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August 28, 2008

NOTICE OF FINAL AGENCY ACTION

Harland B. Young
60 Old Mill Way
Wellfleet, MA 02667

RE: In Re Harland B. Young and Lobster Permit #7265, Including all
Authorizations; Adjudicatory Proceeding, Docket No. CCLP-7265-08

Dear Mr. Young:

Upon my review of the entire record in the above captioned Adjudicatory Proceeding, I concur with and adopt the findings and conclusions of the Administrative Law Magistrate as set forth in the attached Final Decision dated August 25, 2008. Based upon my review of the entire record and the findings and conclusions contained in the Final Decision I have decided not to renew your coastal commercial lobster permit #7265.

My 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 AGENCY ACTION** to seek judicial review of my decision pursuant to G.L. c.30A, §14.

Sincerely,

Paul J. Diodati
Director

Final Decision Enclosed
cc: William Henchy, Esq.
Capt. Peter Hanlon

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. CCLP - 7265 - 08

IN RE HARLAND B. YOUNG, and)
COASTAL COMMERCIAL LOBSTER)
PERMIT No. 7265, INCLUDING ALL)
APPURTENANT AUTHORIZATIONS)

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 held to determine whether the Coastal Commercial Lobster permit #7625 and all applicable endorsements ("lobster permit") issued by the Director of the Division of Marine Fisheries ("*MassMarineFisheries*") to Harland B. Young, 60 Old Mill Way, Wellfleet, MA should not be renewed for violations of 322 CMR §6.02, Regulations Governing the Taking of Lobsters in Massachusetts Coastal Waters; 322 CMR §6.31, Regulations Requiring the Use of Trap Tags; and 322 CMR Part 12.00, Regulations Conserving Northern Right Whales.

The proceeding was held as scheduled on April 15, 2008 at the offices of the Department of Fish and Game, 251 Causeway Street, Boston, MA. In attendance were Captain Peter Hanlon, Sergeant Earl Burns and Officer Gus Lunedei of the Massachusetts Environmental Police (MEP). Also present was the respondent, Harland B. Young who, having knowingly and voluntarily waived the right to counsel was representing himself.

A **TENTATIVE DECISION** was issued on July 24, 2008. The parties had 30 days from the receipt of the **TENTATIVE DECISION**, delivered to the respondent on June 25,

2008 by Federal Express Overnight Priority Mail, to file electronically, by facsimile or by mail their written objections, comments, recommended findings of fact, recommended conclusions of law, and recommended disposition. On June 26, 2008 attorney William Henchy called and identifying himself as counsel for the respondent asked for and was sent a copy of the **TENTATIVE DECISION**. At the conclusion of the thirty-day comment period attorney Henchy asked for, and was given, a ten-day extension of the thirty-day period to provide written comments on behalf of the respondent. Neither the petitioner, the respondent, Harland Young, nor the attorney for respondent William Henchy submitted any written comments or objections to the **TENTATIVE DECISION**.

Having heard the testimony, studied the demeanor of the witnesses, and reviewed all of the evidence, I hereby issue this **FINAL DECISION** and make the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**.

II. FINDINGS OF FACT

1. On January 30, 2007, Officer Gus Lunedei, issued a warning to the respondent for setting one single lobster trap, which was individually attached to a single buoy by a single vertical rope line, in the waters of Cape Cod Bay's right whale critical habitat.¹
2. On May 21, 2007, Officer Matthew Bass issued a citation to the respondent for setting ten single lobster traps each of which was individually attached to a single buoy by a single vertical rope line, in the waters of Cape Cod Bay's right whale critical habitat.
3. On January 29, 2008, in Provincetown Harbor, while the respondent was off-loading approximately twenty-five pounds of lobsters from his 28' lobster boat F/V *Cherie*

¹ The right whale critical habitat was designated within the waters of Cape Cod Bay by regulations of *MassMarineFisheseries* as a protective area for northern right whales that feed within Cape Cod Bay during late winter early spring. Regulations of *MassMarineFisheseries* prohibit the setting of lobster gear within the critical habitat in order to protect endangered right whales from potential entanglements with such gear when feeding. (Ad. Notice. See also Conclusion of Law #1).

Ann, Officer Lunedei approached the respondent and asked if he had removed all of his single lobster traps from within the waters of Cape Cod Bay's right whale critical habitat, to which the respondent stated that he still had some gear there and was trying to get it in.

4. On February 4, 2008, in Provincetown Harbor, Officer Gus Lunedei again approached the respondent while he was off-loading fish from the F/V *Donna Marie* and asked if he had removed all of his single lobster traps from the waters of Cape Cod Bay's right whale critical habitat to which the respondent smiled at Officer Lunedei and continued with his work off-loading.

5. On February 12, 2008, aboard the E/V *Jessie*, Sergeant Earl Burns and Officer Gus Lunedei were conducting routine lobster gear compliance patrols within the waters of Cape Cod Bay's right whale critical habitat.

