

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. BP-158447-11-DM

IN THE MATTER OF PAUL CHENEY)

and)

BOAT PERMIT ID No. 158447, AND)
ALL AUTHORIZATIONS)
_____)

RECOMMENED FINAL DECISION

I. BACKGROUND

A hearing was held in this matter on April 6, 2011. In attendance were the respondent Paul D. Cheney and Division of Marine Fisheries Deputy Director Dan McKiernan. The purpose of the hearing was to determine whether boat permit #158447 should be suspended, revoked, conditionally renewed or not renewed for violations of 322 CMR §6.07, regulations governing the striped bass fishery.

II. FINDINGS OF FACT

1. In 2010 Cheney was issued a boat permit, #158447, with commercial endorsements for the dogfish and the striped bass regulated fisheries. (Exhibit 1)

2. On October 15, 2010, at approximately 11:30 p.m. Cheney entered Saquatucket Harbor in Harwichport aboard the 30' F/V *Lady Ashley*. (Transcript).

3. Cheney testified that he tied the *Lady Ashley* to the pier and began offloading approximately fifty striped bass from the vessel onto his pickup truck which was in an adjacent parking area. (Transcript).

4. Cheney further testified that while loading the striped bass onto his truck he was

approached and questioned by Harwich police officers. (Transcript).

5. Cheney told the officers that while he was tuna fishing in the Great South Channel east of Nantucket he came across a large number of striped bass that were floating dead on the water. (Transcript).

6. Cheney told the officers that he captured the dead striped bass from the water, brought them aboard the *Lady Ashley* and landed them in Massachusetts. (Transcript).

III. CONCLUSIONS OF LAW

1. The striped bass fishery is managed in accordance with a conservation plan developed and approved by the Atlantic States Marine Fisheries Commission and implemented through regulations adopted and enforced by the various Commission member states. (322 CMR §6.07(1)).

2. The Commission's striped bass management plan establishes a yearly quota and allocates a percentage of that quota to each of the member states who in turn regulate how they will manage their quota. (*Id.*) 6.07

3. When the landings of striped bass in a state exceed the state's yearly quota the overage is deducted from the state's next year's quota. (322 CMR §6.07(1)).

4. In Massachusetts regulations adopted by DMF establish measures governing recreational and commercial fishermen, retail and wholesale dealers, seasons, fishing days, quotas, landing limits, minimum sizes and permit requirements. (322 CMR §6.07).

5. Commercial means to harvest any fish or shellfish for purposes of sale, barter or exchange, or to keep for personal or family use any fish or shellfish taken under the authority a commercial permit issued by the DMF Director. (322 CMR §7.01(1)(b)).

6. A commercial striped bass fisherman is defined as any person who harvests or attempts to harvest striped bass for any purpose other than personal consumption. (322 CMR §6.07(2)(b)).

7. A commercial striped bass fisherman is required to accurately report to the Director on forms supplied by DMF the catch by month, location and size of all striped bass harvested during the open season. (322 CMR §6.07(4)(h)).

8. The commercial striped bass quota in Massachusetts for 2010 was completely harvested by August 22, 2010 and DMF closed the fishery on August 23, 2010. (*Marine Fisheries Advisory*, August 19, 2010; www.mass.gov/dfwele/dmf/marinefisheriesnotices/2010/2010_fluke_closure.pdf).

9. The verb "to fish" in all of its moods and tenses, means to take or to attempt to take fish by any method or means, whether or not such method or means results in their capture. (G.L. c.130, §1).

10. 322 CMR §7.01(5)(g) provides that when a permit issued by the Director is signed by the holder, such signature "constitutes a statement that the applicant and all individuals conducting the activity under authority of the permit have read and are familiar with all applicable statutes contained in M.G.L. c. 130, all applicable regulations contained in 322 CMR and agree to fully comply therewith ..."

11. It is a violation of 322 CMR §6.07(4)(b) for a commercial striped bass fishermen "to fish" for striped bass at any time other than during the open season which was between July 12, 2010 and August 23, 2010.

12. It is a violation of 322 CMR §7.01(1)(b) for a commercial striped bass fisherman to

keep for personal or family use any fish taken under the authority of a commercial permit issued by the DMF Director.

13. It is a violation of 322 CMR §6.07(7)(k) for a commercial striped bass fisherman to catch, take, possess, sell, barter, exchange or attempt to catch, take, possess, sell, barter or exchange any striped bass for commercial purposes once the commercial quota is reached and the commercial fishery is closed.

IV. DISCUSSION

Cheney is a commercial striped bass fisherman as evidenced by both the DMF striped bass regulations and the 2010 boat permit #158447 endorsed for the commercial striped bass fishery.¹ All the fishing activities of a commercial striped bass fisherman are governed by the relevant provisions of both G.L. c.130 and 322 CMR. This is so regardless of whether Cheney was fishing for striped bass at the time or was fishing for another species such as tuna.

On February 11, 2011, approximately 6 months after the striped bass fishery closed and well before its re-opening date of July 12th, while fishing for tuna Cheney took approximately fifty striped bass that he found floating on the surface waters east of Nantucket Island and landed them in Massachusetts. Cheney off-loaded some of these fish onto his truck and gave some away to other people. He testified that he was not intending to sell them, but rather was keeping them for his own personal consumption and the personal consumption of others.

These facts constitute a violation or violations of 322 CMR §§7.01(1)(b) and 6.07(4)(b). The number of striped bass, approximately fifty, is fairly significant. Whether they were alive or dead when taken from the surface waters is of no consequence for purposes of this hearing. Once landed, the approximate or estimated weight of these fifty striped bass will be deducted by DMF

¹ Although not applicable to this hearing, Cheney also falls into the dogfish and tuna fishing categories pursuant to DMF regulations and the regulated fishery endorsements for boat permit #158447.

from the Commonwealth's percentage of the striped bass allocation given the states by the ASMFC for the 2012 fishing season.


Ignorance of the law, in fact or feigned, is not a defense. Moreover, when Cheney signed boat permit #158447 endorsed for the striped bass fishery he acknowledged that he was familiar and would comply with all applicable marine fishery statutes and regulations. In effect, Cheney agreed to know what striped bass fishing activities are authorized and what are not. This information is readily available to him on the DMF website.² Authorization to fish in the form of a DMF permit is not a right; it is a privilege. In return for this privilege permit holders agree to conduct their fishing activities in a manner that complies with all DMF fishing requirements.

Cheney is relatively new to commercial fishing as evidenced by the DMF permit inventory. As such, he would do well to review what is required of him by law. If he has any questions at all he should direct them to DMF or OLE. If in doubt and time does not permit he should do the prudent thing and pass-up any fish floating on the surface waters.

V. RECOMMENDATION

Having heard the testimony and reviewed the evidence submitted, I am recommending that boat permit #158447 be suspended for three months.

Dated: 11-7-11

By:  _____

David C. Hoover, Esq.
Administrative Law Magistrate

² The web site not only publishes all DMF regulations but it includes a FAQ section, the names and phone numbers of DMR personnel to call for further information, electronic messaging of regulatory updates, notices and advisories to all permit holders who provide their e-mail address and other links to marine fishery statutes.
http://www.mass.gov/dfwele/dmf/commercialfishing/cmr_index.htm