

## STAFF SUMMARY FOR DECEMBER 14-15, 2022

**Executive Session****Today's Item****Information** ☐**Action** ☒

Executive session will include four standing topics:

- (A) Pending litigation to which FGC is a party
- (B) Possible litigation involving FGC
- (C) Staffing
- (D) Deliberation and action on license and permit items

**Summary of Previous/Future Actions (N/A)****Background**

During the public portion of its meeting, FGC will call a recess and reconvene in a closed session pursuant to the authority of California Government Code subsections 11126 (a), (c)(3), and (e)(1). FGC will address four items in closed session:

**(A) Pending litigation to which FGC is a party**

See agenda for a complete list of pending civil litigation to which FGC is a party, at the time the agenda was made public.

**(B) Possible litigation involving FGC****(C) Staffing**

For details about staffing, see the executive director's report under Agenda Item 3(A) for today's meeting.

**(D) Deliberation and action on license and permit items**

- I. *Consider the proposed decision in Agency Case No. 21ALJ01-FGC, the accusation filed against Jonathan Ewart regarding revocation of a commercial fishing license and a lobster operating permit*

DFW filed an administrative accusation against Jonathan Ewart alleging that violations of the California Fish and Game Code merited revocation of Ewart's commercial fishing license and lobster operator permit. Jonathan Ewart filed a notice of defense with FGC seeking a hearing.

FGC staff referred the case to the Office of Administrative Hearings (OAH), and OAH conducted a hearing. At the hearing, DFW submitted an amended accusation, which most notably deleted the sixth cause of discipline from the original accusation. After the hearing, OAH submitted a proposed decision to FGC; the proposed decision finds that all the violations in the amended accusation did occur, that the 17 causes support imposing discipline, and recommends the revocations that DFW requested (Exhibit 1).

In reaction to the proposed decision, both parties have submitted letters to FGC. DFW submitted a letter to FGC urging it to adopt the proposed decision and revoke

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the license and permit (Exhibit 2). E. Michael Linscheid, representing Jonathan Ewart, submitted a letter to FGC requesting that it impose a punishment or remedy short of the revocation (Exhibit 3).

**Significant Public Comments (N/A)****Recommendation**

**FGC staff:** (D)I. Adopt the proposed decision for agency case number 21ALJ01-FGC.

**Exhibits**

1. [Proposed decision regarding the Ewart Accusation, dated Oct 25, 2022](#)
2. [Letter from DFW to FGC, dated Nov 14, 2022](#)
3. [Letter from E. Michael Linscheid to FGC, dated Nov 16, 2022](#)

**Motion**

Moved by \_\_\_\_\_ and seconded by \_\_\_\_\_ that the Commission adopts the proposed decision for Agency Case No. 21ALJ01-FGC, regarding revocation of Jonathan Ewart's commercial fishing license and lobster operating permit, in its entirety.

**BEFORE THE  
FISH AND GAME COMMISSION  
STATE OF CALIFORNIA**

**In the Matter of the First Amended Accusation against:**

**JONATHAN EWART,**

**Respondent.**

**Agency Case No. 21ALJ01-FGC**

**OAH No. 2021050363**

**PROPOSED DECISION**

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video and teleconference on June 27 and 28, 2022.

David Kiene, Attorney, California Department of Fish and Wildlife (DFW or Department), represented complainant, David Bess, Chief, Law Enforcement Division, DFW.

E. Michael Linscheid, Attorney, represented respondent, Jonathan Ewart, who was present throughout the administrative hearing.

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At hearing, complainant moved to make the following amendments to the First Amended Accusation by interlineation:

(a) delete subparagraphs (1) and (2) of paragraph 29(a) in the Fifth Cause for Discipline, at page 18, lines 7 to 11 (line numbers approximate). (Ex. 4, p. A22.)

(b) delete the entire Sixth Cause for Discipline, at p. 22, lines 18 to 24 (line numbers approximate). (Ex. 3, p. A26.)

There was no objection and the motion was granted.

Testimony and documentary evidence was received. The record was held open until September 26, 2022, to allow the parties to file closing briefs. Complainant and respondent each filed a closing brief and complainant filed a reply closing brief; the briefs were marked for identification as exhibits 23, C, and 24, respectively.

The record was closed and the matter was submitted for decision on September 26, 2022.

## **SUMMARY**

Respondent has worked as a licensed commercial fisher and as a permitted lobster fisher. Between October 2018 and December 2020, DFW wardens cited respondent for offenses arising out of his lobster operator permit activities, and on April 21 and May 16, 2016, DFW wardens cited or arrested respondent for several offenses arising out of his commercial passenger fishing vessel (CPFV) operations.

Complainant asks that the Fish and Game Commission (Commission) revoke respondent's commercial fishing license and lobster operator permit based on his alleged violations of the Fish and Game Code and of title 14 of the California Code of Regulations, and based on a criminal conviction for one of those violations, which respondent suffered in 2017.

Respondent produced rebuttal evidence and evidence of mitigation and rehabilitation. Respondent admits he made mistakes but argues that revocation of his license and permit would be punitive and unnecessary.

The evidence established most of the disciplinary charges. Respondent did not sufficiently rebut those charges or establish mitigating circumstances and rehabilitation. Complainant's request for revocation of respondent's commercial fishing license and lobster operator permit is granted.

## **FACTUAL FINDINGS**

### **Parties and Jurisdiction**

1. DFW issued to respondent a commercial fishing license (License) and a Lobster Operator Permit, no. LOT0272 (Permit), on dates not reflected in the evidence; complainant did not submit a certified license history. Based on evidence introduced at hearing, the License and Permit were in full force and effect at all times relevant in the First Amended Accusation.

2. On January 7, 2021, complainant signed the Accusation. The Accusation was served on respondent, who timely filed a notice of defense. On November 22,

2021, complainant signed the First Amended Accusation. Any new charges were deemed controverted under Government Code section 11507.

## **Complainant's First Amended Accusation**

3. In the First Amended Accusation, complainant seeks to revoke respondent's Permit and License as a result of respondent having allegedly committed violations of the Fish and Game Code and attendant regulations between October 2018 and December 2020 and in April and May 2016, and as a result of a related criminal conviction respondent suffered in 2017.

### **LOBSTER FISHING**

4. The First Cause for Discipline is based on allegations that respondent possessed undersized lobsters on December 30, 2020, in violation of Fish and Game Code sections 8252 and 121.5, subdivision (a).

5. The Second and Third Causes for Discipline are based on allegations that, on March 23, 2019, respondent possessed live lobsters out of season, including undersized lobsters, in violation of Fish and Game Code sections 121, subdivision (b), 8252, and 121.5, subdivision (a).

6. The Fourth and Fifth Causes for Discipline are based on allegations that respondent failed to lawfully deploy and maintain lobster traps and to submit to the DFW, or accurately keep, Daily Lobster Logs on various dates between October 2018 and March 2019, in violation of Fish and Game Code sections 122.2, subdivision (d), and 190, subdivision (a).

7. The Seventh Cause for Discipline is based on allegations that respondent failed to make landing receipts available for inspection within two weeks, by May 8,

2019, in response to a DFW peace officer's request on April 24, 2019, in violation of Fish and Game Code section 8046, subdivision (a).

### **COMMERCIAL PASSENGER FISHING**

8. Complainant alleges that, on April 21 and May 16, 2016, respondent violated the Fish and Game Code, and was criminally convicted for some of those violations, while operating the CPFV Amigo.

### **Fishing for Groundfish in an Area Closed to Fishing**

9. The Ninth, Sixteenth, and Eighteenth Causes for Discipline all relate to April 21, 2016, and the Seventeenth and Nineteenth Causes for Discipline both relate to May 16, 2016. Complainant alleges that on each of those two dates, while respondent was the operator of the CPFV Amigo, respondent, crewmembers, and passengers on the CPFV Amigo illegally fished, and took and possessed rockfish, a type of groundfish, in an area closed to groundfish fishing, in violation of Fish and Game Code section 2002 and California Code of Regulations, title 14, sections 27.45, subdivision (b)(2), and 195, subdivision (f).

10. The area closed to groundfish fishing in 2016, known as the Southern Groundfish Management Area, was seaward of lines approximating 60-fathom-deep sea floor contour lines, (60-fathom contour lines). The 60-fathom contour lines are defined by connecting a set of 60-fathom waypoints as specified in federal regulations. The closed area boundaries have changed since 2016; the closed area is now outside the 100-fathom contour lines. (Cal. Code Regs., tit. 14, § 27.45, subd. (b).)

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## **Keeping Undersized Fish; Skin Not Attached to Filets; Dead Bocaccio**

11. The Tenth, Eleventh, and Twelfth Causes for Discipline are based on allegations that, while respondent operated the CPFV Amigo on April 11, 2016, (a) a cabezon and a sheephead, both species with size limits under California Code of Regulations, title 14, section 28.28, subdivision (c), were illegally fileted aboard the CPFV Amigo; and (b) respondent or crew members fileting rockfish aboard the CPFV Amigo did not leave their entire skin attached, as required by California Code of Regulations, title 14, sections 27.65, subdivision (b)(8), and 195, subdivision (f).

12. The Thirteenth, Fourteenth, and Fifteenth Causes for Discipline are based on allegations that, while respondent was operating the CPFV Amigo on May 16, 2016, (a) rockfish filets aboard the Amigo did not have the entire skin attached as required by California Code of Regulations, title 14, sections 27.65, subdivision (b)(8), and 195, subdivision (f); (b) the Amigo exceeded its boat limit for rockfish in violation of California Code of Regulations, title 14, sections 27.60, subdivision (c)(2), and 195, subdivision (f)(1); and (c) crewmembers on the Amigo threw 26 dead bocaccio, a species of rockfish, into the ocean in violation of California Code of Regulations, title 14, sections 1.87 and 195, subdivision (f).

## **Criminal Conviction**

13. The Eighth Cause for Discipline is based on allegations that, on May 17, 2017, respondent was criminally convicted, in *People v. Ewart* (Super. Ct. Ventura County, 2017, No. 2017013224), of violating Fish and Game Code section 2002 (unlawful possession of fish unlawfully taken) for taking rockfish illegally on April 21,



2016. (See Factual Finding 9.) Respondent was not convicted for his activities on May 16, 2016.