6. On the above date Sergeant Burns and Officer Lunedei located and marked with their Global Positioning Systems (GPS) forty lobster buoys within waters in and around Billingsgate Shoal, north to Truro Harbor at approximately N41° -55.229' W070° - 06.608'.²

7. All forty lobster buoys were identified by Officer Lunedei as belonging to the respondent, Harland Young, 60 Old Mill Way, Wellfleet, MA 02667, holder of lobster permit # 7265.

8. Sergeant Burns and Officer Lunedei contacted MEP headquarters and requested assistance in removing the traps that were connected to these buoys from the waters of Cape Cod Bay's right whale critical habitat area.

9. Using MEP's lobster boat with a hauler on board, Sergeant Philip Desroches, Officer Camire, and Officer Lunedei hauled and photographed forty single lobster traps and

² These waters are located within the Cape Cod Bay right whale critical habitat. (Ad. Notice).

one set of double lobster traps.³

10. Four lobster traps had non-compliant “ghost panels”.⁴

11. Twelve lobster traps did not have trap tags affixed to them as required by *MassMarineFisheries* and *NOAA Fisheries*.

12. Forty lobster traps were attached to a single buoy by non-compliant single vertical rope lines, rather than attaching traps to each other using the compliant sinking ground line required by *MassMarineFisheries*.

13. All forty-two lobster traps were removed from the waters of Cape Cod Bay’s critical habitat.

14. On February 25, 2008 Environmental Police returned to the area where they had located and plotted the respondent’s initial forty lobster buoys and once again using MEP’s lobster boat and hauler brought up an additional forty-four lobster traps from the waters of Cape Cod Bay within the northern right whale critical habitat.

15. All forty-four lobster traps and buoys were identified by Officer Lunedei as belonging to the respondent, Harland Young, 60 Old Mill Way, Wellfleet, MA 02667, holder of lobster permit # 7265.

16. Two lobster traps had non-compliant “ghost panels”. (See footnote 4 *infra*).

17. Twenty-six lobster traps did not have trap tags affixed to them as required by *MassMarineFisheries*.

18. All forty-four lobster traps were attached to a single buoy by non-compliant single vertical rope lines, rather than attaching traps to each other using the compliant

³ A single lobster trap is one trap connected by one vertical line to one buoy. (Ad. Notice).

⁴ Ghost panels are escape panels within the lobster trap that are held in place by metal rings that erode allowing the panel to open and free any trapped lobsters when the trap is lost, left unattended or becomes disconnected to the surface buoy. (Ad. Notice).

sinking ground line required by *MassMarineFisheries*.

19. All forty-four lobster traps were removed from waters within Cape Cod Bay's right whale critical habitat.

20. In all, a total of eighty-four single-buoyed lobster traps belonging to the respondent were found in, and removed from waters of the northern right whale critical habitat in Cape Cod Bay, photographed, inventoried and stored by MEP.

21. The respondent has held a coastal lobster permit, #7265, for the years 2004-2008.

III. CONCLUSIONS OF LAW

1. Eighty-four single-buoyed lobster traps belonging to the respondent were found in, and removed from waters within Cape Cod Bay's right whale critical habitat in violation of 322 CMR §12.04(2)(a).

2. Six of these eighty-four lobster traps had non-compliant ghost panels in violation of 322 CMR §6.02(1)(b)(2)(a).

3. Eighteen of these eighty-four lobster traps did not have trap tags affixed them in violation of 322 CMR §6.31(1)(a)(1).

4. G.L. c.130, §§2 and 80 provides that any permit issued by the Director of *MassMarineFisheries* may be suspended, revoked or not renewed for violations of any provision of 322 CMR.

5. 322 CMR §7.01(9) authorizes the Director of *MassMarineFisheries* to suspend, revoke or not renew any permit for violations of any provision of 322 CMR.

6. 322 CMR §7.01(5)(g)(2) states that a permit applicant's required signature shall constitute a statement that he has read and is familiar with all applicable statutes of M.G.L.

c.130 and all applicable regulations of 322 CMR and agrees to fully comply therewith.

III. DISCUSSION AND OPINION

The evidence in this proceeding is clear and uncontested. The respondent acknowledges that his lobster gear was set in the waters of Cape Cod Bay's right whale critical habitat area. He knew this to be the case when he was approached not once, but twice by the environmental police and directed to remove his lobster gear immediately or face stiff penalties if he did not. He was aware of the fact that he had set lobster gear in the waters of Cape Cod Bay's right whale critical habitat, and knew that the gear was set in violation of the marine fishery laws of the Commonwealth. Most importantly he knew that he had set single lobster traps affixed to single buoys using single vertical lines of rope to connect the two. The respondent knew or should have known that his non-compliant lobster gear, which made extensive use of single vertical lines increased the risk of entanglement with northern right whales which at that very moment were migrating up the Atlantic coast for their annual March stop in Cape Cod Bay to feed.

