

Staff Summary for December 11-12, 2024

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

Executive session includes four standing topics:

- (A) Pending litigation to which the Commission is a party
- (B) Possible litigation involving the Commission
- (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, the Commission will call a recess and reconvene in a closed session pursuant to the authority of California Government Code Section 11126, subdivisions (a), (c)(3) and (e)(1). The Commission will address four items in closed session: Pending litigation, possible litigation, staffing, and license and permit items.

(A) Pending Litigation to Which the Commission is a Party

See agenda for a complete list of pending civil litigation to which the Commission is a party, at the time the agenda was made public. At any meeting, during executive session, the Commission may take action related to pending litigation.

(B) Possible Litigation Involving the Commission**(C) Staffing**

For details about staffing, see the executive director's report under Agenda Item 4(A) for today's meeting.

(D) Deliberation and Action on License and Permit Items

- I. Consider the proposed decision in agency case numbers 21ALJ08-FGC and 21ALJ023-FGC regarding revocation of Tanner Whitmarsh's commercial fishing license, lobster operator permit, and sport fishing privileges.

The Department sent Tanner Whitmarsh (Respondent) a letter stating that Respondent's sport fishing privileges are revoked. The Commission received an appeal from Respondent seeking review of the Department's revocation of sport fishing privileges. The Commission assigned this appeal case number 21ALJ08-FGC.

The Department served an accusation on Respondent and subsequently filed the accusation with the Commission; the accusation seeks permanent revocation of Respondent's commercial fishing license and lobster operator permit. Respondent

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filed a notice of defense requesting a hearing. The Commission assigned this accusation agency case number 21ALJ023-FGC.

Commission staff referred the two cases to the California Office of Administrative Hearings (OAH), OAH consolidated the two cases, and OAH conducted a single hearing on them. After the hearing, OAH submitted a proposed decision (Exhibit 1) to the Commission.

The proposed decision finds that all but one of the 214 alleged causes of discipline were established by the evidence. The proposed decision also indicates that the violations demonstrated a repeated failure of respondent to comply with applicable laws, Respondent did not demonstrate rehabilitation and, as such, the requested revocations were appropriate.

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

Commission staff: (D)I. Determine whether to adopt the proposed decision for agency case numbers 21ALJ08-FGC and 21ALJ023-FGC

Exhibits

1. [Proposed decision regarding agency case numbers 21ALJ08-FGC and 21ALJ023-FGC](#)

Motion

Options will be discussed during closed session regarding agency case numbers 21ALJ08-FGC and 21ALJ023-FGC.

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

In the Matter of the First Amended Accusation Against:

TANNER WHITMARSH, Respondent

Case No. 21ALJ023-FGC

OAH No. 2024081113

and

In the Matter of the Revocation of Sport Fishing Privileges

of:

TANNER WHITMARSH, Respondent

Case No. 21ALJ08-FGC

OAH No. 2024081131

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard these consolidated matters on October 28, 29, and 30, 2024, by videoconference.

Garret Wheeler, Counsel, represented complainant, David Bess, Chief of the Law Enforcement Division, Department of Fish and Wildlife (department), State of California.

E. Michael Linscheid, Attorney, represented respondent, Tanner Whitmarsh, who was present.

Oral and documentary evidence was received. The record was closed, and the consolidated matter was submitted for the issuance of one decision on October 30, 2024. Personal identifying information was redacted from exhibits after submission.

SUMMARY

Respondent is a commercial fisherman who owns and operates two vessels. Complainant alleged 214 causes for discipline against respondent for violating numerous fishing laws. The only cause for discipline not established was a 2014 allegation for possessing undersized lobster when respondent was a crew member. All other allegations were established, and demonstrated a repeated failure of respondent to comply with applicable laws. Respondent knowingly caught lobster in a protected marine reserve, possessed undersized lobsters, sold recreationally caught lobsters, did not complete his logbook, did not possess required paperwork to receive or sell fish, illegally sold fish caught in Mexico, failed to properly mark receivers, and suffered several criminal convictions because of his activities. When caught, respondent lied, played games, and tried to destroy evidence. On this record, public protection requires that his Commercial Fishing License, Lobster Operator Permit, and sports fishing privileges be revoked.

FACTUAL FINDINGS

Licensing History

1. According to the declaration filed by Brent George, an Associate Governmental Program Analyst with the department, respondent has held a valid Lobster Operator Permit and a Commercial Fishing License since 2014, except for the period from January 25, 2023, to April 27, 2023. Respondent has held a Commercial Fish Receiver's License since March 22, 2024. The Commercial Fishing License and Lobster Operator Permit were in full force and effect at all times at issue in this matter. The declaration referenced 31 pages of "accompanying" records, but none were attached to the declaration introduced at hearing. As such, respondent's license and permit numbers were not introduced. Although complainant alleged that on October 17, 2012, the department issued a Commercial Fishing License and a Lobster Operator Permit to respondent, no evidence of this date was offered.

2. Respondent submitted documents indicating he had a Commercial Fish Business License that was valid from June 30, 2023, until December 31, 2023, GOID 1001314921, Dealer ID 86647. He holds a Commercial Fish Business License valid from March 22, 2024, until December 31, 2024, with the same GOID and Dealer ID numbers as the 2023 license.

Jurisdictional Matters

3. On June 9, 2021, complainant sent respondent a letter advising him that because of his 2019 conviction for illegal commercialization of spiny lobsters, detailed below, his sport fishing privileges were permanently revoked. Complainant advised respondent of his appeal rights, which respondent exercised.

4. On January 19, 2024, complainant filed a First Amended Accusation alleging 216 causes for discipline against respondent, and citing the applicable laws violated. At the start of hearing, complainant's unopposed request to withdraw Causes for Discipline Nos. 77 and 90 was granted, and those two causes were stricken from the pleading. As amended, complainant alleged that between 2019 and 2022, respondent violated numerous laws and regulations governing the fishing industry. Respondent timely filed a Notice of Defense to the original accusation, and was not required to file an amended notice of defense.

5. On October 8, 2024, OAH issued an Order consolidating the two matters, and this hearing followed.

Stipulations

6. Respondent stipulated that Causes for Discipline Nos. Four through Two Hundred Nine, inclusive, were true and correct. Accordingly, those causes of discipline are sustained.

7. Respondent stipulated that Exhibit 13, the report prepared by Wildlife Officer (WLO)¹ Austin Smith, accurately summarized the text messages he reviewed and that if called, WLO Smith would authenticate the photographs and video referenced in his report. Those text messages between respondent and individuals, some who did not have commercial fishing licenses, documented their exchanges regarding respondent selling fish those individuals caught, including respondent's text

¹ The term Wildlife Officer is synonymous with the terms Game Warden and Warden, and all were used interchangeably in the evidence.

that “offloading them would be a little scary.” At the time of these texts, respondent did not have a fish receiver’s license. The text messages also documented discussions regarding trading goods for the sale of fish. There were other text messages documenting respondent’s inquiry to buyers about purchasing the fish, and texts about selling lobster. Other text messages and GPS embedded photographs documented that respondent fished in Mexico, and later sold fish caught in Mexico in the United States despite only having a Mexican sport fishing license. Photographs depicted the fish that were caught and offered for sale, and the fishing trips referenced in WLO Smith’s report. Video showed respondent illegally pulling lobster traps and catching fish he later illegally sold. Per the stipulation, all of these texts, photographs and video were deemed to be true.