### **PRAYER FOR RELIEF**

14. Complainant prays that the Commission issue a decision permanently revoking respondent's License and Permit.

### **Respondent's Background and Employment**

15. Respondent currently fishes for lobster from October through March. He no longer operates CPFV's, but at times relevant to the First Amended Accusation he operated CPFV's out of Ventura Harbor. Respondent started learning fishing from his father on sportfishing boats and on commercial boats fishing for crab and squid when he was nine or 10 years old, about 23 years ago. He decided he wanted to fish as a career and trained to become a commercial fisher primarily by fishing with and observing his father. At 16 years old, respondent first operated a vessel when he learned to drive his father's lobster boat.

16. Claimant's father and mother, Greg and Theresa Ewart, owned Ventura Sportfishing and some boats berthed at the Ventura Sportfishing landing. Respondent has never had an ownership interest in Ventura Sportfishing, where he worked as an employee. He has never owned the Amigo or any other sportfishing boat.

17. Respondent has engaged in sportfishing and last worked on a sportfishing boat, the Amigo, two years ago. In March and April each year, the Amigo would take its passengers to fish for seabass and rockfish. Later in the year, the Amigo would look for yellowtail, seabass, halibut, rockfish, and ling cod, depending on the

water temperature. Respondent stopped operating the Amigo after about five years, when the boat was sold in 2020.

18. Respondent has fished for squid, Southern California rock crab, and lobster on commercial vessels. Respondent owns one commercial fishing vessel, the Olivia Rae, which he uses for lobster fishing. He bought it, when it was named the Storm Front, in 2012 for \$36,000, having also just purchased his Permit. According to respondent, he paid \$108,000 to buy the Permit and pays annual Permit renewal fees of \$1,500 to \$2,000.

19. After one season of lobster fishing on the Olivia Rae, respondent performed extensive repairs to the vessel, including work on the boat's fiberglass, electronics, engine, and painting, over a period of four or five months in the shipyard, at a cost of around \$25,000. Respondent renamed the refurbished boat for his daughter. According to respondent, annual costs to operate the boat last year included approximately \$56,000 in fuel costs, calculated at 75 to 100 gallons of fuel per day, four to six days per week, for a six month season, at \$4 per gallon. Costs also included unplanned repairs to the Olivia Rae, which sank at the dock during the last week of October 2021, at the beginning of the lobster season.

## **Commercial Lobster Fishing**

### **UNDERSIZED LOBSTER—DECEMBER 30, 2020**

20. The First Cause for Discipline is based on allegations that respondent possessed undersized lobsters on December 30, 2020, in violation of Fish and Game Code sections 8252 and 121.5, subdivision (a).

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21. DFW Wildlife Officers Cameron Roth and Scott Cohen were patrolling in Ventura Harbor on an inflatable skiff on the evening of December 30, 2020. They observed the Olivia Rae entering the harbor, confirmed it was a commercial fishing vessel, and identified themselves to respondent. With respondent's permission, Officer Roth boarded the boat to measure the catch while Officer Cohen remained on the skiff.

22. There were live lobsters on the vessel, stored in two wells on the deck. Officer Roth measured one lobster using his DFW-issued stainless-steel laser-cut lobster gauge, a metal device with a fixed gap of 3.25 inches between calipers, the minimum legal length of a spiny lobster measured from the midline of the front of the carapace, between the horns, to the midline of the rear of the carapace. Officer Roth also used a highly accurate micrometer as a backup. Officer Roth concluded the lobster he measured was undersized. He stayed on the Olivia Rae as it returned to its slip while Warden Cohen followed in the skiff. When the Olivia Rae docked, Officer Cohen joined Officer Roth on the Olivia Rae.

23. Officers Roth and Cohen measured the catch of about 200 lobsters and concluded 34 were smaller than the minimum legal size of 3.25 inches. The undersized lobsters ranged from 3.183 inches to 3.239 inches. (Ex. 20, p. A106.)

24. Officer Roth asked respondent who had measured the lobsters caught during the day; respondent answered he personally had measured all of them. Officer Roth asked to see respondent's gauge; it exactly matched Officer Roth's gauge.

25. Respondent asked Officers Roth and Cohen to be allowed to re-measure the 34 lobsters the officers believed were undersized. The officers allowed it.

Respondent re-measured the lobsters and agreed that 20 of them were undersized but still maintained that 14 were of legal size.

26. Officer Cohen testified that in his 12 years enforcing commercial lobster fishing laws, he had never seen a catch with so many undersized lobsters. Officers Roth and Cohen cited respondent for commercial possession of 34 undersized lobsters, under Fish and Game Code section 8252. The officers seized the 34 lobsters for use as evidence and stored them in an evidence freezer, but they allowed respondent to sell the rest of his live catch to Moore's Seafood, where the 244.9 pounds of lobster fetched \$39 per pound, for a total of \$9,551.10. The undersized lobsters, weighing about 1.5 pounds apiece, had a wholesale value at that time of \$1,989. Officer Cohen testified the price was "absolutely unbelievable," much greater than the highest price he had previously seen, and provided a strong incentive to keep undersized lobsters.

27. Respondent told the officers he accepted responsibility for incorrectly measuring the undersized lobsters but sought to excuse his measurement errors, stating he has Type I diabetes and did not have enough insulin with him on the boat because he forgot to fill his insulin pump reservoir when he left home that morning.

28. Respondent testified he often used to fish for lobster by himself but had to change his practice once he developed diabetes symptoms. To avoid long days alone in the lobster boat, he testified, he transferred his Permit to his father for two or three years and worked for his father as a crew member on a CPFV. Once respondent learned how to regulate his blood sugar, he had his father transfer the Permit back to him, earlier this year, and began fishing for lobster again. Lobster fishing is respondent's sole source of income to support his family.

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29. There is no evidence, other than respondent's uncorroborated testimony, that respondent was experiencing a diabetic medical emergency on December 30, 2020, either while fishing for lobster, returning to dock, or during the inspection. He claims he has trained his crew to know how to respond if he experiences symptoms of diabetes and has told his crew that the boat would return early if he were to experience symptoms. But, while lobster fishing on December 30, 2020, respondent insisted that he alone measure all of the lobsters he and his crew caught, as was his usual practice, rather than delegating that duty to a crew member. He himself piloted the Olivia Rae back into the harbor and into its slip. He then drank some orange juice and, rather than contact any emergency services or healthcare provider to treat him, at his request proceeded to re-measure the 34 lobsters the officers claimed were undersized.

30. None of respondent's crew members testified at hearing or submitted affidavits to corroborate any of respondent's claims about his condition on December 30, 2020, or about his teaching them how to address his condition generally. Nor did respondent offer corroboration from any healthcare provider as to his condition and its possible effects on him on December 30, 2020, or from any family member as to the insulin reservoir he testified he left at home that day.

31. Though respondent took responsibility for measuring the lobsters incorrectly, from the evidence on this record, including the observations of the two DFW officers, the uncorroborated nature of respondent's testimony, and respondent's voluntarily taking the time to re-measure all the undersized lobsters rather than address his alleged medical issue, it appears unlikely that respondent possessed so many undersized lobsters due to a diabetic condition having impaired his judgment.

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## **Criminal Conviction for Undersized Lobster**

32. On March 1, 2021, in *People v. Ewart* (Super. Ct. Ventura County, 2021, No. 2021001343), respondent was charged with, and on October 1, 2021, respondent pled no contest to and was convicted of, violating Fish and Game Code section 8252 (possessing spiny lobsters of less than the minimum length), a misdemeanor. The sentenced respondent to pay restitution of \$2,000 to DFG and to pay fees.

## **LOBSTER OUT OF SEASON AND UNDERSIZED LOBSTERS—MARCH 23, 2019**

33. The Second and Third Causes for Discipline are based on allegations that, on March 23, 2019, respondent possessed live lobsters out of season, including undersized lobsters, in violation of Fish and Game Code section 8252 and California Code of Regulations, title 14, sections 121, subdivision (b), and 121.5, subdivision (a). The allegations pertain to respondent's alleged activities from March 20 to March 23, 2019.

34. Commercial lobster season closes the first Wednesday after March 15 each year, which in 2019 was March 20, at midnight. The season closes to allow lobsters to spawn and reproduce in the offseason. During the offseason, lobster traps may remain in the water but they cannot contain live lobsters. It would be impossible for a warden to tell whether the lobsters were taken during the season or after the season closed.

35. In March 2019, the commercial fishing vessel *Crustacean* was registered to Ventura Sportfishing, then owned by respondent's parents. Respondent and his father, Greg Ewart, who also has a lobster permit, each operated the *Crustacean* at different times in 2019.

36. On March 22, 2019, the Department received a tip that there were live lobsters being kept in a receiver tied to the cleat used by the Crustacean, two days after the close of the commercial lobster season. On March 22, DFG Officers began surveilling the receiver tied to the cleat at the Crustacean's slip. On March 23, 2019, Officer Van Epps seized the lobsters from the receiver. Officers Van Epps and Johnson counted 42 lobsters inside the receiver. Then, on March 28, Officer Johnson reviewed surveillance video, taken by a fuel dock camera, of the Crustacean's slip during the period from March 20 to March 23, 2019.

### **March 20, 2019**

37. Respondent's lobster log for March 20, 2019, which respondent submitted to DFG by April 10, 2019, reveals respondent, not his father, was using the Crustacean on that date. Respondent docked the Crustacean at a fuel dock that jutted perpendicularly from the shore (variously known as Dave's Marine Fuel, Dave's Fuel Dock, and Leo's Fuel Dock), at the slip closest to the rocks and to the gangway down from the parking lot. There are six other slips at that dock. Four slips belonged to commercial fishers, all with lobster permits and some with other permits as well (crab, swordfish, longlining). The dock may be accessed through a gate and down the gangway, or from the water, by kayak or a small private boat. There is no gate on the water side of the dock.

