



The Commonwealth of Massachusetts

Division of Marine Fisheries

251 Causeway Street, Suite 400, Boston, MA 02114
p: (617) 626-1520 | f: (617) 626-1509
www.mass.gov/marinefisheries



CHARLES D. BAKER
Governor

KARYN E. POLITO
Lt. Governor

KATHLEEN A. THEOHARIDES
Secretary

RONALD S. AMIDON
Commissioner

DANIEL J. MCKIERNAN
Director

November 4, 2020

Daniel Pronk
40 Vesper Lane
Nantucket, MA 02554

Re: *Matter of Pronk*, Docket No. COLP-170687-MB-19

FINAL DECISION

Dear Mr. Pronk,

Upon a thorough review of the administrative record in the above titled matter, including the Magistrate's Recommended Final Decision, it is my final decision to suspend your regulated fishery conch pot endorsement for a period of 3-years. This suspension shall be effective January 1, 2021 through December 31, 2023.

This shall not impact your ability to continue to conduct any regulated fishery activities licensed by your Offshore Lobster Permit (DMF ID# 170687) or other regulated fishery permit endorsements on the Offshore Lobster Permit. However, I am enacting a concurrent three-year probationary period on your permit. During this period, any violation of marine fisheries laws or regulations including municipal rules concerning marine fisheries may trigger another adjudicatory hearing for further sanctions on your Offshore Lobster permit.

During this suspension, you are not authorized to fish with any pots or traps in waters under the jurisdiction of the Commonwealth nor may you retain whelk species using lobster trap gear. Additionally, you may not apply for, hold, or otherwise be issued any regulated fishery permit endorsement or authorization to fish for whelks by trap. Any such permit or authorization that may be inadvertently or mistakenly issued to you shall be null and void.

You have the right to seek judicial review of my decision in the Superior Court pursuant to G.L. c. 30A, §14(1). The complaint must be filed in Superior Court within thirty days of receipt of this **FINAL DECISION**.

Sincerely,

Daniel J. McKiernan
Director

Attachments:

Recommended Final Decision
Docket Sheet

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF FISH AND GAME
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. COLP-170687-MB-19

IN THE MATTER OF:

DAN PRONK and COMMERCIAL
OFFSHORE LOBSTER PERMIT DMF ID
NO. 170687 and APPURTENANT
REGULATED FISHERY SPECIAL
PERMIT ENDORSEMENT FOR CONCH
POTS

Respondent

RECOMMENDED FINAL DECISION

I. INTRODUCTION

On September 25, 2019, respondent Daniel Pronk (“respondent” or “Pronk”) filed a written request for an adjudicatory proceeding. On October 23, 2019, a hearing was held at 251 Causeway Street, Suite 400, Boston, MA 02114. All parties and their witnesses were in attendance and administered the oath. At the conclusion of hearing the administrative record was compiled. On September 4, 2020 a Tentative Decision was issued. On October 13, 2020 respondent filed written comments to the Tentative Decision. I find nothing in the administrative record to support the Findings of Fact contained in and suggested by the respondent in his written comments.

II. BACKGROUND

On April 14, 2019 Lt. Mark Brighenti of the Massachusetts Environmental Police (MEP) conducted a visual inspection of the commercial fishing vessel "Black Earl" MS 2891 BJ sitting at dock off of New Whale St., Nantucket, Mass. The vessel is owned and commercially operated by the respondent Daniel Pronk. On April 15, 2019 the Division of Marine Fisheries (“DMF”)

established season limits for the state's seasonal conch pot fishery¹, an industry and fishery Mr. Pronk is involved in. DMF regulations cap the number of conch pots (traps) authorized to be fished by a permit holder at 200 pots per license. Nantucket Harbor, inside the waters southerly from the Jetties canal inward toward town, is open for fishing 30 pots per licensee by operation of rules and regulations established by the Town of Nantucket. Lt. Brighenti closely monitored the Harbor beginning in April and the Black Earl is standing by on the eve of the opening day of the conch season with 70 conch pots aboard the vessel at 0800 AM.

