements of 322 CMR §6.31(1)(a)(l) during 2006. Mr. Powers testified, and the record shows, that the DMF

vendor for the trap tag program experienced problems responding on a timely and accurate basis to trap tag orders from fishermen due to computer errors with permit numbers.⁵ In 2007, a DMF Advisory informed fisherman that because of a delay in the production and distribution of the 2007 trap tags, the validity of the 2006 trap tags was extended until June 15, 2007, at which time all lobster traps must have the 2007 trap tags attached.⁶ In 2008, 2009 and 2010 these problems had been corrected and DMF issued an advisory notice to that effect reminding fishermen to order and affix the appropriate trap tag to each of their traps prior to fishing.⁷

The second exception taken by Mr. Powers concerned exhibit P, also attachment P to Sgt. Desroches request for adjudicatory proceeding. Exhibit P is an 8/31/10 narrative of Sgt. Desroches, Ref: 10-433-OF. The third and final paragraph of the narrative makes reference to 2010 SAFIS records which indicate that a “Timothy J. Powers” landed and sold fluke on three separate occasions. However, Sgt. Desroches did not allege that the respondent had violated the fluke reporting requirements; it was not included in the charges contained in the request for adjudicatory proceeding or in the order to show cause; nor is it an issue for adjudication in this proceeding. Sgt. Desroches clarified this when he testified that the “Timothy J. Powers” referred to in exhibit P was not the respondent.

⁵ December 20, 2006, Marine Fisheries Advisory, Changes to Trap Tag Program in 2007.

⁶ May 25, 2007, Marine Fisheries Advisory, 2007 Trap Tags Required by June 15, 2007.

⁷ 1/18/2008 *Marine Fisheries* Advisory Notice - Reminder to lobstermen to comply with outer cape cod mandatory haul-out period and the cape cod bay critical habitat rules; November 2009 *Marine Fisheries* Advisory Notice - Compliance reminder outer cape cod mandatory haul-out period and the cape cod bay critical habitat rules; 11/18/2009 *Marine Fisheries* Advisory Notice – Compliance reminder outer cape cod mandatory haul-out period and the cape cod bay critical habitat rules. These advisories are posted on the DMF web site and electronically sent to all fishermen who are on DMF’s e-notice list.

Concerning the remainder of Sgt. Desroches testimony and exhibits, Mr. Powers' stated the following:

- “The law says that you have to protect the whales so you got to do that, but my main concern is not losing my traps.”
- “Orange flags, I screwed up on that. I didn't purchase trap tags in 08 or 09 or this year [2010] because of problems other fishermen have had with getting their tags, not getting them, getting someone else's ...”
- “I Thought my traps would do better fishing in the water rather than sitting on land.”
- “I was never notified by anyone about where my traps were ... didn't know where my traps were or where they [ELE] had them. I did trespass to get my traps because no one told me why they were taken. No one was at the gate house when I went in. They [traps] weren't safe there [ELE impound area] ...”
- “My Catch report was wrong. I lost my slips. I screwed up on that. I had a drug problem for a year, but straightened out ... I'm ok now.”

None of Mr. Powers' traps that were removed from waters within the Right Whale Critical Habitat and impounded by the Environmental Police were baited to catch lobsters. In addition, those same traps and their buoy lines contained heavy growths of seaweed and mussels. This lack of bait and the heavy sea growth shows that these traps had been left in the water, unattended, for an extensive amount of time by Mr. Powers. During surveillance of the critical habitat on February 2, 2010, twenty traps belonging to Mr. Powers were found in this condition entangled in a number of his trawl lines. Again, in February and later in May 2010, 38 traps belonging to Mr. Powers were found in this condition entangled in a number of his trawl lines. All 58 traps had no tags affixed to them, nor were the end buoys marked with strips of orange flagging.

These facts show that Mr. Powers was unable or unwilling to comply with DMF requirements designed to protect and manage the fixed gear fishery, the lobster resource and the continued and ongoing efforts to protect right whales from becoming entangled in

fixed lobster gear. Fishermen are reminded of the importance of actively tending to their traps in the critical habitat area during January 1 to May 15 or remove and store them on land.⁸ Mr. Powers chose the easiest course of action by doing nothing but simply leaving his traps in the water during these months. Moreover, when he learned that a significant number of his con-compliant lobster traps, buoys and trawl lines had been removed from critical habitat waters and impounded by ELE he simply drove to the ELE facility and, without authorization or even notice to the Environmental Police, took possession of and removed his traps only to put them back in the water again.