The respondent admits to the facts of this case and offers no defense. He did, however, testify as to the reasons why he did not remove his lobster gear from the waters of Cape Cod Bay's right whale critical habitat, even though he knew that he was required to do so. That testimony is worth noting here.

The respondent had a coastal lobster permit for the 2004, 2005, 2006 and 2007 fishing seasons. His catch reports on file with *MassMarineFisheries* show that he harvested and sold lobsters in Massachusetts from May-October during those years. In the winter, since 2001, he worked in various capacities for Christopher King, including fishing aboard Mr. King's boats the F/V *Donna Marie* and the F/V *Second Effort*, as well as repairing and

upgrading the fishing gear for those boats. He is twenty-eight years old; recently divorced; has two children who live with their mother; and pays monthly child support. Although the respondent did not provide any detailed accounting of his financial situation it was apparent from his testimony that the divorce had forced him to locate a new residence, and created financial obligations that he was finding difficult to meet.

The respondent was quite aware of his responsibility to remove his lobster gear from waters of Cape Cod Bay's right whale critical habitat. He was also quite aware of his responsibility to pay the bills; both his and his children's. On more than one occasion the respondent's testimony focused on his inability to take care of both responsibilities at the same time, and he was "doing the best that he could." It was clear that the respondent had to work as often and as long as possible to make money to meet his financial obligations. It was equally clear that this meant he did not have the time or energy to haul all of his lobster gear out of the waters of Cape Cod Bay; a time-consuming, labor intensive effort that would not, in and of itself make him any money whatsoever. Thus, his two responses to Officer Lunedei's entreaties to remove all of his lobster gear from the waters of Cape Cod Bay's right whale critical habitat explained his dilemma. His first response: "I still have some gear out there, [waters of Cape Cod Bay's right whale critical habitat] but I'm trying to get it in"; and his second response: a simple smile acknowledging Officer Lunedei's statement to remove his lobster gear from the waters of Cape Cod Bay's right whale critical habitat. Unfortunately, the respondent's personal and financial difficulties, obligations and responsibilities do not excuse his failure to meet the resource and conservation obligations and responsibilities that come with the requirements of having a lobster permit. Indeed, the respondent agreed to comply with those obligations, responsibilities and requirements

when he signed each year's application for the coastal lobster permit. The respondent agreed to fully comply with all marine fishery management measures found in M.G.L. and 322 CMR that are designed to insure the continued conservation of the lobster resource and the endangered northern right whale. In this regard, first and foremost, the respondent has an obligation to retrieve and remove all of his lobster gear from the waters of Cape Cod Bay's right whale critical habitat. The respondent may not leave his lobster gear unattended, or otherwise "store" his lobster gear in those waters rather than removing them as required by regulation because other pressing financial needs and obligations were occupying his time. His additional failure to see that all of his lobster traps which were simply lying unattended on the bottom of Cape Cod Bay had the required compliant "ghost panel" to allow lobsters caught within to escape rather than die, shows a fundamental disregard for the lobster resource.

Respondent's failure to use lobster gear that complies with *MassMarineFisheries* regulations that prohibit the use of a single vertical rope line to attach a single trap to a single surface buoy shows a fundamental disregard for the endangered northern right whale. Leaving his lobster gear unattended or otherwise simply storing his lobster gear in the waters of Cape Cod Bay's right whale critical habitat, rather than removing it as required by *MassMarineFisheries* regulations, and in the face of repeated warnings, citations, reminders and urgings of the environmental police to remove his lobster gear shows not only a further disregard for the endangered northern right whale, but shows a deliberate, repeated and continuing disregard of the instructions given by an environmental police officer as well.

IV. CONCLUSION

Given the facts found in this proceeding, the actions and inactions of the respondent clearly constitute violations of the marine fishery laws of Massachusetts which are designed to protect and conserve the lobster resource as well as the endangered northern right whale. The respondent was well aware of these laws. He had conducted his fishing activities pursuant to these laws for five years. He was repeatedly reminded of these laws by warnings, citations and even pleas made by the environmental police on two occasions to get all of his lobster gear out of the waters of Cape Cod Bay's right whale critical habitat.⁵ The respondent was both unwilling and unable to accomplish this. Either way, Mr. Young knowingly chose not to comply with the obligations and responsibilities that are required of all those who harvest lobsters in Massachusetts under authority of a coastal lobster permit.

Dated: 8-25-08

By: 

David C. Hoover, Esq.
Administrative Law Magistrate
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⁵ The record of the proceeding shows that one of the consequences of the respondent's failure to remove his gear was that MEP had to contract two lobstermen and their own lobster boat to assist MEP in retrieving and removing all of the respondent's lobster gear from the waters of Cape Cod Bay's right whale critical habitat before the expected March arrival of these endangered whales for their annual feeding while migrating north.