



Paul J. Diodati  
Director

# Commonwealth of Massachusetts

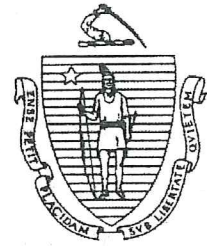
## Division of Marine Fisheries

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Deval Patrick  
Governor

Ian A. Bowles  
Secretary

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Commissioner

March 31, 2009

### Notice of Final Agency Action

In Re Edward L. Ferent and Coastal Commercial Lobster Permit #0909;  
Adjudicatory Proceeding; Docket No. CLP-0909-08

Dear Mr. Ferent:

Having reviewed the entire record of the above-referenced Adjudicatory Proceeding, I hereby concur with and adopt the Findings of Fact and Conclusions of Law set forth in the **Final Decision** issued by the Administrative Magistrate on March 26, 2009. Based on the entire record including the **Final Decision**, I have decided not to renew or re-issue to you coastal lobster permit # 0909.

My decision constitutes **Final Agency Action** for purposes of G.L. c.30A, §14. You have thirty days from your receipt of this **NOTICE** to seek judicial review of my decision pursuant to G.L. c.30A, §14.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Diodati", is written over a horizontal line.

Paul J. Diodati  
Director

Enc: Final Decision

COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING  
DOCKET NO. CLP - 0909 - 08

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IN RE EDWARD L. FERENT, and )  
COASTAL COMMERCIAL LOBSTER )  
PERMIT # 0909, DMF ID # 010410, )  

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**FINAL DECISION**

I. INTRODUCTION

Under authority of G.L. c. 130, §80 and 322 CMR § 7.01(9), and in accordance with G.L. c.30A, §13 and 801 CMR §1.01 an Adjudicatory Proceeding was scheduled for September 18, 2008 to determine whether Coastal Commercial Lobster permit #0909 and all applicable endorsements ("lobster permit") issued by the Director of the Division of Marine Fisheries ("*Marine Fisheries*") to Edward L. Ferent should be suspended, revoked or not renewed.

The respondent was granted a sixty-day continuance, and the proceeding was held on November 18, 2008 at the offices of the Department of Fish and Game, 251 Causeway Street, Boston, MA. In attendance were Environmental Police Officer Robert Ingemi of the Massachusetts Environmental Police, the Respondent Edward L. Ferent and his father Alexander Ferent.

Having heard the testimony, studied the demeanor of the witnesses, and reviewed all of the evidence, including the written comments submitted by the Respondent in response to the Tentative Decision, I hereby issue this **FINAL DECISION**.

## II. FINDINGS OF FACT

1. The Respondent is the holder of coastal commercial lobster permit #0909, DMF ID No. 010410 (lobster permit).
2. On July 26, 2007 the Massachusetts Environmental Police (MEP) petitioned the Division of Marine Fisheries (*Marine Fisheries*) for an adjudicatory proceeding requesting that the respondent's lobster permit be suspended or revoked for violations of the written agreement, violations of the terms and conditions of his lobster permit and violating other marine fishery laws.
3. The Law Enforcement Report accompanying the request for an adjudicatory proceeding contained evidence from Lieutenant Gary Duncan, Sergeant William Manning and Officer Patrick Moran of MEP that between the months of June and September 2006 the respondent fished approximately 1,258 lobster traps from the L/B JENNIFER within Lobster Conservation and Management Area (LCMA) 1, which is approximately 458 more traps than is allowed to be fished in LCMA 1.
4. The Law Enforcement Report also alleged that the respondent did not affix the required trap tags to the bridge or central cross member of his lobster traps.
5. An Adjudicatory Proceeding, Docket No. LP-0909-07-GD was scheduled for September 18, 2007.
6. On September 4, 2007 attorney John E. Sutherland filed a Notice of Appearance on behalf of the Respondent.
7. By Joint Motion of the Parties the proceeding was continued to October 15, 2007.
8. The ALM further continued the proceeding to November 8, 2007.

9. By Joint Motion of the Parties the proceeding was continued to November 26, 2007.

10. On November 20, 2007 the parties filed a joint motion to continue the hearing and conduct a conference on the hearing date of November 26, 2007.

11. The ALM continued the proceeding to a future date and scheduled the parties to conference on November 26, 2007.

12. The parties (Respondent and his attorney John E. Sutherland, MEP and the prosecuting attorney Beverly Vucson and Deputy Director Dan McKiernan) conferenced on November 26, 2007, and thereafter.

13. At some point in the negotiations there were discussions concerning what, if any, options would be available to the Respondent to use the L/B JENNIFER should someone find his gear or in the event his father's boat were to break down during the ninety-day suspension of his permit and use of the L/B JENNIFER. The respondent had the impression that under those circumstances he would have to speak with Deputy Director McKiernan at *Marine Fisheries*.

