



Paul J. Diodati  
Director

*Commonwealth of Massachusetts*

**Division of Marine Fisheries**

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March 9, 2007

**BY FEDERAL EXPRESS**

Daniel Desmond  
333 Nahant Road  
Nahant, MA 01908

Stephen M. Ouellette, Esq.  
127 Eastern Avenue, Suite 1  
Gloucester, MA 01930

RE: Notice of Proposed Agency Action

Dear Mr. Desmond:

Based on the attached Tentative Decision dated March 2, 2007 I am proposing to revoke lobster permit # 5055 for possessing LCMA 1 lobsters that are: (1) less than the 3¼ inch minimum size; (2) female containing a v-notched; and (2) mutilated in such a way so as to obscure a female's v-notch. These activities constitute violations of G.L. c.130, §§ 44 and 44A, and 322 CMR §§ 6.01(2)(a)1., and 6.02(3)(e)1. You have thirty days from the date of this Notice to provide written comments or objections to this Notice of Proposed Agency Action.

Sincerely,

Paul J. Diodati  
Director

Enc. Tentative Decision

COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING  
DOCKET NO. CCL5055-07-RT

\_\_\_\_\_)  
IN RE DANIEL DESMOND AND )  
COASTAL COMMERCIAL )  
LOBSTER PERMIT # 5055 )  
\_\_\_\_\_)

**TENTATIVE DECISION**

I. INTRODUCTION

Under authority of G.L. c. 130, § 80 and 322 CMR § 7.01(9); and in accordance with the provisions of G.L. c.30A, §§ 11 and 13, and 801 CMR § 1.02 the above-captioned adjudicatory proceeding was heard on December 11, 2006 to determine whether the coastal commercial lobster permit #5055 (hereinafter "lobster permit") issued by the Director of the Division of Marine Fisheries (hereinafter "*Marine Fisheries*") should not be revoked and/or not renewed for violations of G.L. c. 130, §§ 44 and 44A, and 322 CMR §§ 6.01(2)(a)1. and 6.02(3)(e)1.

Having heard the testimony, studied the demeanor of the witnesses, and reviewed the evidence, I hereby make the following **TENTATIVE** findings of fact and conclusions of law. The parties have 30 days from the receipt of this **TENTATIVE DECISION** to file electronically, by facsimile or by mail their written objections, comments, recommended findings of fact and conclusions of law.<sup>1</sup>

II. FINDINGS OF FACT

1. Daniel Desmond is the holder of lobster permit #5055. (Exhibit H-1; Administrative Notice).

<sup>1</sup> Although the Informal Rules of Adjudicatory Practice and Procedure are applicable to this proceeding, a Tentative Decision is being issued pursuant to 801 CMR § 1.01(10)(n)1 of the Formal Rules to allow the parties an opportunity to provide their written comments, objections and recommended findings and conclusions to be considered by the Administrative Law Magistrate.

2. Mr. Desmond is authorized by permit #5055 to harvest for commercial purposes lobsters from waters within Lobster Conservation Management Area (hereinafter "LCMA") 1. (Exhibit H1; Administrative Notice).

3. Mr. Desmond has been a full-time fisherman and lobsterman in Massachusetts for over thirty-four years. (Testimony).

4. Sergeant Roger Thurlow is an Environmental Police Officer and Supervisor assigned to the Coastal Bureau of the Massachusetts Environmental Police since 1994. For approximately thirteen years his duties have involved enforcement of the Commonwealth's marine fishery laws including those governing the lobster fishery. (Testimony).

5. Environmental Police Officer Thomas Provost has been with the Environmental Police for approximately two years and assigned to the Coastal Bureau where his duties also involve enforcement of the Commonwealth's lobster fishery laws. Before that Officer Provost was a municipal police officer for eight years and a law enforcement officer for the United States Fish and Wildlife Service for more than two years. (Testimony).

6. The Massachusetts Environmental Police issue to its officers a 3¼ "TOP-ME™" metal gauge which is used to measure the length of a lobster. (Testimony).

7. The same 3¼ "TOP-ME™" metal gauge issued to the Environmental Police is available for purchase and use by Massachusetts lobstermen. (Testimony; Administrative Notice).

8. LCMA 1 lobsters are properly measured from the rear of the eye socket along a line parallel to the center line of the body shell. (G.L. c. 130, § 44; 322 CMR § 6.01(3); *Abstract of the Marine Fisheries Commercial & Recreational Lobster Fishery Regulations*, (hereinafter "*Abstracts*").