Respondent’s Background

8. Respondent began fishing in 2014, two years after graduating high school. He got his first commercial fishing license that same year when he was 20 years old. No prerequisites were required to obtain his license or a permit, he simply paid the necessary fees. There was no required training.

9. Respondent began his career as a crew member on the vessel involved in the 2014 incident referenced below. That vessel only did lobster fishing. Respondent also worked on a sport fishing vessel for approximately five years. On that vessel, he served as a crew member assisting up to 20 passengers on multi-day fishing trips. During the summer months, that vessel fished the waters off San Diego, and from December to May engaged in offshore fishing trips out of Puerto Vallarta, Mexico. In 2017 or 2018, respondent bought the lobster permit, vessel, and traps from the captain involved in the 2014 incident. Respondent currently owns and operates two different vessels.

Complainant's Environmental Evidence

TESTIMONY OF TOM MASON

10. Tom Mason, a Senior Environmental Scientist Supervisor in the department's marine region, manages the invertebrate fisheries in Southern California, which includes overseeing the spiny lobster species. Mr. Mason's territory encompasses the Channel Islands, which contain Santa Barbara Island and the Santa Barbara Island State Marine Reserve (SMR). Mr. Mason explained the importance of the laws which prohibit taking undersized spiny lobster and sea life from SMRs, and how these laws are essential to maintaining a viable lobster fishing industry.

Mr. Mason explained that the spiny lobster size limit, which prohibits taking spiny lobster that have a less than three and one-quarter inch carapace (the bony protective shell covering the head of a spiny lobster), has been in place since 1955. The size limit allows spiny lobsters to reach sexual maturity so they can reproduce at least one time before they are caught, which helps continue the species' population. He described size limits as a "key piece for management of the species," explaining that if size limits were not in place, the spawning potential would be lost, resulting in overfishing and an unsustainable practice. The law limiting the number of spiny lobsters that may be captured using a sports fishing license, seven per day, is in place to minimize overharvesting the species.

Mr. Mason described the value of commercial fishing in California. Spiny lobster have been commercially fished since the late 1800s. It is a very lucrative product, ranking in the top 10 most valuable industries in California. In 2023, catching spiny lobsters generated approximately \$24 million to fishermen, comprising approximately

one million pounds of lobster. This number included landing taxes and fees collected for licenses and permits, which are sums that go to the California General Fund.

Mr. Mason explained how spiny lobster hold “a unique place in recreational and commercial fishing.” They have been caught since the late 1800s and more than 30,000 recreational anglers take part in sportfishing each year, looking forward to opening day of lobster season. There is a high participation in taking spiny lobster on both the sportfishing and the commercial fishing side.

Mr. Mason acknowledged that in the late 1990s, California recognized the need to protect California fisheries. There are approximately 124 SMRs in California. The Santa Barbara Island SMR was created in 2012. The purpose of SMRs, also known as Marine Protected Areas (MPAs), which are “no take” areas, is to protect the environmental diversity of species. Sustaining marine life allows species that are traditionally harvested to grow in size and abundance, leading to a higher reproductive output which aids sustainable fishing management practices. There is also a “spillover effect” from SMRs where species in the SMR “spillover” into allowable catching areas, and fishermen will often place their traps at the SMR boundaries to capture the spillover species. If there were no SMRs, the goals of preserving habitats and species diversity would not be met, species would not increase in abundance, and there would be no spillover effect.

TESTIMONY OF JOHN UGORETZ

11. John Ugoretz, a Pelagic Fisheries and Ecosystems Program Manager with the department, described his duties. Pelagic fish are those species which live in the open ocean, including tuna, swordfish, sardines, and anchovies. He explained the importance of the applicable laws are to ensure that California fisheries are sustainably

managed. Mr. Ugoretz described the treaties and agreements with other countries and Western Pacific organizations that govern fishing. He also explained how taking fish in Mexico and selling it in California violates the law. It is "absolutely" important to follow fishing laws from both a biological and management standpoint because the laws allow species to be fished sustainably.

Until recently, bluefin tuna were overfished so strict laws were put in place to decrease catches which allowed the species to recover. Violating those laws puts sustainability at risk, and violating laws regarding fishing in Mexico could lead to a termination of all fishermen's ability to fish in Mexico. Bluefin tuna are a highly prized species both recreationally and commercially, and laws regulating this species is a "management success story." The laws decreasing catches of bluefin tuna resulted in the species recovering decades sooner than expected, and benefited all fishermen by now having more fish available. Violating the laws could lead to prohibitions against fishing altogether, and could decrease the species.

Mr. Ugoretz explained that recreational fishermen can fish in Mexico as long as they fill out the required declarations and have a Mexican sport fishing license. In order to commercially fish in Mexico, a fisherman must have a Mexican commercial fishing license, but those licenses are not available to Mexican nonresidents. There are also limitations on the number of bluefin tuna recreational fishermen can take, which are not "anywhere near the quantity commercial fishermen can take."

Evidence Regarding Contested Violations

12. Numerous documents, photographs, and testimony from WLO Shane Oswald, WLO Justin Sandvig, WLO Truman Lyford, WLO Kyle Brandt, retired WLO John

Potter, retired WLO Santos Cabral, and respondent were received in evidence regarding the contested violations. The following factual findings are based thereon.

DECEMBER 15-16, 2022, ENCOUNTER IN SANTA BARBARA ISLAND SMR

13. The WLOs involved in this investigation authored reports that were received in evidence pursuant to *Lake v. Reed* (1997) 16 Cal.4th 448.² Their testimony was consistent with those reports.

14. The department received tips regarding illegal fishing in the Santa Barbara Island (SBI) SMR. On December 15-16, 2022, WLO Oswald, WLO Lyford, WLO Sandvig, and WLO Brandt were part of a surveillance operation of the SBI SMR. During that surveillance, on December 15, 2022, at approximately 6:00 p.m., respondent's vessel, *Obsession*, was observed near the SBI SMR. Respondent testified that he had been lobster fishing at the Cortez Bank, and then motored over to the SBI SMR.

² In *Lake*, the California Supreme Court concluded that direct observations memorialized in a peace officer's report were admissible under Evidence Code section 1280, the public employee records exception to the hearsay rule, and were sufficient to support a factual finding. The court further concluded that admissions by a party memorialized in such a report were admissible under Evidence Code section 1220 and were sufficient to support a factual finding. Citing Government Code section 11513, the court held that other hearsay statements set forth in the peace officer's report could be used to supplement or explain other evidence, but they were not sufficient, by themselves, to support a factual finding, unless the hearsay evidence would be admissible over objection in civil actions.

15. At approximately 7:00 p.m., the Obsession then “blacked out” its external lights by turning off its deck, navigation, and running board lights, and slowly entered the SBI SMR. Respondent admitted he turned off his running lights and dimmed his screens so he could not be seen by anyone.