38. Jacob Coombs, a Lieutenant Supervisor for North Los Angeles and Ventura Counties, Patrol Division, supervises other wardens. He was working as a field training officer on the Ventura Patrol on March 20, 2019. Lt. Coombs patrolled Ventura Harbor by vehicle with Lt. J.C. Healy, his supervisor; Capt. John Laughlin accompanied the patrol in his own vehicle. At about 8:00 p.m., Lt. Coombs saw the Crustacean docking at its berth. He and the other two officers walked from the parking lot to the

Crustacean, talked to respondent and his crew, and conducted an inspection of the catch of lobster and crab and of respondent's paperwork, including licenses and log books. Lt. Coombs found respondent to be cooperative.

39. Respondent directed Lt. Coombs to the back deck, where there was a 32-gallon container resembling a large gray commercial trashcan, a typical container on lobster boats. Lt. Coombs testified he was able to conduct only a "visual inspection from looking from the top" of the bin containing the lobsters and observed that the level of lobsters in the bin was "over the halfway mark." Lt. Coombs estimated there were about 45 to 50 lobster in the container; the ones he saw near the surface appeared to be around legal size. Lt. Coombs would typically measure all the lobster in the container, but on this occasion he and the other officers were interrupted by information about a possible poaching incident near the breakwater, so they left respondent's boat to investigate what might be a crime in progress.

40. As Lt. Coombs and the other officers were disembarking, respondent approached them. He said he intended to sell his lobster but that his buyer, who was in Redondo Beach, might not arrive at the dock until after midnight that night, the close of the season. Respondent asked whether there was any leeway in the deadline and whether he would be in violation if he dumped the lobsters in the water.

41. This was an unusual request; no one else had ever asked Lt. Coombs about keeping lobsters past the season closure. The officers said possessing the lobsters after midnight would be a violation, though dumping the lobsters would not be. Lt. Coombs explained that the law, California Code of Regulations, title 14, section 121, prohibited possession of live lobsters after midnight. Lt. Coombs said, though, that he understood the circumstances and would be willing to work with respondent if the buyer were only an hour or two late. The officers told respondent to land the



lobsters so they could be documented before the season closure, and to freeze them if the buyer arrived more than an hour or two late. (Ex. 19.) Respondent testified he told the officers he would rather just dump the lobsters; they were worth only a few hundred dollars at \$7 per pound, so there was no real value to keeping them and risking a violation.

42. After the officers left, respondent and his crew cleaned the boat, that being the last day of the season, checked the oil, engine, and transmission, and left. Respondent testified he called the buyer to see whether he was nearby; the buyer said he was still on the freeway and had to go to Oxnard first. According to respondent, because it appeared the buyer would not arrive before or even shortly after midnight, respondent went down to the Crustacean and dumped all the lobsters. Respondent's lobster log reads, "Dumped barrel of lobster, buyer couldn't make it. Crab was dumped as well." (Ex. 9, p. A70.)

### **March 22 to 23 Surveillance**

43. On March 22, 2019, DFG Officer Joe Johnson visited Ventura Harbor. He had been called by Officer Van Epps about a tip that a fisher had a receiver of spiny lobsters at a slip. A receiver is a heavy-duty plastic crate used by commercial fishers to transport and store their catch alive in the water. Receivers are required by law to be tied to a buoy with a fisher's commercial fishing license number ("L number") on the buoy. The receiver in question was reportedly tied by rope, not to a buoy, but to one of three or four cleats in the private slip at which the Crustacean was docked. Officer Johnson and Officer Van Epps planned to observe the receiver to see whether someone tried to retrieve it and take the lobsters. They staked out the slip and conducted surveillance.

44. On March 22, 2019, Officer Johnson entered the fuel dock to observe the cleat and confirmed lobsters were in one of two receivers tied to two cleats and suspended a couple of feet below the surface of the water; the other receiver contained live rock crabs. The receivers were roughly one foot by three feet by four feet. Officer Johnson ended his surveillance at 10:00 p.m., Officer Stanton relieved him, and he was relieved in turn by Officer Van Epps. Surveillance was continuous.

45. Slips are rented out by the harbor, and the slip owner has exclusive use of the slip. Ventura Sportfishing owned the Crustacean's slip on the fuel dock, but others with slips on that dock could access it.

46. The marine fuel store above the gangway to the fuel dock and outside the gate has a surveillance video camera. The camera has a short memory bank, recording over itself at two-week intervals.

47. On March 28, 2019, after the officers finished surveilling the slip, Officer Johnson visited the fuel store and reviewed three or four days' worth of video from the fuel dock camera covering the period from March 20 to March 23. Officer Johnson asked the owner to record a copy of the video, but the owner did not know how to do so and the video was deleted.

48. According to Officer Johnson, the video revealed that, once the boat arrived on March 20, it remained docked the entire time. Officer Johnson did not see any line tied to a cleat at the slip prior to the Crustacean docking there. A still image introduced in evidence captured an unobstructed view of a portion of the gangway, the entirety of the Crustacean's slip, and portions of two or three other slips at the fuel dock. Ropes may be seen attached to cleats near the Crustacean and leading into the water. A small portion of the boat in the slip adjacent to the Crustacean's slip can be

seen; Officer Johnson could not remember what type of vessel it was. Officer Van Epps testified there were five other boats at the dock, including one for commercial crabs, one for harpoon swordfish, and one for commercial groundfish and bait.

49. On the video Officer Johnson observed people entering the Crustacean slip three times.

50. First, Officer Johnson saw that, on March 20, respondent and his crew pulled the boat into the slip, and Lt. Coombs and the two other officers who inspected respondent's catch that day walked down the gangway and talked to respondent and his crew for about 10 minutes. The crew left the Crustacean and took no lobsters with them. Lobster season was still open and would close at midnight that night.

51. Next, Officer Johnson observed video of March 21, the day after lobster season closed; the video showed respondent accessing the slip. Respondent did some work on the vessel and moved some items under water on the starboard side at about 8:30 p.m. The video showed respondent bent down near the cleat at the bow of the boat and moving his arms. Officer Johnson interpreted the movements as being consistent with tying something to the cleat.

52. Finally, on the night of March 21, Officer Johnson himself appeared in the video, inspecting the receivers.

53. Officer Johnson saw no one else enter the slip during those three days captured on video.

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## **March 23 Seizure and Inspection**

54. Surveillance ended on the morning of March 23, when Officer Van Epps seized the live spiny lobsters from the receiver. There were two receivers attached to the cleat at the Crustacean's slip. The receivers had no identifying marks or L number.

55. That afternoon, Officer Johnson inspected the lobsters seized from the receiver. He counted 42 lobsters. This was a close approximation of the number of lobsters Lt. Coombs testified he saw in respondent's bin on the Crustacean, before Lt. Coombs was called away to investigate a poaching incident. Officer Johnson measured the lobsters and found three to be undersized.

56. Officer Johnson spoke with respondent the afternoon of March 23, when inspecting respondent's catch. Respondent said nothing about who might have tied the receiver to the cleat. Only persons authorized to use the slip, i.e., persons associated with the Crustacean, were authorized to use the cleat at that slip. Officer Johnson testified that he has never seen someone tie a receiver to someone else's cleat. It also would have been very difficult and risky for any person other than respondent to tie a receiver filled with illegally possessed lobsters to someone else's cleat without getting caught. To reach the Crustacean's cleat, a person would have to, without attracting the attention of DFG officers (who, in addition to patrolling the harbor, operated a patrol vessel that was docked in a slip within view of the Crustacean), carry and then tie the large receiver to the cleat.

57. Respondent testified he occasionally uses a receiver when he is the only fisher with a catch, to hold lobsters until other fishers bring in their catch so the buyers can pick up all the lobsters at once. Respondent testified he makes his own receivers from black PVC-coated wire mesh and that his receivers are tagged with his

commercial fishing license number, as required by law. The receiver seized in this case (ex. 17, A86) does not resemble his receivers. Respondent denied catching the lobsters that were in the receiver. According to respondent's lobster logs, respondent dumped the 21 lobsters aboard the Crustacean back into the ocean due to not having a market for them. (Ex. 9, p. A70.) Aside from his own self-serving log entry, respondent offered no evidence to corroborate his testimony.

58. Officer Johnson did not compare the unmarked receivers found at the Crustacean's slip to other receivers respondent owns. He did not know whether respondent's receivers all have respondent's L number on them. Officer Johnson conceded that someone who wished to hide a receiver from scrutiny could possibly hide it near another fisher's boat. Recreational fishing boats used the adjacent dock and public launch ramp, and vessels launched from the public ramp sometimes tie up at the fuel dock at night.

59. Respondent was criminally charged with having lobsters in the receiver after the season closed. He was not convicted.

60. A preponderance of the evidence supports a finding that respondent transferred the lobsters from the bin on his deck to a receiver, placed the receiver into the water, and tied the receiver's rope to the Crustacean's cleat.

61. The receiver was just below the surface of the water and the rope attached to the cleat and receiver was visible. When respondent walked past the receiver, he could not have avoided seeing the rope and the receiver. But respondent did more than merely walk past the receiver—he spent 30 minutes on March 21, 2019, working on and around the Crustacean. He even tied a rope to the same cleat to which the receiver containing lobster was attached. If the receiver was not respondent's, as

he claims, he would have been expected to either release the lobsters or contact DFG to report a violation. However, respondent did neither of those things, presumably because he intended to keep the 42 lobsters in his receiver. The Crustacean was the only lobster fishing vessel at that dock, making it highly unlikely that the receiver belonged to anyone other than respondent. That the criminal prosecutor was unable to establish respondent's violation by a burden of proof stricter than that applicable here is not determinative of the import of the evidence in this case.

### **LOBSTER TRAPS AND LOGS**

62. The Fourth Cause for Discipline is based on allegations that respondent failed to lawfully deploy lobster traps and maintain them, i.e., raise, clean of debris, empty, and service them at statutorily mandated intervals between October 2018 and March 2019. The Fifth Cause for Discipline is based on allegations that respondent failed to submit to the DFW or accurately keep Daily Lobster Logs on various dates in the same time period. Both causes allege violations of California Code of Regulations, title 14, sections 122.2, subdivision (d), and 190, subdivision (a).