9. The 3¼ inch minimum size limit for LCMA 1 lobsters has been in effect since 1989. (G.L. c. 130, § 44).

10. A LCMA 1 v-notched lobster is any lobster which bears a v-shaped notch of any size on the flipper which is next to and to the right of the center flipper as viewed from the rear of the lobster when the underside of the lobster is down. (*Abstracts*; G.L. c. 130, § 44A; 322 CMR § 6.02(3)(e)1.).



11. *Marine Fisheries* maintains a web site containing all of the laws governing the lobster fishery which is found at <http://www.mass.gov/dfwele/dmf/index.html>.

(Administrative Notice).

12. Mr. Desmond receives the *Marine Fisheries*' quarterly DMF NEWS. (Exhibit D3).

13. Volume 21, Third & Fourth Quarter, July-December 2001 edition of DMF NEWS contains a detailed description of Massachusetts lobster management regulations, including specific information regarding LCMA 1, v-notching and notice that the 3¼ inch minimum size limit for LCMA 1 lobsters has remained the same. (Exhibit E).

14. Volume 22, First Quarter, January-March 2002 provides notice of public hearings on enhanced requirements for v-notched lobsters. (Exhibit F).

15. Volume 22, Second & Third Quarter, April-September 2002 edition of DMF NEWS contains a detailed description of what constitutes a v-notched lobster. (Exhibit G).

16. *Marine Fisheries* also makes available to the public a two-page *Abstract* of the regulations governing the lobster fishery which contains all the necessary information on LCMA 1, the 3¼ inch minimum size limit for LCMA 1 lobsters, how to properly measure a lobster, v-notching and what constitutes a LCMA 1 v-notched lobster. (See [http://www.mass.gov/dfwele/dmf/publications/informational.htm#lob\\_abs](http://www.mass.gov/dfwele/dmf/publications/informational.htm#lob_abs); Administrative Notice; Exhibit I).

17. On September 4, 2006 Sergeant Thurlow observed that Mr. Desmond's lobster boat, the F/V STAR FIRE was not at its mooring in Winthrop Harbor and waited for it to return from its fishing activities. (Testimony)

18. At approximately 3:30 pm on that same day Sergeant Thurlow and Officer Provost observed the F/V STAR FIRE enter Winthrop Harbor and watched as Mr. Desmond proceeded to off-load two grey fish totes both of which were full of lobsters. (Testimony; Exhibits C4 and C8).

19. Both officers identified themselves and informed Mr. Desmond that they were going to inspect his catch of lobsters. (Testimony).

20. Sergeant Thurlow and Officer Provost measured all the LCMA 1 lobsters possessed by Mr. Desmond from the rear of both eye sockets along a line parallel to the center line of the body shell to the rear end of the body shell from both eye sockets using

the 3¼ "TOP-ME™" metal gauge and found that three of the lobsters were less than 3¼ inches, one of which also had a v-notch in its tail; a fourth lobster that had a v-notch in its tail; and three mutilated v-notched lobsters.

21. Mr. Desmond agreed with Officer Provost that, with the exception of one lobster which Mr. Desmond felt was within the 3¼ inch minimum size limit, the remaining seven LCMA 1 lobsters were all in violation of the lobster fishery laws governing minimum size and v-notching.

22. Photographs of these eight non-complying lobsters were taken by Sergeant Thurlow on the above date. (Exhibits C5 and C6).

## II. CONCLUSIONS OF LAW

1. It is a violation of law for any person authorized by permit to harvest lobsters in LCMA 1 to possess any lobster the measurement of which is less than 3¼ inches taken from the rear of the eye socket along a line parallel to the center line of the body shell to the rear end of the body shell. (G.L. c. 130, § 44; 322 CMR § 6.01(2)(a)1.).

2. It is a violation of law for any person authorized by permit to harvest lobsters in LCMA 1 to possess any female v-notched lobsters defined as any female lobster which bears a v-shaped notch of any size with or without setal hairs on the flipper which is next to and to the right of the center flipper as viewed from the rear of the female lobster when the underside of the lobster is down. (G.L. c. 130, § 44A; 322 CMR § 6.02(3)(e)1.).

3. It is a violation of law for any person authorized by permit to harvest lobsters in LCMA 1 to possess any female lobster that is mutilated in such a manner that could hide, obscure or obliterate a v-notch in the flipper which is to the immediate right of the center flipper as viewed from the rear of the female lobster when the underside of the lobster is down. 322 CMR § 6.02(3)(e)).