16. WLOs then observed the Obsession make multiple stops in the SBI SMR. A crew member deployed a handheld light against the water, and the Obsession circled the light. This activity lasted for approximately one and one-half hours. GPS plot points documented what the WLOs observed, showing 16 circling turns the Obsession made within the SBI SMR.

17. After performing those maneuvers, the Obsession anchored and turned back on its navigation and deck lights. This made the deck well-lit and easily observable. WLOs saw individuals and a dog moving about the vessel. No traps were observed on the deck, but a large blue holding tank and miscellaneous gear were seen on board.

18. Respondent testified he dropped only three traps before anchoring for the night. He claimed that at approximately three or four the morning, he left his anchorage, motored over, and pulled his three traps before returning to his anchorage. He measured the lobsters caught, threw the undersized ones back, and went back to bed.

19. However, WLOS observed and reported that on December 16, 2022, at approximately 4:00 a.m., the Obsession left its mooring and engaged in similar circling maneuvering activity as seen earlier, and then re-anchored. The Obsession now had multiple lobster traps on its deck. The Obsession remained anchored, and two individuals, later identified as respondent’s brother, Trevor Whitmarsh, and crew

member, Joshua Senn, were observed on deck with rods and reels in hand fishing inside the SBI SMR.

20. Later, respondent had just sat down in his chair to fill out his logbook when he saw the department's patrol vessel approaching. He knew they had been caught. He looked to his left, and saw his brother and his crew member fishing with poles in the SBI SMR, which respondent knew was not allowed. WLOs also observed those two men fishing and saw them quickly reel in their lines, and put the rods down when they saw the department's vessel.

21. The patrol vessel contacted the Obsession at approximately 9:00 a.m., and WLOs boarded it. WLOs discovered three different locations on board that were completely filled with lobsters, estimated at 1,100 pounds total.

22. Respondent testified that WLOs observed that the traps did not have tags on them so "they knew something was wrong." Respondent had taken the tags off so in case he "could not get back to the traps in time, no one would know whose traps they were."

23. Respondent initially told WLOs he arrived at SBI SMR about 11:00 p.m., having come from Cortez Bank, a commercial fishing spot. However, when told that he had been observed the previous evening by WLOs, respondent then changed his statement and pointed to three traps on the aft of the boat, saying he fished those three the night before when he arrived at SBI SMR at 7:00 p.m.

24. Respondent testified that when told that WLOs had been watching him all night, "I knew we were in trouble, we had been caught."

25. WLOs found 14 traps on board the vessel, which was primarily consistent with the 16 GPS locations WLOs observed and later plotted. The traps were wet, and contained marine life, leading WLOs to conclude they had been fished at the SBI SMR, consistent with what was observed during the surveillance.

26. As he told WLOs, respondent testified that he had only fished three traps the night before in the SBI SMR. He claimed the other traps had all been used to legally capture lobster at Cortez Bank.

27. WLO Oswald reported that when asked why he had fished SBI SMR, respondent replied, "Why wouldn't I get another 200 pounds while I'm sleeping?"

28. WLOs asked respondent if they could inspect his GPS navigational devices, also known as plotters, to verify his locations. Respondent allowed WLOs to inspect one plotter, which he told WLOs was his secondary navigation device, but said they would need a warrant to review the other plotter, which he identified as his primary navigation device. WLOs then informed respondent they were seizing both plotters, and allowed respondent to unplug them so as not to damage either the devices or his vessel.

29. After respondent unplugged the primary navigation device, he lowered it over the rail and dropped it into the ocean. However, rather than descend to the sea bottom, the device floated on the surface, and was retrieved by WLOs. WLO Oswald testified that because the device had been dropped in the ocean, the department was unable to corroborate respondent's claim of fishing at Cortez Bank. Although no evidence about what was on that device was offered, respondent testified that he lowered it into the ocean "trying to hide points I had in there marked."

30. Respondent admitted that he knew he was in the SBI SMR, knew he was in trouble, yet still attempted to destroy evidence by dropping the plotter in the water. He also knew destroying evidence could be a crime, but said it was “just me being nervous, taking action, and not thinking about the consequences of my action.”

31. Upon further inspection of the Obsession, WLOs discovered that respondent had not yet begun his commercial lobster logbook, which must be completed at the end of each trip. Also, respondent’s brother did not possess the required lobster crew member permit, nor was there any documentation supporting the claim that respondent’s brother was simply an observer on board. Observers are allowed if properly documented. Respondent testified he had not completed his logbook for the Cortez Bank trip or filled anything out for the SBI SMR trip.

32. Based upon the WLOs’ observations and inspection, they informed respondent they were seizing the entire load of lobsters and would be accompanying him back to a safe port where the entire load would be sold and the proceeds seized.

33. During the four-hour journey to San Pedro Harbor, WLOs reported that respondent admitted engaging in illegal fishing activity to make money before his permits and licenses were revoked due to previous commercial fishing violations. Although respondent initially testified that he did not recall making that statement, he later testified that he fished SBI SMR “because I thought they were going to take my licenses and permits, so I was trying to make a little bit extra money before that happened.” Respondent further testified that he thought he might have his license and permit revoked, thought his career was over, so “let’s make money” which is why he entered SBI SMR.

34. Various records documented that 1,063.6 pounds of lobster were seized from respondent's vessel. The lobsters were sold to a licensed fish dealer at \$17 per pound. A total of \$18,081.20 was paid by the licensed fish dealer to the Fish and Game Preservation Fund. Of note, given the evidence presented that the lobsters were alive, and the majority would survive if returned to the ocean, plus the testimony of Mr. Mason and Mr. Ugoretz about the reasons for the laws, it was unclear why the lobsters were sold to a licensed fish dealer as opposed to being returned to the SBI SMR.

35. Respondent testified that because the lobsters were alive, he does not know why they were not released into the SBI SMR. The fish dealer who retrieved the lobsters was not very prepared, did not bring enough totes, so many of the lobsters were just piled up inside the van, as depicted in a photograph introduced at hearing.

36. In addition to the SBI SMR lobsters caught, respondent testified he also had the Cortez Bank lobsters in his tanks on board. He estimated he caught approximately 750 to 800 pounds of lobster at Cortez Bank. Since 1,063 pounds were determined to have been caught, this would mean he caught approximately 263 to 313 pounds at SBI SMR, believing respondent's claim to be true.

37. Respondent testified that going into SBI SMR is "one of the biggest regrets" he has. As a result of his actions, he suffered a conviction, detailed below.

38. Three WLO reports were dated in March 2023, several months after the December 2022 encounter. WLO Sandvig did not know why his report was dated in March 2023. In cases of this nature, supplemental reports are often not needed from all WLOs, but he does not know why he was asked to do one in this case. WLO Lyford believed the March date was when his report was submitted, not when it was drafted. WLO Brandt did not know why his report was in March, but that may have been the

date it was approved, although he acknowledged his supervisor approved it in November 2023. In any event, there was no showing the three reports written in March 2023 were inaccurate or that the WLOs mis-reported what occurred.