63. To catch spiny lobsters, a fisher uses a commercial lobster trap, which is large, rectangular, and of wire construction, with a couple of openings and escape hatches. The trap is baited and dropped in the water with a line, which is attached to a buoy. Lobsters enter; small ones may escape. The fisher pulls the line attached to buoy, retrieves the lobsters, and returns undersized lobsters to the water. The fisher must have a commercial fishing license, a lobster operator permit, and a vessel registration to fish for lobster this way.

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## **FAILURE TO LAWFULLY DEPLOY AND MAINTAIN TRAPS**

64. Fishers may leave their traps without checking them for up to seven days (168 hours). (Cal. Code Regs., tit. 14, § 122.2, subd. (d).) Lobsters left in traps more than seven days are subject to predation from other lobsters, fish, birds, and seals.

65. Officer Johnson explained that daily lobster logs are helpful for managing marine resources. Department biologists use the data to make management decisions, and the logs are useful for enforcing commercial fishing laws.

66. Lobster fishers must submit logs by the 10th of month following the month when they were created. The logs have blanks for the number of traps pulled and serviced in a given area, the number of nights the traps were in the water since they were last serviced, the number of undersized lobsters released, the number of legal-sized lobsters retained, i.e., lobsters pulled from traps, measured, and kept on vessels to be sold; and the date the traps were pulled. There is a Note Pad section for fishers to mark any notes. The fisher is to indicate whether it was a multi-day trip, where the fisher might service several traps, anchor overnight, and continue servicing traps the next day. The form asks for the number of traps currently deployed; there is a limit of 300 per permit that may be simultaneously in the water.

67. Respondent did not complete the field on his logs indicating the number of traps deployed.

68. Completed lobster logs reflect the date a trap is pulled from the water. According to Officer Johnson, that is usually the same as the date the trap is again placed, except first date of season. A fisher will pull a trap onto the vessel, open it, remove all wildlife, throw back in the water undersized lobsters, keep legal lobsters, re-bait the trap, and put the trap back in the water immediately to keep it fishing and

productive. A fisher might move a trap slightly as the season progresses, but usually places it again within the same block. This avoids lost time, fuel costs, and crew costs; besides, spaces for traps are scarce during the season, as there are numerous traps set by numerous lobster fishers. Unless something is wrong with a trap, the fisher will place it back in the water the same day it is pulled to be checked and maintained.

69. Comparing the date traps were pulled for a particular block with the last prior log that mentions that block shows that respondent committed 14 violations during the 2018-2019 lobster season for failing to raise, clean of debris, service, and empty traps at intervals not to exceed seven days. The logs contained numerous understatements of the number of nights traps were in the water.

70. Respondent admitted that the Department correctly calculated the number of nights traps were in the water for these fourteen violations of California Code of Regulations, title 14, section 122.2, subdivision (d). To excuse these violations, respondent claimed he was unable to service lobster traps as planned due to inclement weather.

71. Officer Johnson explained that neither California Code of Regulations, title 14, section 122.2, subdivision (d), nor any other authority, allows a fisher to delay servicing a trap for any reason. If fishers cannot service a trap in the prescribed time, they may apply for a waiver from DFW to permit another operator to service their traps. Officer Johnson told respondent that he could apply for a waiver if he could not service his traps, but knows of no time that season when respondent requested a waiver. In any event, most of the log entries respondent cites as documenting bad weather or other delays occurred on dates unrelated to his fourteen violations of section 122.2(d).



72. Respondent disputes two violations of California Code of Regulations, title 14, section 122.2, subdivision (d), based on his leaving traps in the water unserviced for 22 days from January 31 to February 22, 2019, and leaving traps in the water unserviced for 66 days from October 8 to December 14, 2018. Officer Johnson testified the records show respondent did not move these traps when he pulled them on January 31, 2019: instead, he immediately placed those traps back in the water and did not pull or service them until 22 days later. Respondent acted similarly on October 8, 2018, and December 14, 2018. (Ex. 9, pp. A52 [October 8, 2018], A62 [December 14, 2018].) "Trap Locations" data respondent submitted in his lobster logs show he did not move these traps at all. (See ex. 9, pp. A67 [January 31, 2019], A68 [February 22, 2019].) The latitudinal and longitudinal data, including minutes, for both dates are nearly identical. Respondent did not move these traps nor did he service them for 66 days. While the minutes for the latitudes differ by .003 minute, and the minutes for the longitudes differ by .006 minute, these differences are negligible considering that 0.001 minute is about six feet and could be caused by drifting.

### **FAILURE TO KEEP AND TIMELY SUBMIT ACCURATE LOGS**

73. On 34 occasions in 2018 and 2019, respondent submitted incomplete and inaccurate logs. Officer Van Epps explained that except at the beginning and end of a season, lobster fishers place traps back in the water immediately or very soon after they are pulled, so the "Date Traps Pulled" field in lobster logs also reliably indicates the date traps were returned to the water. There is no separate "Date Traps Replaced" field in the logs. Moving traps around and redeploying them at later dates requires large amounts of both time and fuel, and take the traps out of production for a time. Depending on the size of the vessel and number of traps, it can take several trips to remove traps and redeploy them later. Suitable fishing grounds are limited, so

it is often difficult once the season is underway to find new locations to place traps that are not already occupied by other traps.

74. Because "Date Traps Pulled" reliably indicates the same date that traps were returned to the water, wardens can verify whether lobster logs accurately state the number of nights that traps were in the water by looking at the difference between the Dates Traps Pulled fields for the same fishing block number. For example, respondent's November 16, 2018 log describes fishing activity related to 150 traps in Block 681. The November 16 log states that traps had been deployed in the water for five nights. Reviewing previous lobster logs shows that the last prior log that mentions Block 681 is respondent's November 6, 2018 lobster log, which is both the date the traps were last pulled from the water and, what is highly likely, the date the traps were last returned to the water. Respondent submitted an inaccurate entry in his November 16 lobster log because those 150 traps in Block 681 were actually in the water from November 6 to November 16, 2018, i.e., the traps were in the water ten nights and not five nights as respondent claims.

75. Applying this method to respondent's 2018-2019 lobster logs shows that he inaccurately logged the number of nights that traps were in the water 32 times. When asked to explain discrepancies between what the Department determined were the actual numbers of nights his traps were in the water and what he submitted in his logs, respondent stated he had simply made mistakes in counting nights when filling out the logs. He maintained that the dates he entered in his logs were correct.

76. In addition to these 32 inaccuracies regarding the number of nights his traps remained in the water, respondent also wrote in his March 20, 2019 log that he kept 21 legal-sized lobsters when he actually kept 39 legal-sized lobsters and three undersized lobsters total in his receiver. He also submitted an incomplete log on

November 12, 2018 by not providing "No. of Legals Retained," even though there is a landing receipt number, 0477371, listed in the corner of that log under "Landing Receipt Number(s)" showing he had retained legal-sized lobsters.

77. Todd Neahr, Environmental Program Manager, assumes the fisher puts traps back in same spot. A few might be moved, perhaps up to 50 traps on one fishing day, but respondent's boat cannot hold, for example, 300 traps at a time. Because respondent failed to complete the "# of Traps Deployed" field in his logs, despite a requirement that fishers completely and accurately fill out their logs. Officer Neahr believes it probable, based on lobster fishing practices and the practicalities of moving traps, that respondent did not move the traps after he pulled them to service them.

78. Officer Van Epps testified he has observed fishers pulling and placing traps hundreds or thousands of times. He has never heard of a fisher moving large numbers of traps from one location to another in the middle of the season; that happens at the beginning or end of a season. A fisher might move one trap during the season if it is not performing well, but moving more is very uncommon. Lobsters are valuable, and fishers put the traps back in the same place to maximize the time the traps are in the water. Also, in addition to the logistics of moving traps on relatively small vessels, it can be a challenge to find a location without a substantial number of traps already there.

79. Respondent testified he usually moves traps that are not performing well to different blocks during the season. Logbooks do not have a box showing where fishers relocated their traps. They do, however, have a box where the fisher can enter explanatory notes. Respondent also testified there is no advantage to failing to timely service traps, since bait will not be fresh and other fishers' traps will catch the available lobsters. Finally, traps in front of the harbor may be damaged by large swells, so the

Harbor Patrol permits fishers to pull traps and place them in the parking lot ahead of the swell and replace them when the swell goes out.

80. Respondent admitted his logs were inaccurate in that he incorrectly calculated the time between dates, but insisted he logged correct dates. That is why he did not contest the criminal case against him for these violations.

81. Respondent submitted incomplete logs; they lacked required information and information that would be helpful in determining such important facts as changing trap placement and time in the water. Complainant did not establish, though, that the dates respondent entered in his logs were inaccurate; indeed, complainant calculated time-in-the-water violations based on respondent's dates. Nor did complainant establish respondent was trying to conceal the number of days the traps were left in the water, since he entered correct dates.

### **LANDING RECEIPTS**

82. The Seventh Cause for Discipline is based on allegations that respondent failed to make landing receipts available for inspection by May 8, 2019, in response to a DFW peace officer's request on April 24, 2019, in violation of Fish and Game Code section 8046, subdivision (a).

83. Todd Neahr testified that landing receipts at commercial landings are used throughout the U.S. whenever a catch is offloaded to a commercial fish business. All licensed commercial fish businesses are required to submit landing receipts to DFW. DFW uses data from the receipts to assess fish stock, fishery productivity, and economics. Until July 1, 2019, all paper landing receipts were entered into a Marine Landings Database system. Landing receipts have been electronic since July 1, 2019.

84. Lobster fishers are required to submit their logbooks each month by the 10th day of the following month. They must also retain and make available to DFW copies of landing receipts. Buyers submit the receipts to DFW; lobster fishers receive a copy.

85. On April 3, 2019, by letter, Officer Johnson asked respondent for his 2018 to 2019 season logbook pages and landing receipts. Officer Johnson sent the letter to respondent's address of record, as listed in the DFW automated license and data system. Licensees must keep their address listing current. Receiving no response, Officer Johnson sent respondent a second request for the landing receipts on April 10, by certified mail. The letter was returned to DFW, stamped "Return to Sender. Refused." (Ex. 9, p. A91.)