On May 30, 2019, Lt. Brighenti and Shellfish Constable J.C. Johnsen of the Nantucket Department of Natural Resources (DNR) conducted a thorough boat patrol of Nantucket Harbor with a concentration on inspecting conch pots and gear set by local commercial conch pot fisherman Daniel Pronk. Using a Nantucket DNR vessel, patrol of the inner harbor was conducted to ensure that the number of conch pots being fished by Mr. Pronk was not in violation of the conditions of his Town permit and DMF regulations for trap tags.² This was accomplished by counting and hauling selective conch pots within Nantucket Harbor for compliance purposes, including but not limited to, the proper tagging of conch pots and the number of conch pots allowed, as regulated by both state and local laws. This was followed by a more extensive investigation by Brighenti and Johnson with assistance from MEP officers Lt. Robert Akin, Lt. Matthew Bass, and Ofc. Michael Cole into Mr. Pronk's conch pot gear set within Nantucket Harbor on June 12, 2019.³

III. FINDINGS OF FACT

1. Respondent is the holder of a commercial offshore lobster permit DMF ID No.170687 with a regulated fishery special permit endorsement for the conch pot fishery.
2. Respondent is a commercial whelk fisherman who uses red buoys marked with his permit number DMF ID No. 170687 to mark the location of his conch pots.
3. Respondent is the owner-operator of the F/V Black Earl.

¹ This case concerns the marine resource known as whelk. Often confused with the commonly named conch, whelk is a large predatory sea snail that lives in temperate waters on the east coast from northern Florida to Cape Cod. While the species targeted is whelk, the fishery is referred to as a conch pot fishery and the trap gear used to target these animals are referred to as "conch pots." This terminology, while imprecise, reflects the origins of the technology and that Massachusetts fishermen borrowed it from the pot fisheries for conch species around Florida and the Gulf of Mexico.

² The town allows commercial fishermen to use no more than 30 conch pots within the waters of Nantucket Harbor. See Brighenti LE report.

³ In response to this enforcement activity Lt. Brighenti issued respondent a non-criminal citation of \$100 for violations of DMF tagging regulations. *Id.*

4. On May 30, 2019, Lt. Brighenti and Nantucket Shellfish Constable J.C. Johnson found a concentration of unmarked conch pots and gear set by respondent within Nantucket Harbor.

5. The overall number of red buoys identified as belonging to respondent within Nantucket Harbor is sixty-two.

6. Lt. Brighenti and Shellfish Constable Johnsen hand hauled 12 single conch pots. None were tagged with valid 2019 state issued conch pot trap tags. Location of all gear was logged and the gear was reset.

7. On June 12, Lt. Brighenti and Shellfish Constable Johnsen, with assistance from MEP Lts. Akin and Bass, and Ofc. Cole, identified 60 red buoys belonging to Pronk.

8. Of the 60 buoys, 34 of these buoys were hauled by MEP Patrol Vessel Jessie. The other 26 buoys were in too shallow of water for the P/V Jessie to operate.

9. Of the 34 buoys hauled, 33 were affixed to 54 separate conch pots configured as 32 single pots and one 20 pot trawl. The 34th buoy hauled was affixed to a trawl of green crab traps.

10. On June 12, 2019, Lt. Brighenti and Shellfish Constable Johnsen boarded the F/V Black Earl outside Nantucket Harbor when Mr. Pronk was tending his conch pot gear. At this time, Lt. Brighenti observed a 20 pot trawl on deck of the F/V Black Earl and two of the 20 conch pots did not bear valid 2019 state issued trap tags.

11. On June 13, 2019, Mr. Pronk admitted to Lt. Brighenti, during a conversation at the Nantucket Boat Basin, that the other 26 red buoys belonging to him and located in Nantucket Harbor which were not hauled by MEP and Nantucket DNR on June 12, 2019, were affixed to 26 single conch pots. Mr. Pronk also admitted that these 26 conch pots did not bear valid 2019 state issued conch pot trap tags.

12. Lt. Brighenti issued respondent a non-criminal citation for violations of the state laws governing use of conch traps and required trap tags.

IV. CONCLUSIONS OF LAW

1. It is a violation of 322 CMR §6.31 to set or fish any conch pot as defined in 322 CMR 6.12(1) in any waters under the jurisdiction of the Commonwealth without an official state conch pot trap tag permanently attached to the bridge or central cross-member of the trap.

2. It is a violation of G.L. c.130, §37A not set or mark all traps, gear and buoys used to take green crabs in a uniform manner in accordance with requirements set forth by the Director.