2019 ENCOUNTER REGARDING UNDERSIZED LOBSTER AND LOGBOOK

39. On February 27, 2019, WLO Potter and his partner were patrolling San Diego Bay when they observed respondent dock his vessel at his slip. Another male was on board. The two men exited, and were offloading the vessel when approached by WLO Potter and his partner. Respondent told WLO Potter that he had fished that day under the authority of his commercial fishing license and lobster operator permit. He had a total of 10 legal spiny lobsters.

40. When WLOs asked to inspect the other male's commercial fishing license, he said he was not a commercial fisherman and respondent asked him to participate in the day's outing to help retrieve respondent's lost lobster traps. Respondent testified the man was his friend who can free dive much deeper than respondent can dive, so he asked him to come along to dive and help search for respondent's lost traps.

41. Respondent had not logged the man into his logbook, and told WLO Potter he was not aware of any requirement to do so. Respondent testified he did not know he was required to record observers on board, explaining that the captain who trained him never recorded observers on board, so respondent did not know that this was a requirement.

42. Respondent told WLOs he had retained a total of 10 legal spiny lobsters during the trip. He had placed four in a receiver he pointed out to WLOs that was tied to his dock. Respondent had placed the remaining six smaller spiny lobsters inside a separate receiver tied to the dock. Both receivers were identified with commercial

license numbers. Respondent was asked to raise the receivers; one contained four spiny lobsters, but the other contained approximately 20 spiny lobsters. Respondent said all were caught using his valid commercial fishing license and lobster operator permit, and he intended to sell them to a licensed fish receiver in the next two days. Respondent said he measured all spiny lobsters in both receivers using a gauge he handed to WLO Potter, which WLO Potter examined against his own gauge and determined that both gauge openings were the same size.

43. The lobsters were measured and WLO Potter discovered that two of the spiny lobsters were less than three and one-quarter inches, indicating they were undersized. After making that determination, respondent stated, "Yeah, they are short," and "I'm not sure how I missed those."

44. Respondent testified that as a captain, this was the only time he ever had undersized lobsters in his possession.

2018 ENCOUNTERS INVOLVING CATCHES, SALES, AND PAPERWORK

45. October 3, 2018, was the opening day for the 2018 commercial spiny lobster season. Approximately five hours after the season opened, while on patrol with his partner, WLO Potter located a receiver tied to a water spigot at respondent's slips, slips 84 and 85, that contained ten spiny lobster. The receiver did not have the required buoy or identifying markings on it. WLO Potter and his partner marked six of the large spiny lobsters in the receiver by placing a "V" notch in each lobster's tail.

46. WLO Potter and his partner traveled out of the harbor, and contacted respondent and his deckhand on their vessel offshore near Point Loma. Respondent and his deckhand were commercially fishing for spiny lobsters. The men reported they left the dock at first light that morning, and had not taken any breaks or returned to

the dock since leaving. Respondent said he controlled slip numbers 84 and 85, which was not shared with any other fishermen, and he intended to remain fishing until dark.

47. At approximately 7:25 p.m., WLO Potter observed respondent and his deckhand return to slip 84. The two men cleaned and offloaded the vessel. One of the men was observed carrying a single spiny lobster from the vessel to the unmarked receiver, raising the receiver, and placing a single spiny lobster into it. Both men then left the area without being contacted by WLOs.

48. The next day, October 4, 2018, at approximately 7:00 p.m., respondent's vessel was observed returning to its slip with respondent and his crew member aboard. The two men cleaned the vessel, and loaded lobster onto a pushcart which was pushed up the ramp. WLO Potter contacted both men who were in possession of two trash cans containing live spiny lobsters. Respondent said he intended to sell his catch, and identified the licensed receiver to whom he was going to sell.

49. Because respondent was not a licensed receiver, he was required to complete a Fish Transportation Receipt (FTR). An FTR is a serialized document supplied by the department used to record various types of information regarding the catch, transportation, and sale of fish species. In December 2017, during a previous encounter, WLO Potter had explained the FTR process to respondent after discovering respondent had failed to complete 24 FTRs. At that time, WLO Potter reviewed the instructions printed on the front cover of the department-issued FTR book with respondent, and gave him a verbal warning for the 24 FTR violations.

50. Now, on October 4, 2018, when WLO Potter reviewed respondent's October 3, 2018, FTR, he determined respondent failed to record the name of the fish business to whom he sold his catch. That FTR did document that respondent

transported one bin of lobster weighing 142.65 pounds and another bin weighing 142.87 pounds, but was incomplete because it did not identify the business name.

51. When WLO Potter asked respondent if he could review respondent's logbooks for October 3 and 4, 2018, respondent agreed and said they were on his boat. While walking to the vessel, WLO Potter made a formal demand for respondent to declare all kellets, whelk, sea urchin, crabs, and spiny lobster he had on board or stored at his vessel. Respondent claimed that spider crabs were the only species on board. Upon reaching the vessel, WLO Potter shined his flashlight on a receiver floating in the water, asked what was inside, and respondent said spider crab. Respondent then opened the lid of the receiver, and WLO Potter told him all receivers must be buoyed with the fisherman's identification number on the buoy. Respondent stated he was not aware of that requirement.

52. WLO Potter then shined his light on a second receiver floating on the surface which respondent said also contain spider crab. This receiver was buoyed with respondent's identification number. Seeing that, WLO Potter told respondent it was evident he knew of the buoy requirement and asked why he had pretended not to be aware of the regulation. Respondent apologized and said he would put a buoy on the first receiver. In addition to spider crab, there was also one spiny lobster in the second receiver that respondent had failed to declare. Respondent said he intended to eat it himself since it was missing multiple legs and would not be worth anything.

53. WLO Potter than shined his flashlight on the third line which was also not buoyed. That one contained spider crabs. Respondent then attempted to return to his vehicle, explaining he would correct the violations. However, WLO Potter reminded him of the lobster logbooks he wanted to review that respondent said were on his vessel. Respondent returned to his vessel and handed "a common notebook" with

recorded trap locations and catch information written in respondent's hand. Respondent explained that this was his lobster logbook, but WLO Potter advised that it was not, and that he needed to inspect respondent's department-issued lobster logbook. Respondent then stated this logbook was "up at his truck."

54. Respondent then reached into a cooler and produced a second spiny lobster. He handed it to WLO Potter and apologized for not telling him about both lobsters and the non-buoyed receivers. Respondent stated he also intended to eat this lobster since it was missing multiple legs. WLO Potter then shined his flashlight on another unbuoyed line that respondent said was filled with spider crab, which WLO Potter confirmed.

55. Next, WLO Potter shined his light on the line leading to the receiver he and his partner had lifted the day before. He asked respondent what was at the end of the line to which respondent asked, "What line?" WLO Potter told respondent the only line he was shining his light on, and respondent pulled the line to the water's surface. Attached to the line was the same receiver WLO Potter had seen the day before, but which now contained 11 spiny lobsters. Respondent said he caught all lobsters using commercial traps from "outside of the bay." He said he caught them on October 3 and 4, 2018, under the authority of his commercial license, and recorded the lobsters on his lobster logbooks. Respondent intended to sell them to the licensed fish receiver after taking "a really cool picture" with them that he would post on his social media.