86. On April 24, 2019, Officer Johnson made a third request, in person, on board the Amigo, operated by respondent. It was at the end of a sportfishing day trip and passengers were disembarking. Officer Johnson did not expect respondent to have the landing receipts with him. Officer Johnson told respondent to produce the documents within two weeks, by May 8, either directly to him or to the Los Alamitos field office. Officer Johnson told Respondent he "was issuing him a formal demand to inspect his copies of his logs and landing receipts from this past commercial spiny lobster commercial fishing season" by May 8, 2019. Officer Johnson gave respondent a letter demanding respondent send his logbook and landing receipts to the usual address. This was on April 24, 2019, two weeks after the date the logbooks for March 2019 would have been due.

87. Officer Johnson never received the landing receipts from respondent.

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88. Respondent testified the address Officer Johnson sent the requests to was not his address, it was his parent's address. Respondent submitted no evidence to support this claim, or to explain why he had not correctly informed DFW of his address of record.

89. Respondent was subjected to criminal prosecution for the conduct alleged in seventh cause for discipline and was acquitted by a jury. (Ex. B.) Officer Johnson found the landing receipt for the fish bought on October 7, 2018, submitted by the buyer, on DFG's database. The landing receipt identified Greg Ewart, not respondent, as the seller. Respondent was criminally charged with having a landing receipt but no log entry for October 7, 2018. But since, from the landing receipt, it appears respondent was not the fisher, respondent would not be expected to have a log entry for that day.

## **CPFV Sportfishing**

### **FISHING IN A CLOSED AREA ON APRIL 21 AND MAY 16, 2016**

90. The Ninth, Sixteenth, and Eighteenth Causes for Discipline, relating to April 21, 2016, and the Seventeenth and Nineteenth Causes for Discipline, relating to May 16, 2016, are based on similar allegations. Namely, that on those dates, respondent took and possessed fish in, and his crewmembers and passengers fished, and took and possessed fish taken in, an area closed to groundfish fishing, all while respondent was the operator of the CPFV Amigo, in violation of California Code of Regulations, title 14, sections 27.45, subdivision (b)(2), and 195, subdivision (f), and Fish and Game Code section 2002.

91. In 2016, groundfish fishing was prohibited in the Southern Groundfish Management Area, an area seaward of lines approximating the 60-fathom depth

contour, defined by connecting a set of 60-fathom waypoints adopted in federal regulations (60-fathom contour lines). A fathom is six feet. Fishing in a closed area may be detrimental to the health of the target species fishery. Rockfish, a type of groundfish, are slow growing and may live to be 70 years old. The rocky areas where they are found are relatively small; most of the sea floor in the area is sandy.

92. A CPFV is a vessel registered in California that carries paying fishing passengers. Passengers pay for a day of fishing because they generally want to be able to bring fish home, according to Officer Van Epps. He characterized rockfish as a CPFV's "bread and butter." A CPFV will fish for more exotic species, such as white seabass, halibut, and yellowtail, early in the day. It not infrequently happens that some passengers will not catch their limits. Later in the day the boat will target rockfish, where the passengers will more likely succeed and be more likely to come back for more trips.

93. All owners of CPFVs must submit logs, or may designate others to submit logs, at the conclusion of each day trip, or for every day of a multi-day trip. A CPFV log provides information about the operator of the boat, the duration of the trip, the target fish species, the number of passengers, what is caught and released while the vessel is on fishing grounds, and the depth at which fish were caught. Logs should be submitted by the 10th day of the month following the trip.

94. In April and May, 2016, DFW Lt. Specialist Ambartsum Bagdasaryan assisted Officer Van Epps with an investigation into the Amigo. DFW had received a tip that the Amigo was taking passengers fishing for groundfish in a closed area, beyond the permitted depth.

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95. During the April 21, 2016 trip and the May 16, 2016 trip, Lt. Bagdasaryan and another officer boarded the Amigo in Ventura Harbor to conduct a plainclothes investigation. During each trip, Lt. Bagdasaryan used two Global Positioning System (GPS) devices, one to record vessel locations and the other to record waypoints showing where fishing activity occurred, to determine whether passengers and crew were fishing on the seaward side of the 60-fathom contour lines. After returning from the trips, Lt. Bagdasaryan plotted the GPS data he had obtained to create maps using Google Earth. Officer Todd Van Epps then overlaid those maps with a map produced by the National Oceanic and Atmospheric Administration showing the 60-fathom contour lines.

### **April 21, 2016**

96. On the morning of April 21, 2016, Lt. Specialist Bagdasaryan and another Wildlife Officer, Lt. Specialist Norris, who is no longer with DFW, were among the thirteen total passengers who boarded the Amigo. Respondent was the captain.

97. The Amigo departed at about 4:23 a.m. The target species that day were seabass and rockfish. The captain determines where to fish and what species to fish for, and announces his decisions over the boat's speaker so fishers know what gear to use. The gear used varies depending on the target fish. Fishers may target seabass at the middle of the water column, using relatively light sinkers and baiting a single hook with live or dead bait. To catch rockfish, fishers generally use a heavier sinker in order to reach the sea floor, and may bait multiple hooks with dead squid or dead fish.

98. Passengers and some of the crew started fishing around 6:00 a.m. After fishing near Arch Rock, the Amigo went to the back side of Anacapa Island. At about 10:30 a.m., respondent directed the Amigo passengers and crew to begin fishing for



rockfish. Respondent himself began fishing for rockfish at 11:45 a.m. For the rest of the trip, passengers, crew, and respondent fished for and kept rockfish. Fishing stopped at 3:01 p.m.

99. The maps that Officer Van Epps and Lt. Bagdasaryan created show that between 11:10 and 11:54 a.m. on April 21, 2016, the Amigo entered a closed area seaward of a 60-fathom contour line. Respondent, his crew, and his passengers caught and kept rockfish there.

100. A CPFV captain is responsible for all violations committed aboard a CPFV. (Cal. Code Regs., tit. 14, § 195, subd. (f).) Officer Cohen, who has worked as a deckhand on a CPFV, testified that few passengers have knowledge of fishing laws, though many are concerned about and support regulations for sustainable fisheries. The captain of a CPFV determines the activities of the passengers and of the crew, and passengers generally follow their captain's directions. Every passenger who fishes for rockfish in a closed area commits misdemeanor violations, though probably unknowingly. Officer Van Epps testified that, unless officers find the passengers knowingly violated the law, wardens only prosecute the captain and crew.

101. Respondent concedes that he committed the violations described in the Eighth, Ninth, Sixteenth, and Eighteenth Causes for Discipline. On May 17, 2017, in a criminal case based on those violations committed on April 21, 2016, respondent pled guilty to and was convicted of violating Fish and Game Code section 2002 (possession of fish taken in violation of the law). (Ex. 7, pp. A38-A43.)

## **May 16, 2016**

102. On May 16, 2016, one day before respondent's criminal conviction for his activities on April 21, Lt. Bagdasaryan and another wildlife officer, Wayne Zerofsky, no

longer with DFW, conducted a second plainclothes investigation aboard the Amigo. The boat carried 17 passengers for that trip, including the two officers. The log for the May 16, 2016 trip shows respondent was the operator. It was a single-day trip.

103. Respondent and his passengers spent the morning fishing for white seabass and other species along Santa Cruz Island. At 10:48 a.m., they stopped fishing and travelled towards an area outside a 60-fathom contour line. At 11:53 a.m., in an area four miles seaward of a 60-fathom contour line, an area closed to groundfish fishing, respondent directed passengers to use rockfish tackle and to fish for rockfish. Respondent did not tell the passengers they were in an area closed to rockfish fishing.

104. The Amigo was in the closed area for 3 hours and 30 minutes, fishing most of the time except when the captain moved the boat a bit. Passengers and crew caught and kept large numbers of rockfish species, including bocaccio. The fish were large and abundant in the closed area. The Amigo stopped fishing in the closed area at 3:25 p.m. and started heading back to Ventura Harbor.

105. Respondent testified it is possible the Amigo drifted outside the contour line while still fishing, but maintained it was not intentional. And the more inexperienced fishers who rent rods and reels have a hard time winding up 300 feet of line; while they are doing so, the captain cannot power up and move the boat, even if it has unintentionally drifted to a closed area. But on cross-examination, respondent was reminded that Lt. Specialist Bagdasaryan testified the Amigo was fishing four miles outside the 60-fathom contour line. Respondent, asked if that was not quite a ways for an unintentional crossing, simply answered, "Yeah."

106. Based on the evidence, including the waypoints, the timeline, the distance traveled into the closed area, the long time spent there, and respondent's

testimony along with that of the officers, respondent intentionally took the Amigo across the 60-fathom contour line, found a fishing location, set up at furthest point from the lawful fishing grounds, and then allowed his boat to drift toward lawful fishing grounds.

**KEEPING UNDERSIZED CABEZON AND SHEEPHEAD; SKIN NOT ATTACHED TO FILETS; DEAD BOCACCIO**

107. The Tenth, Eleventh, and Twelfth Causes for Discipline are based on allegations that, on April 11, 2016: a cabezon and a sheephead, species with size limits under California Code of Regulations, title 14, section 28.28, subdivision (c), were fileted aboard the CPFV Amigo, and rockfish filets aboard the CPFV Amigo did not have the entire skin attached as required by California Code of Regulations, title 14, sections 27.65, subdivision (b)(8), and 195, subdivision (f), all while respondent was operating the CPFV Amigo.

108. The Thirteenth, Fourteenth, and Fifteenth Causes for Discipline are based on allegations that, on May 16, 2016, rockfish filets aboard the CPFV Amigo did not have the entire skin attached as required by California Code of Regulations, title 14, sections 27.65, subdivision (b)(8), and 195, subdivision (f); the CPFV Amigo exceeded its boat limit for rockfish in violation of California Code of Regulations, title 14, sections 27.60, subdivision (c)(2), and 195, subdivision (f)(1); and crewmembers on the CPFV Amigo threw 26 dead bocaccio into the ocean, in violation of California Code of Regulations, title 14, sections 1.87 and 195, subdivision (f), all while respondent was operating the CPFV Amigo.