V. DISCUSSION

Channeled whelks, which Massachusetts fishermen target with conch pots, are a depleted resource in Massachusetts. The channeled whelk conch pot fishery occurs in the waters under the jurisdiction of the Commonwealth south and west of Cape Cod. The primary harvest area is Nantucket Sound. The channeled whelk resource within Nantucket Sound is considered to be overfished and subject to ongoing overfishing.⁴ Overtime, DMF has developed conservation and management measures applicable to whelk including establishing the whelk conch-pot fishery as a limited entry commercial fishery and prohibiting the use of more than 200 commercial conch pots to harvest conch.

Respondent holds a regulated fishery special permit for conch pots, allowing him to target channeled whelk with this gear. The testimony and evidence supports the conclusion that respondent was familiar with the state's channeled whelk conservation and management regulations, as well as those established by Nantucket for management of conch pots in Nantucket Harbor. Compliance is essential to the success of the conservation and management effort. Voluntary compliance is far more effective and places less demand on law enforcement through such things as vessel boarding, catch inspections, MEP patrols, and issuing non-criminal citations.

There are two distinct enforcement events that form the basis of this proceeding: the first being May 30, 2019, and the second on June 12, 2019. On May 30, 2019 a preliminary investigation was conducted by MEP and Nantucket DNR into Pronk's conch pot gear. Based on the findings of this preliminary investigation, a more comprehensive investigation was conducted on June 12, 2019. This June 12, 2019 investigation utilized additional MEP resources, including the P/V Jessie, which is equipped with a pot hauler. All conch pot gear that was hauled by MEP and Nantucket DNR was located in Nantucket Harbor and is subject to both local and state regulations⁵. An additional at-sea inspection of the F/V Black Earl was also conducted on June 12, 2019 outside of the boundaries on Nantucket Harbor where local regulations do not apply.

⁴ *Ad. Notice.*

⁵ G.L. c. 130, §52. "The selectmen of a town bordering upon coastal waters, if so authorized by their town, and the board of aldermen or the city council of any city so situated may control, regulate or prohibit the taking of eels and any or all kinds of shellfish and sea worms within such cities and towns and may, from time to time, without other or special authority therefor, make any regulations not contrary to law in regard to said fisheries as they deem expedient, including the times, places, methods, purposes, uses, sizes, quantities and any other particulars of such taking, and may grant permits, and establish the fees therefor, subject to any such regulation, then or thereafter in force."

Given the quantity of potentially non-compliant gear, the observations from May 30, 2019 inspection spurred a more thorough inspection June 12, 2019. This inspection involved MEP Lts. Brighenti, Bass and Akin, OFC Cole and Nantucket DNR Officer Johnsen. During this inspection they were able to haul 34 of 60 buoys belonging to Pronk onboard the P/V Jessie. The other 26 traps were not hauled because the water was too shallow for the P/V Jessie to operate.

The allegations following this inspection are that 33 of those buoys belonged to 52 conch pots configured as 32 singles and one 20 pot trawl. None of the pots had the required state issued trap tags for conch pots. Additionally, he was fishing 54 traps inside Nantucket Harbor, in excess of local regulations limiting this to 30 traps. The 34th buoy belonged to a trawl of green crab traps that he was fishing a trawl of green crab traps without an authorization from DMF.

Pronk, while fishing onboard the F/V Black Earl, was then later boarded on June 12, 2019 by Lt. Brighenti and Shellfish Constable Johnson. The purpose of the boarding was serve Pronk the citation for his gear violations found during the earlier inspection. At this time, Lt. Brighenti conducted an at-sea inspection of Pronk's conch pot gear onboard the F/V Black Earl.

During this inspection, Lt. Brighenti observed 20 single conch pots being worked on by Pronk aboard the Black Earl. A visual inspection of each trap was done. Of the 20 conch pots, 18 did not have state issued trap tags for conch pots affixed. Respondent upon noticing two conch pots were untagged immediately and frantically stated, "I have some spare tags up here (at the helm) ... sometimes they fall off." Pronk scrambled to the front of the vessel and affixed the tags on the untagged traps, saying "I know they need to be tagged".

Lt. Brighenti asked Pronk to give him a figure on how many traps he was running and fishing inside Nantucket harbor and he replied immediately "40 tops". Lt. Brighenti mentioned the 30 pot Town of Nantucket rule and Pronk immediately responded "I got the OK from Jimmy Ellis and Matt Herr to borrow their (town issued) tags...we can do that." I asked Pronk if he made all of the necessary arrangements to "borrow/exchange the allotment of their (Ellis and Herr's) tags for this (2019) year?" and Pronk replied "yes all set". Lt. Brighenti further asked Pronk "How many traps are you fishing outside the Harbor?" He answered, "Well before I had those 57 traps stolen that I reported the other day between 140 and 150". Lt. Brighenti asked respondent if all conch traps he fishes are marked with his state allotment of the 200 maximum allowed to be fished and he answered. Respondent replied that he knew what the law was and knew it is illegal not to have each trap marked.