56. Respondent and WLO Potter then returned to respondent's truck where respondent produced his lobster logbook which was a blank on the pages where the October 3 and 4, 2018, trips should have been recorded. The October 3, 2018, trip should have been completed, and an entry for the October 4, 2018, trip should have been started. Instead, there were no entries for either day.

57. On October 5, 2018, WLO Potter inspected respondent's slips, noting that buoys had now been placed on receivers in compliance with the law. He lifted the receiver that had contained the 11 spiny lobsters, and it was now empty. WLO Potter went to a licensed fish receiver respondent sold to in the past, and learned that respondent had delivered spiny lobsters earlier in the day. WLO Potter learned that the fish receiver thought something might be wrong, so had kept respondent's lobsters in a separate bin, he had not combined them with all the other lobsters he purchased. In that bin, WLO Potter found the six spiny lobsters with the "V" notch in their tails that he and his partner had previously marked. WLO Potter photographed those six lobsters and the October 5, 2018, landing receipt documenting that respondent sold 110.5 pounds of lobster for \$1,491.75 to the licensed fish receiver.

58. On October 7, 2018, WLO Potter contacted respondent when his vessel arrived at its slip. Respondent affirmed all his previous statements. WLO Potter then told respondent about the 10 spiny lobsters found in the illegal receiver and that he doubted respondent could have caught them commercially as he claimed and placed them in the receiver before the time WLO Potter boarded his vessel on October 3, 2018. Respondent agreed, but questioned the number of spiny lobsters found in the illegal receiver, stating that there only should have been seven because seven is the legal limit. Respondent then said that he was fishing on his grandfather's skiff during spiny lobster sport season opening weekend (which began September 29, 2018). Respondent told WLO Potter that it was only respondent, his brother, his father, and his grandfather on board his grandfather's skiff, and he was not sure how three additional spiny lobsters came to be in the receiver.

59. The following day, October 8, 2018, respondent called WLO Potter and told him that his crew member had also been on board his grandfather's skiff.

Respondent said all five men caught their allotted seven limit, for a total of 35 sport caught lobsters. WLO Potter advised that he would need to reinterview respondent and his crew member based on this new information, and instructed them to bring their sport cards to the interview. Both men said they understood, and respondent said he would get his card from his grandfather's skiff.

60. On October 15, 2018, WLO Potter contacted respondent and told him he wanted to interview him and his crew member that day. He reminded them to bring their completed sport cards for inspection, which both men said they understood. Approximately 45 minutes later, WLO Potter made contact with respondent and his crew member. When asked, respondent said he did not have his sport card with him as it was still on his grandfather's skiff. Respondent confirmed he had placed the seven spiny lobster he caught on his grandfather's skiff in the unmarked receiver WLO Potter previously found, and then sold them to the licensed receiver. Respondent caught those lobster using his sport fishing license, during spiny lobster sport season, not during spiny lobster commercial season.

61. Respondent did not understand how 11 spiny lobsters came to be in the receiver. The crew member initially told WLO Potter he gave all of seven of his lobsters to respondent, which respondent denied. WLO Potter then told the crew member he had observed him on October 3, 2018, place one lobster in the unmarked receiver, which the crewmember acknowledged doing. The crew member then revised his statement to say he only gave three lobsters to respondent. WLO Potter testified this would explain how 11 lobsters, seven from respondent, three from the crewmember, and the one large lobster, were in the unmarked receiver. Respondent continued to deny getting any lobsters from the crewmember, upon which the crewmember then claimed he did not know what happened to any of his seven lobsters.

62. Respondent said his grandfather's skiff had been launched from Coronado/Glorietta Bay, and, prior to returning, dropped respondent off at slip 84. The crewmember denied ever leaving the skiff with his catch. Upon further questioning, respondent and the crewmember changed their statements about the single large lobster, now claiming it was respondent who put it in the unmarked receiver.

63. WLO Potter refuted respondent's claim about not knowing the law. He testified there are numerous places to find applicable laws. The department-issued logbooks and fish transportation receipt books contain instructions and information regarding how to properly fill out those documents and what information is required. Individuals can contact the department or talk to a WLO. Additionally, fishing is an industry where individuals do not start at the top, they start as crewmembers so can ask their captains and other bosses. The industry is very much a "learn on the job" industry. There is also online information, printed books, and other materials. WLO Potter agreed that individuals only need the required fees to purchase licenses and permits, no classes or other trainings are required.

64. Respondent testified that he, his grandfather, his father, his brother, and another friend had fished recreationally for lobsters on the 2018 opening day. The legal limit for recreational fishing is seven lobsters per person. All the captured lobsters were taken home, but respondent kept six in the receiver because they had enough to feed everyone from their catch, and he does not like to freeze lobsters because he does not think they taste as good. Respondent "did not know if it was illegal or not" to put the recreationally caught lobsters in the receiver at his slip. He did so to keep them alive.

65. Recreational lobster season opened a few days before commercial lobster season. The six recreationally caught lobster were in the receiver before the

commercial lobster season began. When respondent returned with his catch on the first day of the commercial lobster season, he put one large lobster he had caught in the receiver with six recreationally caught lobster. He acknowledged it is not legal to combine the two types of caught lobsters.

66. Respondent did not know he needed a buoy on the receiver. He was trained by the captain involved in the 2014 incident referenced below, who did not teach him he needed to put buoys on his receivers. Respondent explained that crewmembers are taught from their bosses, the captains. Of note, this testimony did not explain why some of his receivers had buoys.

67. At the time of this 2018 encounter, the use of department-issued logbooks had only been in effect for one or two years. Before that time, respondent kept information on notes, which he continued to do. He acknowledged, "to be honest," that he does not recall if he transferred his notes to his logbook.

68. Respondent admitted he only showed one or two of the receivers to WLO Potter. He did not show WLO Potter the one with the recreationally caught lobsters inside, admitting, "I was kind of hiding that from him. I knew I was in the wrong, and knew it was illegal to process those [recreationally caught lobster] for commercial use."

69. Respondent admitted that he was "totally in the wrong" and never should have mixed recreationally caught and commercially caught lobsters. He was thinking he could make a couple extra hundred dollars but it was not worth it. He thought he would not get caught, but it was definitely a mistake. He described himself as being "young and dumb."

2014 UNDERSIZED LOBSTER INCIDENT

70. On December 19, 2014, while on patrol Point Loma, WLO Cabral and his partner encountered and boarded a vessel captained by another individual. Respondent was a crew member on board.

71. During their inspection, WLOs discovered 39 lobsters, 25 of which were undersized. WLO Cabral determined the opening on the captain's gauges were the same size as his gauge openings.

72. WLO Cabral asked respondent about his experience and duties. Respondent said he had worked as a crew member on the vessel for three years. His duties were stacking lobster traps, baiting the traps, and doing "some measuring of the lobsters." Respondent said he had "measured three days ago for the first time. The captain oversaw my measuring of lobsters three days ago and today and was helping me measure them."

73. WLO Cabral photographed the lobsters, and told respondent and the captain they violated the law by taking/retaining/possessing undersized lobsters. As a result, all the lobsters on board were being seized. The 14 legal sized lobsters were seized and sold to a licensed fish dealer for \$347.60, which was paid to the Fish and Game Preservation Fund. The 25 undersized lobsters were returned to the ocean at the South La Jolla Marine Protected Area. WLO Cabral explained that if the undersized lobsters are alive, they are returned to the ocean.