109. On April 11, 2016, Lt. Specialist Santos Cabral contacted respondent shortly after the Amigo returned from a commercial passenger fishing trip and pulled

into its slip in Ventura Harbor. Lt. Cabral inspected fish that crewmembers had already fileted and placed in bags that they were distributing to passengers. Lt. Cabral noticed that several rockfish did not have the entire skin attached to the filets. Lt. Cabral also found cabezon and sheephead carcasses that were fileted. Regulations in effect at the time required that the crew leave the full skin attached to the fish. The Amigo's crew and respondent instead removed the entire skin, so it was difficult or impossible to identify the fish species by looking at the filets or to determine their sizes when they were intact.

110. Lt. Cabral warned respondent about these violations. In response, respondent told Lt. Cabral he would do a better job on fileting in the future. But respondent committed the same violation again about a month later, on May 16, 2016, when he and a crewmember fileted rockfish without leaving the entire skin attached to the filets. (Thirteenth Cause for Discipline.)

111. On the May 16 trip, while the Amigo was returning to Ventura Harbor, respondent and one of the crew started cleaning and fileting the fish for the passengers, again removing the entire skin. Passengers kept the fileted fish, including some bocaccio. The May 16 log was submitted late, on August 27, 2016; it should have been submitted by June 10.

112. Among the rockfish the passengers caught and kept onboard were 26 whole bocaccio. Bocaccio are known to be much more likely than other rockfish to be infested with parasites. The crew placed the bocaccio under the cleaning table and eventually tossed them overboard, dead. This is consistent with an illegal practice in which a CPFV retains whole, dead bocaccio that are caught, then discards them later during the trip if the CPFV reaches a boat limit with more desirable rockfish species,

i.e., species not as likely as bocaccio to be infested with parasites. According to Officer Van Epps, this illegal practice is known as "highgrading."

113. Each fisher may possess no more fish of a particular species than allowed by regulations, the fisher's "bag limit." The "boat limit" is each passenger's bag limit multiplied by the number of passengers on the boat. Respondent reported 170 rockfish were kept (ex. 10, p. A73); that was the boat limit, i.e., each passenger's 10-fish limit multiplied by 17 passengers. But that did not include the 26 bocaccio that were dumped into the ocean. (Ex. 12, p. A76.) Including those, the Amigo really took 196 fish, 26 over the boat limit.

114. Respondent excuses these violations by claiming that the laws governing the amount of skin to be left on fileted fish changed shortly before the May 16, 2016 trip. The laws governing fileting rockfish, however, were amended over a year before that date, and the laws governing fileting sheephead and cabezon were amended four years earlier. In any event, even if the fileting regulations had changed only shortly before respondent's May 2016 trip, that would not excuse any of respondent's fileting violations, especially after receiving Lt. Cabral's warning in April 2016.

115. Respondent argued that his CPFV violations described in Eighth through Nineteenth Causes for Discipline are "unrelated to commercial fishing or the commercial lobster fishery." But the Commission may revoke a commercial fishing license or lobster operator permit for any violation of the Fish and Game Code or its implementing regulations. (Fish & Game Code, § 7857, subd. (b)(2).) CPFV operations are similar to commercial lobster fishing in that they both involve profiting from the taking of state fishery resources. Thus, respondent's CPFV violations are relevant to the question of disciplining his License and his Permit.

116. Respondent argued the wardens never counted the number of rockfish brought back to the dock to determine whether the 170 noted in the log included the bocaccio, so it is possible the passengers kept only 144 rockfish. But the log belies this assertion; it reflects that 170 rockfish were caught and none were thrown back. (Ex. 10, p. A73.)

### **CRIMINAL CONVICTION**

117. The Eighth Cause for Discipline is based on allegations that, on May 17, 2017, respondent was criminally convicted of violating Fish and Game Code section 2002, a violation for which the License may be revoked.

118. On April 20, 2017, in *People v. Ewart* (Super. Ct. Ventura County, 2017, No. 2017013224), respondent was charged with six criminal counts arising out of his activities on April 21 and May 16, 2016. They comprised a count for each date of unlawful possession of a creature unlawfully taken, in violation of Fish and Game Code section 2002, as well as multiple counts for May 16, i.e., one count of possessing rockfish filets without the skin attached (Cal. Cod Regs., tit. 14, § 27.65, subd. (b)(8)), two counts of taking and possessing rockfish in excess of the limit (Cal. Cod Regs., tit. 14, § 28.55, subd. (b)), and waste of fish (Cal. Cod Regs., tit. 14, § 1.87).

119. On May 17, 2017, respondent pled guilty to and was convicted of violating Fish and Game Code section 2002 (unlawful possession of creature unlawfully taken) on April 21, 2016, a misdemeanor. The court dismissed the other charges, suspended imposition of sentence, and placed respondent on probation ("conditional revocable release") for 36 months, on conditions including that he pay a fine of \$500 and other fees and fines.

120. Respondent successfully completed probation.

## **Mitigation and Rehabilitation Evidence**

121. Complainant established respondent engaged in numerous and repeated acts of misconduct that had an effect upon marine resources.

122. Respondent failed to produce credible evidence that established mitigation of most of his misconduct, and failed to offer evidence from any third parties, in the form of testimony, declarations, or letters, to corroborate his testimony or establish rehabilitation.

## **LEGAL CONCLUSIONS**

### **Commission's Authority**

1. The Commission may, after a hearing, suspend, revoke, or temporarily cancel commercial fishing privileges of a licensee for a period of time to be determined by the Commission for the violation by the licensee, or by the licensee's agent, employee, or other person under the licensee's control, of: (a) the Fish and Game Code or of the regulations adopted under the code, (b) the terms of the license or permit, or (c) federal law relating to the fishery for which the license or permit was issued. (Fish & Game Code, § 7587, subd. (b)(2), (3).)

### **Burden of Proof**

2. Relying on section 7857, subdivision (b)(2), complainant requests that the Commission revoke respondent's commercial fishing license and lobster operator permit for numerous alleged violations of marine aquatic laws. As the party seeking relief, complainant bears the burden of proving the alleged violations by a preponderance of the evidence. (Evid. Code, §§ 115, 500.) No statute or case law

requires the application of the clear and convincing standard of proof to revocations of commercial fishing entitlements.

3. The more exacting “clear and convincing evidence” standard of proof used in disciplinary cases involving professional licenses is inapplicable because respondent’s license and permit are nonprofessional licenses. (See *Imports Performance v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.) Professional licenses have extensive education, training, and testing requirements. (*Ibid*; see also *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894; *Mann v. Department of Motor Vehicles* (1996) 76 Cal.App.4th 312, 319; 1889, 1894.) Respondent’s commercial fishing license and lobster operator permit have no such requirements. All persons over 16 years of age who pay the required fees are eligible for those licenses and permits. (Fish & Game Code, §§ 7852 [commercial fishing license], Cal. Code Regs., tit. 14, § 122 [lobster operator permit].) Respondent offered insufficient authority to support his proposition that an outlay of capital to purchase equipment converts an occupational license to a professional license.

## **Causes for Discipline**

### **FIRST CAUSE FOR DISCIPLINE**

4. Cause exists to suspend, revoke, or temporarily cancel respondent’s License and Permit in that respondent possessed undersized lobsters on December 30, 2020, in violation of Fish and Game Code sections 8252 and 121.5, subdivision (a), as set forth in Factual Findings 1 through 32.

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## **SECOND AND THIRD CAUSES FOR DISCIPLINE**

5. Cause exists to suspend, revoke, or temporarily cancel respondent's License and Permit in that, on March 23, 2019, respondent possessed live lobsters out of season, including undersized lobsters, in violation of Fish and Game Code sections 121, subdivision (b), 8252, and 121.5, subdivision (a), as set forth in Factual Findings 1 through 19 and 33 through 61.

## **FOURTH AND FIFTH CAUSES FOR DISCIPLINE**

6. Cause exists to suspend, revoke, or temporarily cancel respondent's License and Permit in that respondent failed to lawfully deploy and maintain lobster traps and to submit to the DFW, or to accurately keep, Daily Lobster Logs on various dates between October 2018 and March 2019, in violation of Fish and Game Code sections 122.2, subdivision (d), and 190, subdivision (a), as set forth in Factual Findings 1 through 19 and 64 through 81.

## **SEVENTH CAUSE FOR DISCIPLINE**

7. Cause exists to suspend, revoke, or temporarily cancel respondent's License and Permit in that respondent failed to make landing receipts available for inspection within two weeks, by May 8, 2019, in response to a DFW peace officer's request on April 24, 2019, in violation of Fish and Game Code section 8046, subdivision (a), as set forth in Factual Findings 1 through 19 and 82 through 89.

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**NINTH, SIXTEENTH, AND EIGHTEENTH CAUSES FOR DISCIPLINE, RELATING TO  
APRIL 21, 2016, AND THE SEVENTEENTH AND NINETEENTH CAUSES FOR  
DISCIPLINE, RELATING TO MAY 16, 2016**

8. Cause exists to suspend, revoke, or temporarily cancel respondent's License and Permit in that, on April 21 and May 16, 2016, respondent took and possessed fish in, and his crewmembers and passengers fished, and took and possessed fish taken in, an area closed to groundfish fishing, all while respondent was the operator of the CPFV Amigo, in violation of California Code of Regulations, title 14, sections 27.45, subdivision (b)(2), and 195, subdivision (f), and Fish and Game Code section 2002, as set forth in Factual Findings 1 through 19 and 90 through 106.

**TENTH, ELEVENTH, AND TWELFTH CAUSES FOR DISCIPLINE**

9. Cause exists to suspend, revoke, or temporarily cancel respondent's License and Permit in that, on April 11, 2016: a cabezon and a sheephead, species with size limits under California Code of Regulations, title 14, section 28.28, subdivision (c), were fileted aboard the CPFV Amigo, and rockfish filets aboard the CPFV Amigo did not have the entire skin attached as required by California Code of Regulations, title 14, sections 27.65, subdivision (b)(8), and 195, subdivision (f), all while respondent was operating the CPFV Amigo, as set forth in Factual Findings 1 through 19 and 107 through 116.