Lt. Brighenti continued his questioning and asked Pronk how many trawls he set in total this season. He replied, only the two that were stolen. Lt. Brighenti asked, "those are the only trawls you ran this year?" Pronk replied "That's it." Lt. Brighenti inquired about Pronk's surplus tags he had aboard the Black Earl and wanted to see them. Pronk produced 23 unused 2019 DMF trap tags for conch pots. Pronk emphatically was quick to respond, "I just called Dan McKiernan for more tags." Lt. Brighenti again reaffirmed with Pronk his knowledge of tagging all traps, to which he stated, "yes".

VI. CONCLUSION AND RECOMMENDATION

The burden of proof rests with the claimant who must prove his allegations by the "clear weight" or the "preponderance" of "credible evidence". *Medical Malpractice Joint Underwriting Association of Massachusetts v. Commissioner of Insurance*, 395 Mass. 43 (1985); *Doe v. Sex Offender Registry Board*, 428 Mass. 90 (1998). I find the claimant has carried his burden of proof and established by a preponderance of credible evidence that respondent knowingly violated both state and local regulations governing the conch trap fishery.

The Director has both the authority to issue a permit and the authority to revoke the permits he issues. G.L. c.130, §80 and 322 CMR §7.01(9). *Burgess v. Mayor and Aldermen of Brockton*, 235 Mass. 95 (1920), *Connerty v. Metropolitan District Commission*, 398 Mass. 140 (1986) (the authority to issue a permit includes the authority to revoke that permit). *Matter of Reed*, Docket #SP-0001-10-DH (2010) (the Director's exercise of his authority to revoke a commercial fishing permit is necessary and appropriate in cases that pose a threat to the public health, welfare, and safety). *Matter of Young*, Docket #CLP-7265-08 (2008) (the revocation of a commercial permit is proper where repeated violations pose a threat the public health, welfare and safety). *Matter of Merenda*, Docket #BP-053530-KR (2009) (a commercial fishing permit is properly revoked where the holder is repeatedly made aware of regulatory requirements by MEP but chooses not to comply). *Matter of Powers*, Docket #CCL-004814-PD (2011) (the revocation of a commercial fishing permit is necessary where holder repeatedly demonstrates an unwillingness or inability to comply with marine fishery laws). *Matter of Ferent*, Docket #CLP-0909 (2009) (the revocation of a commercial fishing permit is appropriate where record establishes prolonged practice of non-compliance with fishery conservation and management laws by the permit's holder). *Matter of Thong Le*, Docket #CLP-6140-DM (2013) (marine fishery violations that are found to be egregious, such as possessing two hundred and fifty-three

(253) lobsters less than the minimum size limit, subjects the permit to revocation). *Matter of Santapaola*, Docket #178-DM (2019) (where a permit holder has shown repeated disregard of regulatory measures designed to conserve and manage the lobster resource in Massachusetts revocation of the permit is necessary).

VII. RECOMMENDATION

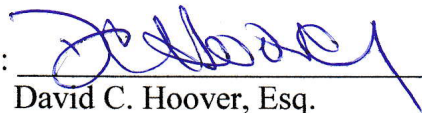
The Director has the legal authority to suspend, revoke, establish probationary conditions, and/or not renew commercial offshore lobster permit DMF ID #170687. This would necessarily include the authority to suspend, revoke, establish probationary conditions, and/or not renew respondent's permit endorsement for the use of conch-pots to catch whelk.

Sanctions including revocation are warranted in this case. Claimant seeks a revocation. Counsel suggests a two-year suspension along with a reduction in the number of trap tags.

Dated:

November 3, 2020

By:



David C. Hoover, Esq.
Administrative Law Magistrate

NOTICE

This is a Final Recommended Decision of the Administrative Law Magistrate. This decision is not a Final Decision of the Director and may not be appealed to the Superior Court pursuant to G.L. c.30A. The Director's Final Decision will contain a NOTICE on the subject of judicial review. No party shall communicate with the Director regarding this case, unless the Director, in his sole discretion, decides otherwise.