74. WLO Cabral testified this incident was the "most egregious case of undersized lobsters I had encountered as [a WLO] and the laissez faire attitude of the captain and respondent [*sic*]." This many undersized lobsters "was way more than I'd

ever encountered” as a WLO. He acknowledged he did not put “laissez faire” in his report, explaining his report contains facts, and “laissez faire” was his opinion.

75. Respondent testified that the captain of this vessel was the first captain for whom he worked. He described his duties as a licensed crew member; he did not have a lobster permit. The captain was teaching respondent how to measure lobsters. Respondent would measure the lobsters and the captain would remeasure them, and then they would place the lobsters in the bin. Respondent was just learning how to measure lobsters, and was doing it under his captain’s direction. His captain never advised respondent the lobsters were undersized.

76. In 2017 or 2018, respondent purchased this captain’s lobster permit for \$110,000 when that captain retired. He paid him an additional \$40,000 to purchase the vessel and its traps.

77. Respondent testified he was never cited or charged as a result of the 2014 encounter. Respondent asserted the captain, not him as a crew member, was responsible for any undersized lobster violations. WLO Cabral acknowledged that the lobster permit was issued to the captain, not to respondent.

Respondent’s Convictions

78. On March 14, 2019, in the Superior Court of California, County of San Diego, in *People v. Tanner James Whitmarsh*, Case No. M256058CE, respondent was convicted on his guilty plea of Count 1, violating Fish and Game Code section 2012 (exhibiting licenses and fish upon demand); Count 3, violating California Code of Regulations, title 14, section 122.1 (placing buoys on traps and receivers); and Counts 7-12, violating Fish and Game Code section 7121 (selling recreationally caught fish). He acknowledged his prior violations for violating undersized lobster laws. In his plea

agreement, respondent admitted that he “sold sport caught lobster.” In exchange for his plea, the court suspended imposition of sentence for three years and placed respondent on summary probation. The court also ordered fines and fees of \$5,236, and 20 days of public service.

79. On July 1, 2024, in the Superior Court of California, County of Santa Barbara, in *People v. Tanner James Whitmarsh*, Case No. 23CR07736, the court issued a Sentencing Order and Terms and Conditions of Probation based upon respondent’s misdemeanor conviction for violating Fish and Game Code section 12012.5 (taking fish from a marine protected area). The court suspended imposition of sentence and ordered unsupervised probation for one year, with terms and conditions including paying a \$5,000 fine, paying a \$150 restitution fine, obeying all laws, advising the court of any change of address, not violating the Fish and Game Code, and not fishing in Marine Protected Areas.

Respondent’s Civil Judgement

80. On November 30, 2023, a Request to Enter Separate Stipulations for Entry of Final Judgment, in *People v Tanner Whitmarsh, and Trevor Whitmarsh*, Case No. 37-2023-00024191-CU-MC-CTL, was filed seeking to have separate stipulations of the entry of final judgment entered against respondent and his brother. The request set forth the statement of facts and attached the stipulations reached with respondent and his brother.

81. Respondent stipulated that he would not buy or sell fish or lobster caught under a sport fishing license (Fish & Game Code, §§ 7121, 12012, subd. (a)); would not sell fish caught in Mexico without a Mexican commercial fishing license (Fish & Game Code, §§ 7121, 12012, subd. (a)); would not bring fish into California

without declaring it to the department (Fish & Game Code, § 2353, subd. (a)(3), and 16 USC § 3372, subd. (a)(2)(A)); would not remove fish that was caught from the point of landing for the purpose of selling it, except to a licensed fish receiver, without a fish receiver's license (Fish & Game Code, § 8033, subd. (a)); would not fail to create a landing receipt for fish sold commercially (Fish & Game Code, § 8043, subd. (a)); would not fail to submit landing receipt or commercial fish sales to the department (Fish & Game Code, § 8046, subd. (a)); would not fail to keep accounting records of commercial fish sales (Fish & Game Code, § 8050, subd. (a)); would not file landing receipts that are known to be false (Pen. Code, § 115, subd. (a); Fish & Game Code, § 1054, subd. (a)); and would not conduct any type of business in San Diego without first obtaining a business tax certificate (Municipal Code section 31,0121). Respondent also agreed to pay civil penalties of \$60,000, \$45,000 of which was immediately suspended and would only be imposed if respondent violated the terms of the stipulation. Respondent agreed to make two payments of \$7,500 each to comply with the fine imposed.

82. On December 4, 2023, the court ordered the stipulation imposed.

Respondent's Additional Testimony

83. Respondent testified about his sport boat fishing experience. He knows that tuna caught with a sport fishing license cannot be sold commercially.

84. He described the work he has done to build clientele to whom he sells. He did not have a fish business license until recently because he "thought it was a lot of money, but I came to realize it is not and I should have had it." This testimony demonstrated respondent knew this license was required but chose not to get it.

85. Respondent further testified about the allegations to which he stipulated. He admitted he fished in Mexican waters and brought that fish to the United States to sell. When doing so, he did not have either a recreational or a commercial fishing license to fish in Mexico. He did not have a permit to sell fish caught in Mexico. He explained it is legal to catch fish with a Mexican recreational license, but acknowledged it is illegal to sell that fish in the United States. He admitted he should not have done this, describing himself as being young, not listening to the rules, not thinking he was hurting anyone, and not thinking he was not going to get caught.

86. Respondent described the department's search warrant raid on his home and the resulting negative publicity, including negative press and social media postings. This made him realize the importance of "getting the license" and was a "big wake-up call." He described the fines and fees imposed. During the raid, his brother was questioned first, after which he told respondent the department "knows everything, be honest" when answering questions, so respondent told the truth.

87. Respondent acknowledged getting letters in the mail from the department regarding new laws. He did not do any independent research regarding those laws. Usually he learns of new laws from the docks where other fishermen are discussing them. He later acknowledged visiting the department's website and being aware that the laws and regulations are on the site. He has not accessed that site for "a while," but he probably should do so. He also was aware of the digest published that contains new laws, having obtained a copy of couple years ago. He does not own a computer, he uses his brother's, but later acknowledged he has a cell phone with Internet access. He also acknowledged using social media, but claimed he does not do it as much anymore since the department's raid. He said his reputation "was shot" because of the negative publicity.

88. In 2024, his vessel has been boarded three times. There have been no violations discovered. His lobsters have all been the appropriate size. He has his logbooks correctly filled out and all of his paperwork has been in order. He does not fish outside of United States waters.

89. Respondent described the yearly cost to renew his license and permit, and the high costs he has paid to maintain and repair his vessels.

90. Respondent estimated that in his career he has caught approximately 35,000 to 45,000 lobsters, a rough estimate.

91. Respondent has recently assisted the department by advising them of illegal poaching activities he learned about. He gave the department a list of names of people actively fishing in Mexico. He also recently informed the department about illegal deer hunting he learned about.