14. On December 18, 2007 the parties reached agreement whereby the respondent waived his right to a hearing, and agreed to a three month suspension of his lobster permit and use of the L/B JENNIFER to haul traps; the suspension to be effective from April 15, 2008 through July 15, 2008.

15. The parties filed a written document entitled, Waiver of Hearing and Agreement to a Three Month Permit Suspension (written Statement) that was signed by the Respondent, dated and notarized setting forth all of the terms of the agreement reached by the parties.



16. The respondent agreed in the written statement not to set or fish any lobster traps or fish for, store or land any lobsters in Massachusetts waters using the L/B JENNIFER during this 90 day permit suspension period.

17. The respondent agreed in the written statement that any violation by him of this 90-day permit suspension would constitute a violation of G.L. c.130, §80 subjecting his lobster permit to additional sanctions.

18. The Waiver of Hearing and Agreement to a Three Month Permit Suspension was signed by both parties, notarized, filed with the ALM, and endorsed and approved by the Director of *Marine Fisheries*.

19. Based on the Waiver of Hearing and Agreement to a Three Month Permit Suspension the ALM concluded the proceeding, Docket No. LP-0909-07-GD.

20. By operation of the terms of the Waiver of Hearing and Agreement to a Three Month Permit Suspension, the respondent's lobster permit was suspended on April 15, 2008, and surrendered to MEP. At the time he surrendered his permit the Respondent spoke with the prosecuting attorney Beverly Vucson and in response to his question about what he should do if any problems arose he was told by her that he would have to talk with Deputy Director McKiernan about such issues.

21. The lobster permit was reinstated and returned to the Respondent on July 15, 2008.

22. On April 30, 2008 MEP Lieutenant Kevin O'Brien and Officer Robert Ingemi observed the respondent aboard the L/B JENNIFER within waters of the Commonwealth, approximately one tenth of a mile southeast of Graves Light, 42.21.632N/70.51.773W.

23. On June 2, 2008 MEP requested an Adjudicatory Proceeding and the permanent suspension of lobster permit #0909, DMF ID No. 010410 for fishing with a suspended permit, and fishing the gear of another without the written authorization of the Director of *Marine Fisheries*.

24. An Adjudicatory Proceeding, Docket No. CLP-0909-08 was scheduled for September 18, 2008.

25. The Respondent requested, and was granted a sixty-day continuance to November 18, 2008.

26. The adjudicatory proceeding was held on November 18, 2008. In attendance were the Respondent Edward L. Ferent, the respondent's father, Alexander Ferent, and the petitioner, MEP officer Robert Ingemi.

27. On April 30, 2008, within coastal waters, MEP Lieutenant Kevin O'Brien and Officer Robert Ingemi boarded the L/B JENNIFER where they found the respondent, lobster traps and gear belonging to the respondent's father, Alexander Ferent, as well as live lobsters.

28. The Respondent admitted that his lobster permit was suspended, but that he was helping his father who was in ill health and unable to fish his own gear and whose own lobster boat was under repair.

29. The Respondent admitted that he did not have the required written authorization from the Director of *Marine Fisheries* to haul the lobster traps of his father, but stated that he had tried repeatedly to contact Dan McKiernan at *Marine Fisheries* as he was told to do if his father's boat were to break down, but his calls to Mr. McKiernan were not returned.

30. The Respondent testified that he made repeated telephone calls to the offices of *Marine Fisheries* in an attempt to reach either the Director or the Deputy Director to obtain the required written authorization, but was unsuccessful in reaching either individual.

31. The Respondent testified that he left numerous messages on Mr. McKiernan's voice mail and with the Director's receptionist but never received a telephone call back from either individual.

32. The Respondent's father, Alexander Ferent also testified that he made repeated telephone calls to *Marine Fisheries* intending to speak with the Director or the Deputy Director but was likewise unsuccessful.

33. The Respondent introduced his telephone records which show that five telephone calls were made from his cell phone to the offices of *Marine Fisheries* from May 1 to May 8, 2008.

### III. CONCLUSIONS OF LAW

1. It is a violation of G.L. c.130, §§37, 38 and 80 to catch, take or possess lobsters in the Commonwealth without a commercial fishermen's permit.

2. It is a violation of 322 CMR §7.01(2)(a) to harvest, possess or land lobsters for commercial purposes in Massachusetts without a coastal commercial lobster permit issued to a named individual.

3. It is a violation of 322 CMR §(14)(a) to conduct any marine fishery activity which is subject to a permit pursuant to G.L. c.130 during a period of suspension of that permit.



4. It is a violation of 322 CMR §(14)(d) to violate or fail to comply with any permit condition or restriction.

5. It is a violation of 322 CMR §(14)(j) to have more than one individual, boat, vessel or business entity fish or conduct business under authority of a permit, unless otherwise provided for in G.L. c. 130, 322 CMR or in writing by the Director.