This affirmative act, coupled with his testimony that the traps would be better off fishing in the water than sitting on land, shows not just ambivalence towards fishery conservation and management and the many other fixed gear fisherman who *are* willing and able to work by the rules, but clearly shows a contempt for law enforcement and protection of the endangered right whale as well.

All of this explains why Mr. Powers falsified his 2009 lobster catch report and fail to comply with DMFs fixed gear marking and identification requirements for lobster traps in the critical habitat: to evade ELE enforcement of the law and insure that his traps were still in the water when he began fishing them after the winter months. As evidenced by his failure to comply with the trap tag requirements in *all* five years, from 2006 through 2010, Mr. Powers showed that he had no intention of ordering and affixing the required tags to his traps. Although he was fully aware of the requirement that his trawl end buoys be marked with flag-like strips of orange material identifying the location of

⁸ To receive notices and advisories via email, the DMF web site and its other mailings provides the following information: "This is a notification list only, where you will receive timely information from the Division regarding fishery openings and closings, regulation changes and public hearing notices. We hope to use this listserv to keep our constituents more informed and eventually reduce our reliance on paper mail. Please encourage other interested parties to join this list."
<http://www.mass.gov/dfwele/dmf/recreationalfishing/listserv.htm>.

his traps, he had no intention of complying because to do so would alert ELE to the lobster traps he left unattended in the critical habitat during their routine patrol of these waters.

For the past 25 years, DMF has worked towards the creation of conservation and management measures designed to insure that right whales are not entangled in fixed fishing gear. During this same time ELE has devoted countless hours enforcing these measures. This dual effort has been the subject of much litigation in both the state and federal courts. DMF attention to date has been on publicizing and enforcing these conservation and management measures. During the last five year's DMF has issued no less than five advisories to the fixed gear fisherman informing them of the gear marking and tending requirements, strict enforcement measures including Environmental Police surveillance of the critical habitat area, removal and impounding of non-compliant gear, and the revocation of commercial lobster permits held by those fishermen found to have violated these fixed gear conservation and management measures.⁹ The 2008 advisory noted as much:

“*Marine Fisheries* has worked on the local, state and federal level to prevent harm to right whales through the Right Whale Conservation Program that included surveillance and monitoring and the Conservation Engineering Program that includes gear studies to reduce risk. The goal of these efforts has been to ensure fishermen and large whales can co-exist.”

The record shows deliberate and repeated non-compliance by Mr. Powers of these requirements well after DMF and ELE had provided him with compliance reminders, warnings, citations and impoundment of his non-compliant lobster gear. The Director, as the permitting authority, has a duty and responsibilities to require that all fixed gear

⁹ The federal courts have placed the Commonwealth on notice that right whale entanglements in fixed lobster gear used by any person under authority of a permit issued by DMF may result in injunctive action against the agency and any further issuance of lobster permits by DMF. See the line of cases *Strahan v. Cox*, 939 F.Supp. 963 (D.Mass. 1996), affirmed in part and vacated in part, 127 F.3d 155 (1st Cir. 1997), cert. denied 119 S.Ct. 437 (1998); *Strahan v. Pritchard*, 473 F.Supp.2d 230 (D.Mass 2007).

fishermen that hold a commercial fishing permit comply with all applicable marine fishery laws. This responsibility is heightened because the coastal commercial lobster fishery is a limited access fishery where the issuance of new coastal lobster permits has been restricted by the Legislature and is governed by a comprehensive regulatory system.

Especially important in this proceeding is the fact that the applicable marine fishery laws being violated are designed to protect the endangered right whales which stop to feed in Cape Cod Bay during their northerly migration. Continued fishing by Mr. Powers under these circumstances is a clear and present threat to the resource. See *In Re Harland B. Young and Lobster Permit #7265*; Adjudicatory Proceeding, Division of Marine Fisheries, Docket No. CCLP-7265-08 (August 28, 2008).

V. RECOMMENDATION

Given the above record, findings, conclusions, and consistent with past agency action, I am recommending that the Director revoke coastal commercial lobster permit ID #004814 and all pertinent authorizations.

Dated: 5-9-11

By: 

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