Respondent's Written Statement

92. Respondent submitted a written statement addressed to the Administrative Law Judge and the commission in which he wrote:

I do not plan to sit here and make excuses, for some of the charges that have been brought against me. That is not the best use of everyone's time and not the best way to handle this situation. I have made several mistakes during my tenure as a commercial fisherman, which goes back over a decade, even though I just turned 30 this year.

During the entire time that I've had to deal with some of these issues I am being accused of, I have never tried to lie

or make untrue excuses. I have owned what I've done the entire time. Being young and stupid is not a good excuse and I since have realized, "doing what a lot of other fishermen do" is not a good excuse.

For example, earlier this summer, the tuna start their migration towards US waters and are easily within one day range, prior to crossing our US line. Many commercial fishermen catch tuna in Mexico and in turn sell them in the US. Most everyone thinks "I'm smart enough" and won't get caught. "Most everyone else is doing it why shouldn't I [?]" No one thinks they are going to get caught and continue to do it. Even after all the news and media published what I and a few others were charged with, even more people continue to fish these Mexican caught fish illegally. In fact, I believe this year was worse than prior years. I personally contacted Warden Austin Smith on a couple of occasions, about illegal fishing and had offered to provide him with information which would assist him in catching fisherman fishing illegally.

I do not catch fish in Mexico any longer and its [sic] definitely reduced the opportunity to make money early in the season, but obviously I have learned my lesson. It is hard to see what continues to go on and I'm the one that is paying this price. In addition, it has caused tremendous

harm to me and my reputation and many of the fish buyers will not buy fish from me.

As far as not having all the proper documents to sell fish, that is my fault and simply something that I just didn't totally understand. I now fully realize how important understanding all the regulations and licenses is just as important as catching fish [*sic*]. I was always very lazy on the business side of the business and again focused on catching fish and lobsters.

There is also no good excuse as to why I put a couple of traps in the MPA in the Channel Islands, other than I know several other people actively fish the MPA (especially during rough weather). This again, was a stupid mistake and something I shouldn't have done. I want to also be clear the day I was approached in the MPA, I had several hundred lobsters that I legally obtained in open areas and only a few lobsters less than 40 or so came from the MPA. I do not understand why ALL of the lobsters were retained, brought to port and then sold with the money going to the [department]. It made more sense, to release the entire live load of lobsters back into the MPA so they could reproduce. This all could have been filmed for evidence vs killing all selling the entire load ? [*sic*] That is not my definition on conservation, being honest [*sic*].

I could go on and on, about the stupid mistakes I have made. I think what hurts the most, is my dad and grandpa didn't teach me this way. They both taught me and my brother how to hunt and fish the right way. Disappointing my dad and grandpa (who since passed away a couple years ago) will always bother me. I can't take this back, only try to move forward and do better.

In closing, I don't have any good excuses for the poor decisions I have made and other than being young, naïve and frankly stupid [*sic*]. I never really stopped and put thought into what I was doing other than "it's not that bad" and not hurting anyone. This is the wrong approach which I now realize and can only hope to do better in the future. I love our California fishery and will do whatever it takes to be given a chance to continue to work in California. I was born and raised in San Diego and only hope to continue to live and earn a living here.

Given the chance, I want to be a good Steward to this industry that I truly love and could be an asset to the [department] and continue to be for the US Coast Guard.

Respondent's Additional Evidence

93. In a March 20, 2023, declaration from Melissa Miller-Henson, Executive Director of the California Fish and Game Commission (commission), filed pursuant to a court order in a Superior Court of California, County of Los Angeles, civil litigation

matter, she stated under penalty of perjury that the commission “does not have a policy with regard to the suspension or revocation of commercial fishing licenses or permits.” Further, the commission “does not have a manual with regard to the suspension or revocation of commercial fishing licenses or permits” and “does not have a regulation for determining penalties with regard to the suspension or revocation of commercial fishing licenses or permits.”

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)
2. The department has the burden of establishing the allegations in the First Amended Accusation and of establishing cause exists to revoke respondent’s sports fishing license.

Applicable Code Sections

3. Fish and Game Code section 86 defines “take” as “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.”
4. Fish and Game Code section 1054, subdivision (a), states:

It is unlawful to submit, or conspire to submit, any false, inaccurate, or otherwise misleading information on any application or other document offered or otherwise presented to the department for any purpose, including,

but not limited to, obtaining a license, tag, permit, or other privilege or entitlement pursuant to this code or regulations adopted thereto.

5. Fish and Game Code section 2000 states:

(a) It is unlawful to take a bird, mammal, fish, reptile, or amphibian except as provided in this code or in a regulation adopted pursuant to this code.

(b) Possession of a bird, mammal, fish, reptile, amphibian, or part of any of those animals, in or on the fields, forests, or waters of this state, or while returning therefrom with fishing or hunting equipment, is prima facie evidence the possessor took the bird, mammal, fish, reptile, or amphibian, or part of that animal.

6. Fish and Game Code section 2012 states:

All licenses, tags, and the birds, mammals, fish, reptiles, or amphibians taken or otherwise dealt with under this code, and any device or apparatus designed to be, and capable of being, used to take birds, mammals, fish, reptiles, or amphibians shall be exhibited upon demand to any person authorized by the department to enforce this code or any law relating to the protection and conservation of birds, mammals, fish, reptiles, or amphibians.

7. Fish and Game Code section 2353 states:

(a) Birds, mammals, fish, reptiles, or amphibians shall not be imported or possessed in this state unless all of the following requirements are met:

(1) The animals were legally taken and legally possessed outside of this state.

(2) This code and regulations adopted pursuant thereto do not expressly prohibit their possession in this state.

(3) A declaration is submitted to the department or a designated state or federal agency at or immediately before the time of entry, in the form and manner prescribed by the department.

(b) Birds, mammals, fish, reptiles, or amphibians legally taken and legally possessed outside of this state may be imported into this state and possessed without a declaration if the shipment is handled by a common carrier under a bill of lading or as supplies carried into this state by common carriers for use as food for the passengers.

(c) The commission and the department shall not modify this section by any regulation that would prohibit the importation of lawfully killed migratory game birds taken in any other state or country and transported into this state pursuant to the migratory bird regulations adopted annually by the Secretary of the Interior.

8. Fish and Game Code section 7121 states:

Except as otherwise provided by this code or by regulation, it is unlawful to sell or purchase any fish or amphibia taken in, or brought into, the waters of the state, or brought ashore at any point in the state.

It is unlawful to buy, sell, or possess in any place of business where fish are bought, sold, or processed, any fish or amphibia taken on any boat, barge, or vessel which carries sport fishermen, except those fish may be possessed in such a place only for the purposes of canning or smoking under regulations adopted by the commission.

9. Fish and Game Code section 7850 states in part:

(a) Excepting persons expressly exempted under this code, no person shall use or operate, or assist in using or operating, any boat, aircraft, net, trap, line, or other appliance to take fish or amphibia for commercial purposes, and no person shall cause to be brought ashore, any fish or amphibia at any point in the state for the purpose of selling them in a fresh state or shall contribute materially to the activities on board the commercial fishing vessel, unless the person holds a commercial fishing license issued by the department.

(b) Any person not required under subdivision (a) to hold a commercial fishing license shall register their presence on

board the commercial fishing vessel in a log maintained by the owner or operator of the vessel according to the requirements of the department.