6. The Director of *Marine Fisheries* is authorized by G.L. c.130, §80 and 322 CMR §7.01(9) to suspend or revoke any permit for violation of any condition or restriction of the permit or for violation of any provision of G.L. c.130 or 322 CMR.

#### IV. DISCUSSION

On July 26, 2007 the respondent was charged by MEP with violating the marine fishery laws of the Commonwealth by using approximately 1,258 traps to take lobsters from LCMA1, 458 more traps than the maximum number of 800 traps established by regulations of *Marine Fisheries*. An Adjudicatory Proceeding was scheduled by *Marine Fisheries* on the petition of MEP. Prior to the hearing, the Respondent and MEP agreed to a disposition of the case. The disposition was reduced to a written agreement, filed with the ALM and approved by the Director of *Marine Fisheries*.

The written agreement provides that in lieu of the hearing, the Respondent voluntarily agreed to, and his lobster permit was, suspended from April 15, 2008 to July 15, 2008. The Respondent agreed not to set any lobster pots or fish for, store or land any lobsters from the L/B JENNIFER during this period of permit suspension. The Respondent knew what he was agreeing to: not to haul any lobster traps using the L/B JENNIFER during the 90 suspension of his permit. He knew what he was not supposed to do; he knew the terms of the written agreement which had been fully explained to him; he



understood the legal effect of the document; and he voluntarily signed it before a Notary Public.

The actions of the Respondent after he signed his written agreement were precisely those which he knew he was prohibited from doing: hauling traps and fishing for lobsters using the L/B JENNIFER. This is not a complicated matter. It is not made complicated because the Respondent thought that he had a verbal agreement with the prosecuting attorney and the Deputy Director that was entered into after the terms of the written agreement were reached. To be sure there was no evidence at the hearing of any such verbal agreement being reached. Neither the prosecuting attorney nor the Deputy Director was present to testify. If he had reached such a verbal agreement during the parties' conference of November 26, 2007, or at any point thereafter he or his attorney would have made sure to include it as a provision of the written agreement. There is no such provision. The Respondent's testimony is insufficient to establish the existence of such a verbal agreement.

Assuming for the moment that there was a verbal agreement whereby the Respondent could speak with the Deputy Director about adjustments to the terms of the written agreement and his permit suspension, repeated telephone calls left by the Respondent with *Marine Fisheries*, Director Diodati and Deputy Director McKiernan the day after the Respondent violated the written agreement would not have sufficed. To argue further, as the Respondent does, that the some how he had a free get-out-of-jail-card and could ignore the terms of the written agreement and use his L/B JENNIFER to haul traps and fish for lobsters in direct violation of the written agreement by simply leaving phone messages at *Marine Fisheries* would render the written agreement moot,

and it's terms and provisions superfluous. There was no such open door arrangement, nor would such an arrangement have been made by the prosecuting attorney or the Deputy Director.

Finally, the lack of a response from the Deputy Director to the Respondent's repeated telephone calls is in fact a response which says there is nothing I can or will do under these circumstances. While the Respondent may have spoken with the prosecuting attorney and there may have been a discussion concerning what to do in such situations the response would have been, and no doubt was *to call and speak directly with* Deputy Director McKiernan. A phone message left on voice mail is insufficient. If the Respondent had believed it to be sufficient, one call would have been made, not multiple calls as his telephone records show.

There are simply no reasons to justify or excuse this violation. It matters not that he was helping out his father who was ill and unable to move his own lobster gear. It matters not that his fathers lobster boat had a broken engine. It matters not that he repeatedly called *Marine Fisheries* the day after he and the L/B JENNIFER were boarded by MEP either hoping that he would be given a retroactive written authorization from Deputy Director McKiernan, or that the simple act of leaving a message had in effect amended the written agreement allowing him to do that which he specifically agreed he not to.<sup>1</sup>

## V. CONCLUSION

The respondent knowingly and willfully violated his own written agreement not to fish for lobsters using the L/B JENNIFER. He violated 322 CMR §7.01(14)(a) by


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<sup>1</sup> According to the respondent's telephone records his first call to *Marine Fisheries* was made on May 1, 2008 the day after he was boarded by MEP, which was April 30, 2008.

conducting fishing activities which require a permit during a suspension period of that permit. He violated the terms of his permit when he fished for lobsters while it was suspended. He violated 322 CMR §7.01(14)(j) by fishing the lobster gear of another without written authorization from the Director of *Marine Fisheries*.

For the reasons set forth above, the Director of *Marine Fisheries* may suspend, revoke or not renew lobster permit #0909, DMF ID No. 010410.

Dated: 3-26-09

By: \_\_\_\_\_

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