**THIRTEENTH, FOURTEENTH, AND FIFTEENTH CAUSES FOR DISCIPLINE**

10. Cause exists to suspend, revoke, or temporarily cancel respondent's License and Permit in that, on May 16, 2016, rockfish filets aboard the CPFV Amigo did not have the entire skin attached as required by California Code of Regulations, title

14, sections 27.65, subdivision (b)(8), and 195, subdivision (f); the CPFV Amigo exceeded its boat limit for rockfish in violation of California Code of Regulations, title 14, sections 27.60, subdivision (c)(2), and 195, subdivision (f)(1); and crewmembers on the CPFV Amigo threw 26 dead bocaccio into the ocean, in violation of California Code of Regulations, title 14, sections 1.87 and 195, subdivision (f), all while respondent was operating the CPFV Amigo, as set forth in Factual Findings 1 through 19 and 107 through 116.

### **EIGHTH CAUSE FOR DISCIPLINE**

11. Cause exists to suspend, revoke, or temporarily cancel respondent's License and Permit in that, on May 17, 2017, respondent was criminally convicted of violating Fish and Game Code section 2002, a violation for which the License may be revoked, as set forth in Factual Findings 1 through 19 and 117 through 120.

12. "[A] plea of nolo contendere or 'no contest' to . . . a charge of a violation of any provision of this code, or any rule, regulation, or order made or adopted under this code, is a conviction of a violation thereof. (Fish & Game Code, § 12158.5.)

13. Respondent's criminal convictions are substantially related to the qualifications, functions, and duties of a person holding a commercial fishing license. A licensee's conviction must be substantially related to his or her fitness to engage in an occupation. (*Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 954.) Where a licensing statute does not require a showing of a nexus between the licensee's conduct and the licensee's fitness or competence to practice, the statute must be read to include this "nexus" requirement to ensure its constitutionality. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770.)

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14. While many licensing agencies have published substantial relationship criteria, neither the Department nor the Commission have done so, and neither agency is under a legislative mandate to provide such criteria because its inclusion is implied.

15. Respondent's criminal convictions at issue in this disciplinary matter arose out of respondent's acts of proven misconduct in his capacity as a commercial fisher, or involved violations of the Fish and Game Code and regulations adopted thereunder. Thus, there is no factual or legal issue regarding the existence of a substantial relationship.

### **LEVEL OF DISCIPLINE**

16. Neither the Department nor the Commission has developed guidelines regarding the level of discipline to impose for misconduct by a licensed commercial fisher or permitted lobster operator. But Fish and Game Code section 12154, which concerns appeals of suspended or revoked hunting or sportfishing licenses, describes factors that are useful in determining the appropriate discipline in this case. The factors the Commission considers in such appeals include the nature, circumstances, extent, and gravity of the violations, the person's culpability for the violations, and the injury to natural resources caused by the violations. (Fish & Game Code, § 12154, subd. (b)(1).)

17. The primary purpose of administrative license proceedings is to protect the public; punishing the licensee is not the object of license discipline. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817; see also *Pirouzian v. Superior Court* (2016) 1 Cal.App.5th 438, 448-450.) It is reasonable to consider the factors described in Fish and Game Code section 12154 in this case to evaluate public protection, specifically the protection of the public's natural resources.

18. Respondent violated laws and regulations designed to protect the lobster fishery and the recreational sportfishing fisheries. The violations were serious and repeated, and sometimes engaged in after respondent received warnings about his very misconduct. His culpability for the violations is largely unmitigated.

19. Respondent presented almost no evidence of rehabilitation. The amount of evidence required to establish rehabilitation varies according to the seriousness of the misconduct at issue. The mere expression of remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is presented by sustained conduct over an extended period of time showing rehabilitation and fitness to practice. (*In re Menna* (1995) 11 Cal.4th 975, 987, 991.) Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

20. Respondent testified himself but called no other witnesses to describe his rehabilitation efforts, current commercial fishing practices, or present character. He downplayed his culpability for the violations by characterizing them as inadvertent mistakes, even the violation of placing the Amigo four miles inside a closed fishing area for over three hours. He did not adequately address his attempts to conceal his violations, such as keeping live lobsters in a receiver near his boat. Overall, respondent's evidence of rehabilitation from such serious violations was too limited to support his continued licensure as a commercial fisher and permitting as a lobster operator.

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21. Revocation of respondent's commercial fishing license and lobster operator permit is warranted to protect public resources.

22. Respondent argues that the threat of revocation of his Permit and License constitutes punishment and is disproportionate to his offenses. He also argues revocation would violate the prohibition against excessive fines set forth in the Eighth Amendment to the United States Constitution and Article I, Section 17 of the California Constitution.


23. Contrary to respondent's argument, revoking a habitual violator's privileges to take state fishery resources is not punishment or a fine, nor does it result in monetary benefit to the state. Neither is it punitive. In this case, the revocation of respondent's License and Permit is intended to protect the public by protecting state fishery resources against the likelihood, established by respondent's repeated violations over a period of time and after receiving warnings, that respondent will continue to violate statutes and regulations.

24. Respondent's violations include twice taking passengers on a CPFV beyond the 60-Fathom Line to fish for rockfish; wasting 26 dead bocaccios; keeping an overlimit of rockfish on a CPFV trip; disregarding fish fileting requirements and ignoring Department warnings about violating fileting requirements; not making landing receipts available upon request of a Wildlife Officer; possessing 42 lobsters after the close of the season; submitting lobster logs that contained many inaccurate or incomplete submissions; and twice keeping undersized lobsters. These are precisely the type of offenses that justify a License and Permit revocation. The aggregate harm of respondent's repeated misconduct both as a CPFV operator and lobster fisher, and the strong likelihood that he will continue to commit additional violations if he is not removed from the fishery, is proportionate to the discipline sought.

## ORDER

The commercial fishing license and lobster operator permit issued to respondent Jonathan Ewart are revoked.

DATE: 10/25/2022

  
Howard W. Cohen (Oct 25, 2022 11:29 PDT)

HOWARD W. COHEN

Administrative Law Judge

Office of Administrative Hearings



State of California – Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
P.O. Box 944209  
Sacramento, CA 94244-2090  
[www.wildlife.ca.gov](http://www.wildlife.ca.gov)

**GAVIN NEWSOM, Governor**  
**CHARLTON H. BONHAM, Director**



November 14, 2022

California Fish and Game Commission  
P.O. Box 944209  
Sacramento, CA 94244-2090

Re: Adoption of Proposed Decision, *In Matter of the First Amended Accusation Against Jonathan Ewart* (Agency Case No. 21ALJ01-FGC, OAH No. 2021050363)

Dear Commissioners:

I respectfully request that you adopt the entire Proposed Decision issued *In Matter of the First Amended Accusation Against Jonathan Ewart* (Agency Case No. 21ALJ01-FGC, OAH No. 2021050363; "Proposed Decision"), which recommends revoking Mr. Ewart's Commercial Fishing License and Lobster Operator Permit.

In recommending the revocation of Mr. Ewart's commercial fishing license and lobster operator permit, Administrative Law Judge ("ALJ") Howard Cohen found that Mr. Ewart committed all **64 violations** described in the Accusation's eighteen Causes for Discipline, but provided little evidence of rehabilitation or mitigation. Mr. Ewart's violations include:

- Twice taking passengers on a Commercial Passenger Fishing Vessel ("CPFV") to fish for rockfish in an area where rockfish fishing was prohibited.
- Wasting 26 dead bocaccio that were caught on a CPFV by dumping them into the ocean.
- Keeping an overlimit of 26 rockfish on a CPFV trip.
- Twice disregarding fish fileting requirements for several species of fish, thus rendering fish species unidentifiable and their sizes indeterminable.
- Failing to make his lobster landing receipts available upon demand of a Wildlife Officer.
- Submitting 34 Daily Lobster Logs that contained inaccuracies and incomplete information.
- Possessing 42 spiny lobsters after the close of the season.
- On fourteen occasions, leaving lobster traps in the water several days or even several weeks longer than seven days without servicing them.



- Twice keeping undersized spiny lobsters, including keeping 34 undersized lobsters on December 30, 2020.

As ALJ Cohen states:

These are precisely the type of offenses that justify a License and Permit revocation. The aggregate harm of respondent's repeated misconduct both as a CPFV operator and lobster fisher, and the strong likelihood that he will continue to commit additional violations if he is not removed from the fishery, is proportionate to the discipline sought. (Proposed Decision, p. 44.)

Accordingly, I request that the Commission adopt this Proposed Decision in its entirety.

Moreover, revoking Mr. Ewart's Commercial Fishing License and Lobster Operator Permit would be consistent with discipline ordered in previous Commission decisions you have designated as precedential. For example, *In the Matter of the Accusation against Troy Tecklenburg*, the Commission determined that the totality of Mr. Tecklenburg's commercial lobster fishing violations warranted a revocation of his Lobster Operator Permit and Commercial Fishing License.<sup>1</sup> Likewise, the Commission determined that the totality of Mr. Woodrum's CPFV violations *In the Matter of the Accusation against Pursuit Fishing, LLC, and John Woodrum* warranted revocation of his commercial fishing privileges.<sup>2</sup> In this matter, Mr. Ewart's numerous commercial lobster and CPFV violations justify revoking his Commercial Fishing License and Lobster Operator Permit.

In addition to adopting the Proposed Decision, I also request that the Commission designate its decision on this matter as precedential. Government Code section 11425.60, subdivision (b), allows the Commission to "designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur." The Proposed Decision contains many significant legal and policy determinations of general application that are likely to recur, including:

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<sup>1</sup> *In the Matter of the Accusation against Troy Tecklenburg*, Agency Case No. 15ALJ04-FGC, dated February 8, 2017 (<https://fgc.ca.gov/About/Precedential-Decisions>).