4. All Massachusetts permit holders acknowledge at the time their permit is issued that they have read and are familiar with all applicable statutes contained in G.L. c. 130 and all applicable regulations contained in 322 CMR and agree to fully comply with them. (322 CMR § 7.01(5)(g)2.).



### III. DISCUSSION

Mr. Desmond is a longstanding commercial fisherman in Massachusetts. He began commercial lobstering in 1972, having started out with a small lobster boat 5 or 6 years prior to that time. He is authorized to take lobsters only from LCMA 1. He receives the *Marine Fisheries* quarterly news letter, "DMF NEWS." The newsletter is designed by *Marine Fisheries* to keep the fishing industry and its participants, especially the Massachusetts commercial fisherman constantly updated with the most current changes in fishery management measures and regulations, as well as notification concerning all upcoming public hearings on proposals to change fishery management measures and regulations. In addition, the newsletter contains the names and telephone numbers of *Marine Fisheries* professional staff who are available to answer any and all questions that a fisherman might have regarding what is required of the commercial fisherman in Massachusetts.

As a condition to receiving his lobster permit Mr. Desmond agreed that he had read and was knowledgeable with applicable marine fishery laws and would comply with them. Any lobster regulatory measure that he was unclear about could be easily clarified by a telephone call to *Marine Fisheries* staff. In addition all of this information may be found at the *Marine Fisheries* web site, and is readily available in a two-page pamphlet containing the Abstracts of all lobster regulations relevant to this proceeding.

The 3¼ inch lobster minimum size limit applicable to LCMA 1 has not changed since it was first enacted by statute on January 1, 1989. What constitutes a v-notched lobster in LCMA 1 is clear and readily understandable as described in the regulations and in the *Abstracts*. Most importantly, when Mr. Desmond's lobster permit was reauthorized in May of 2008 after a ninety-day suspension it was done so subject to a two-year probationary period. Mr. Desmond was on notice that his fishing activities would be monitored by *Marine Fisheries* and the Environmental Police and that any violations of the marine fishery laws during that time would result in a revocation of permit #5055.

There is no obligation, legal or otherwise, for the Environmental Police to educate Massachusetts fishermen, including Mr. Desmond, regarding any marine fishery laws.

Furthermore, ignorance of the law is no defense, especially for a lobsterman of Mr. Desmond's experience.

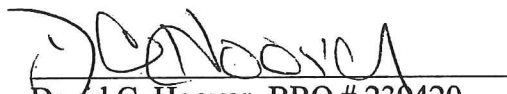
Given the above, Mr. Desmond's suggestion that he measured his LCMA 1 lobsters with an incorrect gauge, one that was not 3¼ inches is simply not plausible. Similarly, Mr. Desmond's suggestion that he was confused about what constituted a v-notched female lobster and that the regulatory requirements concerning such a lobster were unclear is equally implausible. To be sure, Mr. Desmond admitted to Officer Provost at the time of the violation that he was in possession of seven illegal lobsters. In addition, photographs of the lobsters possessed by Mr. Desmond show quite clearly that four lobsters had a "v-shaped notch of any size ... in the flipper next to and to the right of the center flipper ...". A fifth lobster was missing entirely both the "flipper next to and to the right of the center flipper ..." as well as the far right, last, fifth flipper on the lobster's tail. The photograph of this fifth lobster clearly shows "a lobster that is mutilated in a manner that could ... obliterate such a [v-notch] mark." The photographs also graphically show that three lobsters possessed by Mr. Desmond were less than the required 3¼ minimum size limit as measured from "the rear of the eye socket along a line parallel to the center line of the body shell to the rear end of the body shell" using the 3¼ "TOP-ME™" metal gauge. The officers testified that they measured each lobster from both of its eye sockets.

Mr. Desmond's possession of eight non-complying lobsters on September 4, 2006 were in direct violation of the marine fishery laws of the Commonwealth.

#### IV. CONCLUSION

Based on the above findings of facts and conclusions of law, the Director of *Marine Fisheries* has the authority and may suspend, revoke and/or condition lobster permit #5055 for violations of G.L. c. 130, §§ 44 and 44A, and 322 CMR §§ 6.01(2)(a)1. and 6.02(3)(e)1.

Dated: March 2, 2007

  
David C. Hoover, BBO # 239420  
Administrative Law Magistrate  
Department of Fish and Game  
251 Causeway Street, Suite 400  
Boston, MA 02114