<sup>2</sup> *In the Matter of the Accusation against Pursuit Fishing, LLC, and John Woodrum*, Agency Case No. 19ALJ05-FGC, dated December 23, 2020 (<https://fgc.ca.gov/About/Precedential-Decisions>).

- CPFV violations are relevant to Commercial Fishing License and Lobster Operator Permit revocations because both CPFV operations and commercial lobster fishing involve profiting from the taking of state fishery resources.
- Fish and Game Code section 12154 can be used in determining an appropriate level of discipline.
- A revocation of a habitual violator's privileges to take state fishery resources does not violate the Eighth Amendment of the U.S. Constitution because a revocation is not a punishment or a fine, does not result in monetary benefit to the state, and is not punitive.
- The decision would serve as an example that the Commission can cite in future actions in determining appropriate levels of discipline.

Thus, the Commission should also designate this Proposed Decision as precedential.

Please do not hesitate to contact me if you have any questions.

Sincerely,

DocuSigned by:  
*David Bess*  
A8646E90CBC140C...

DAVID BESS  
Deputy Director and Chief of the Law Enforcement Division

Cc: E. Michael Linscheid

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November 16, 2022

California Fish and Game Commission  
P.O. Box 944209  
Sacramento, CA 94244-2090  
Via E-mail: Michael.Yaun@fgc.ca.gov

**Re: Rejection of the Proposed Decision In the Matter of the Accusation  
Against Jonathan Ewart, 21 ALJ01-FGC, OAH NO. 2021050363.**

Dear Commissioners:

Respondent, Jonathan Ewart, is in receipt of the Proposed Decision rendered by Howard W. Cohen, Administrative Law Judge (ALJ) following a hearing on June 27<sup>th</sup> and June 28<sup>th</sup>, 2022. The proposed decision of the ALJ is to permanently revoke Respondent, Jonathan Ewart's, Commercial Fishing License and Spiny Lobster Operator Permit. On behalf of Mr. Ewart, I request that the Commission not permanently revoke the license and permit of a lifelong fisherman for conduct that is alleged to have occurred from 2016-2020. Mr. Ewart has accepted responsibility for the conduct established in most of the allegations and requests that the commission give him an opportunity to demonstrate his rehabilitation.

At the hearing, the Department of Fish and Wildlife [hereinafter "Department"] sought the permanent revocation of Respondent, Jonathan Ewart's, California commercial fishing license and California Spiny Lobster permit. The ALJ made findings that Respondent committed violations alleged within the 1<sup>st</sup>-5<sup>th</sup> and 7<sup>th</sup>-19<sup>th</sup> Causes for Discipline, which the Department identifies as 64 violations.<sup>1</sup> Many of the ALJ's factual conclusions were based upon speculation or insufficient evidence which must be addressed and reconsidered.

**A. ALLEGATIONS PERTAINING TO LOBSTER FISHERY**

Six of the causes for discipline within the First Amended Accusation (Causes 1, 2, 3, 4, 5 and 7) pertain specifically to Mr. Ewart's conduct while participating in the Spiny Lobster Fishery.

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<sup>1</sup> While the Department elects to emphasize the number of violations, the conduct alleged within the First Amended Accusation is duplicated amongst several different violations.

**Cause 1** involved possession of several undersized lobsters. Mr. Ewart accepted responsibility in this action by pleading no contest and accepting the punishment from the court. The ALJ discounts that he accepted responsibility through his actions of wanting to remeasure the lobsters despite experiencing a medical condition related to his diabetes. Respondent explained in his testimony that on the date and time of the incident he was experiencing low insulin and suggested that the errors in measuring the lobster were likely a result of his condition. While the ALJ appears to question Mr. Ewart's medical condition and appeared to require that he prove his disability to the ALJ, the wardens who cited Mr. Ewart corroborated his account that he had an insulin pump and another admitted that he bragged to others about citing Mr. Ewart while he was claiming to be experiencing low insulin. The ALJ makes conclusions, without medical expertise, as to how someone experiencing low insulin levels should respond when to law enforcement officers seeking to cite him for a law violation. Respondent agrees with the majority of the findings pertaining to Cause 1, except paragraphs 26 and 31.

Four of these five causes for discipline (Causes **2, 3, 4, 5 and 7**) were litigated in the superior court and a jury acquitted Mr. Ewart of the conduct.

**Causes 2 and 3** related to an allegation that he retained legal and undersized lobster after the close of the lobster season. The government's case of tying Mr. Ewart to a receiver of lobsters containing undersized and legal lobsters after the close of the season is based upon a video that law enforcement officers viewed but then permitted to be erased. The video purports to contain an image of someone who "looked like" Mr. Ewart in the vicinity of the receiver.<sup>2</sup> The ALJ does not address the law enforcement officer's lack of evidence tying Mr. Ewart to the receiver but instead accepts the government's version of the contents of the missing video as evidence of Mr. Ewart's conduct. Insufficient evidence established that Respondent had any connection to the receiver. Respondent disputes the findings in paragraphs 39, 51, 56, 60, 61.

**Causes 4 and 5** involve convoluted allegations that Mr. Ewart did not properly service his lobster traps. While Mr. Ewart admitted that on occasion, he did not complete all of the fields in the lobster logs the government's evidence that he left his lobster traps in the ocean for extended periods of time are based upon speculation and were without corroboration. The wardens, without the experience of a lifelong lobster fisherman and without calling a lobster fisherman as a witness, speculated that fisherman always place the lobster trap in the same location it was pulled from. Respondent provided a logical explanation for not always returning the lobster traps to the same location immediately after pulling the traps, which included removing the traps from the water due to poor weather or moving the traps to other

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<sup>2</sup> Nothing prevented law enforcement officers in 2019 from taking a video of the surveillance video once the officers determined that the person in the video "looked like" Mr. Ewart.

fishing grounds. (Paragraph 68) Mr. Ewart disputes the conclusions made in paragraphs 67, 68, 69, 70, 72, 73, 74, 76<sup>3</sup>, 77, 78.

As to errors in his logs, Respondent did admit that there were mistakes in his logs but not to the degree alleged by Complainant. Respondent disputes in part the finding at paragraph 80 in that despite the ALJ's statement that Respondent did not contest the charges, Respondent was acquitted of the charges in Cause 5.

**Cause 7** involves an allegation that Respondent did not make landing receipts available for inspection. Respondent admits that he did not make the receipts available after Officer Johnson approached him on the dock as he believed the wardens had access to all his landing receipts through the Marine Landings Database. (Paragraph 83) Respondent denies having received any mailed communication demanding access to his logbooks or landing receipts as indicated in paragraph 85. In the future, Mr. Ewart will make landing receipts and logbooks available for inspection.

## **B. CPFV ALLEGATIONS**

The balance of the allegations relates to conduct while operating a Commercial Passenger Fishing Vessel.

**Causes 8, 9, 16 and 18** relate to fishing beyond the 60-fathom contour line on two separate occasions. Respondent conceded that while operating a sport fishing boat (CPFV) he fished beyond the 60-fathom contour line.

**Causes 10, 11, 12, and 13** relate to the improper filleting of rock fish which included filleting two fish that are not permitted to be filleted aboard a vessel (Cause 10 and 11) as well as not keeping the entire skin attached to rockfish (Cause 12 and 13). Respondent admitted these violations.

**Causes 14 and 15** relate to exceeding the boat limit for rock fish on May 16, 2016 (Cause 14) and throwing bocaccio back into the ocean (Cause 15). While Mr. Ewart admits that 26 bocaccio were returned to the ocean, the bocaccio were only returned to the ocean because they were infested with worms and not because they were in excess of the boat limit. No evidence was presented that the 170 fish boat limit did not include the 26 bocaccio that were thrown back. The log reporting that 170 fish were taken was based on the fact that 170 fish were removed from the fishery and thus no longer able to be fished by others. Respondent disputes the conclusions in paragraphs 112, 113, 115 and 116.

## **C. Discipline**

In Determining the Appropriate Discipline, the Commission Must Consider Factors Relevant to the Conduct. Neither the Department of Fish and Wildlife nor the Fish and Game Commission have developed guidelines regarding the level of discipline to impose for misconduct by a commercial fisherman other than a recent

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<sup>3</sup> The purported inaccuracy as to the March 2019 log is based upon the location of crab in a receiver near a vessel jointly operated by Ewart and his father. Ewart denies any connection to those lobsters, and they were appropriately excluded.

flurry of decisions revoking or suspending commercial privileges. While the Department requests that the Commission consider as precedent, Fish and Game Code section 12154 for determining the appropriate level of discipline, such section is inapplicable to the current case as that section, by its express language, applies only to those individuals who hold hunting and sport fishing licenses.

Further, the cases cited by Counsel for Complainant which resulted in the Commission ordering a revocation of a commercial fishing license and permit involved numerous criminal convictions and allegations of numerous other law violations.

While the Department seeks the revocation of Jonathan Ewart's commercial fishing license and lobster permit, revocation is not the only remedy. (Cal. Fish and Game Code § 7857(b) ["The commission, after notice and opportunity for hearing, may suspend, revoke, or cancel commercial fishing privileges for a period of time to be determined by the commission..."].) The commission is not precluded from, as an alternative to revoking Ewart's commercial license and lobster permit, temporarily suspending or potentially staying a suspension or revocation for a period of time to allow Ewart the opportunity to demonstrate that he has learned from his mistakes and from this process. (14 CCR Forward ["the commission may suspend or modify these rules, in whole or in part, upon good cause shown or when in the discretion of the commission the particular facts or circumstances render such action appropriate in a given instance."].) Respondent respectfully requests the commission exercise its discretion consider a lesser alternative to permanent revocation of his permit and license.

### CONCLUSION

Respondent, Jonathan Ewart respectfully requests that the commission consider the totality of his conduct as a commercial fisherman and the nature of the allegations and not limit their consideration to the years 2016-2020. Respondent respectfully requests that the commission impose a punishment or remedy short of the revocation or cancellation of Mr. Ewart's commercial fishing license and lobster permit.

DATED: November 16, 2022

Respectfully Submitted,



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E. MICHAEL LINSCHIED

Attorney for Respondent

JONATHAN EWART