[¶] . . . [¶]

10. Fish and Game Code section 7857 states in part:

Unless otherwise specified, the following conditions apply to each commercial fishing license, permit, or other entitlement issued to take, possess aboard a boat, or land fish for commercial purposes and to each commercial boat registration issued by the department, except licenses issued pursuant to Article 7 (commencing with Section 8030):

[¶] . . . [¶]

(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 for the following reasons:

(1) The person was not lawfully entitled to be issued the license, permit, or other entitlement.

(2) A violation of this code, the terms of the permit or other entitlement, or the regulations adopted pursuant thereto, by the licensee, permittee, person holding the entitlement, or their agent, servant, employee, or person acting under

the licensee's, permittee's, or entitled person's direction or control.

(3) A violation of any federal law relating to the fishery for which the license, permit, or other entitlement was issued by the licensee, permittee, person holding the entitlement, or their agent, servant, employee, or person acting under the licensee's, permittee's, or entitled person's direction or control.

[¶] . . . [¶]

(d) The commercial fishing license, permit, or other entitlement shall be in the licensee's, permittee's, or entitled person's possession, or immediately available to the licensee, permittee, or entitled person at all times when engaged in any activity for which the commercial fishing license, permit, or entitlement is required.

[¶] . . . [¶]

(h) An application for a commercial fishing license, permit, or other entitlement shall be made on a form containing the information the department may require. The commercial fishing license, permit, or other entitlement shall be signed by the holder prior to use.

[¶] . . . [¶]

11. Fish and Game Code section 8033 states:

(a) Except as provided in Section 8033.1 or 8033.5, or subdivision (b) of Section 8047, any person who purchases or receives fish for commercial purposes from a fisherman who is required to be licensed under Section 7850, or any person who removes fish from the point of the first landing that the person has caught for his or her own processing or sale, shall obtain a fish receiver's license.

(b) The annual fee for a fish receiver's license is five hundred forty-nine dollars (\$549).

(c) A cooperative association of fishermen may be licensed as fish receivers.

12. Fish and Game Code section 8033.5 states:

(a) Any commercial fisherman who sells fish for other than marine aquaria pet trade or research purposes that he or she has taken to the ultimate consumer of that fish shall obtain a fisherman's retail license. The annual fee for a fisherman's retail license is sixty-nine dollars (\$69).

(b) Any person required to obtain a license under this section who engages in any activity described in Section 8033, 8034, 8035, or 8036 shall also obtain an appropriate license to engage in those activities.

13. Fish and Game Code section 8043 states:

(a) The following persons shall report all fish sales, deliveries, transfers, and landings using an electronic fish ticket as prescribed under regulations adopted by the commission:

(1) Any person who is required to be licensed under Article 7 (commencing with Section 8030) to conduct the activities of a fish receiver, as described in Section 8033.

(2) Any commercial fisherman who sells, delivers, or transfers fish to any person who is not a fish receiver licensed under Article 7 (commencing with Section 8030).

(3) Any commercial fisherman who sells, delivers, or transfers live marine fish for use exclusively as live bait that are not brought ashore to any person who is not a fish receiver licensed under Article 7 (commencing with Section 8030).

(4) Any person licensed under Article 7 (commencing with Section 8030) who brings ashore their own fish as described in Section 8033, 8033.1, or 8033.5.

(5) Any commercial fisherman licensed pursuant to Section 8033.5 who sells fish to persons not licensed to receive fish for commercial purposes pursuant to Article 7 (commencing with Section 8030).

(b) The electronic fish ticket shall show all of the following:

(1) The name of the species of landed fish as designated by the department, or if not designated, the commonly used name of the species.

(2) (A) The accurate weight of the species of fish received. Sablefish may be reported in dressed weight, and if so reported, shall have the round weights computed, for purposes of management quotas, by multiplying 1.6 times the reported dressed weight.

(B) For purposes of this paragraph, "accurate weight" means a weight that is determined by a scale that conforms to the standard within the applicable tolerances and other performance requirements as required by the California Code of Regulations or the Business and Professions Code, but for marine fish used as live bait that are not brought ashore, the department may adopt rules and regulations necessary to establish other methods to determine accurate weight.

(3) The commercial fisherman's name and the commercial fishing license identification number.

(4) The department registration number of the boat.

(5) The name of the recipient of the fish, and that person's identification number, if applicable.

(6) The date of receipt.

(7) The price paid for the fish, except for live marine fish for use exclusively as live bait that are not brought ashore.

(8) The department origin block number where the fish were caught.

(9) The type of gear used.

(10) Any other information the department may require.

(c) Persons identified in paragraph (1), (2), or (3) of subdivision (a) shall complete the electronic fish ticket as prescribed by regulation at the time of receipt, purchase, or transfer of fish, whichever occurs first. Persons identified in paragraph (4) of subdivision (a) shall complete the electronic fish ticket as prescribed by regulation at the time the fish are brought ashore. Persons identified in paragraph (5) of subdivision (a) shall complete the electronic fish ticket either at the time of individual sale or at the completion of sales for the calendar day of sales pursuant to Section 8043.2.

(d) With the exception of live marine fish for use exclusively as bait that is not subsequently brought ashore or as otherwise prescribed by regulation, the receipt, purchase, or transfer of fish shall not occur at sea or from vessel to vessel.

(e) Any person taking, purchasing, or receiving fish, whether or not licensed under Article 7 (commencing with Section 8030), shall sign the original paper hard copy of the electronic fish ticket as prescribed by regulation.

14. Fish and Game Code section 8046 states:

(a) The electronic fish ticket made under Section 8043 shall be submitted to the department within three business days of the landing unless otherwise specified in regulations. The original signed copy of the paper landing receipt made under Section 8043.1 shall be delivered to the department on or before the 16th or last day of the month in which the fish were landed, whichever date occurs first after the landing. A copy of the electronic fish ticket or landing receipt shall be delivered to the commercial fisherman at the time of the purchase or receipt of the fish. That copy of the electronic fish ticket or landing receipt shall be retained by the commercial fisherman for a period of four years and shall be available for inspection at any time during that period by the department. A copy of the electronic fish ticket or landing receipt shall be kept by the person licensed pursuant to Article 7 (commencing with Section 8030), or live bait dealer registered with the department, who filled out the electronic fish ticket or landing receipt for a period of four years and shall be available for inspection at any time within that period by the department.

(b) On delivery of sardines, anchovies, mackerel, squid, tuna, or bonito intended to be processed or sold as fresh fish, the person licensed pursuant to Article 7 (commencing with Section 8030) who filled out the electronic fish ticket or landing receipt, upon request of the authorized agent described in subdivision (c), shall notify the authorized agent of the unloading and weighing of the fish and shall permit the authorized agent to be present at all times during the weighing of the fish.

(c) A copy of the electronic fish ticket or landing receipt shall be delivered to an agent authorized in writing by the majority of the persons who participated in the taking of the fish, excluding the commercial fisherman receiving the original copy.

(d) For purposes of this section, "business day" means Monday to Friday, inclusive, excluding days designated as state or federal holidays.

15. Fish and Game Code section 8047 states:

(a) (1) An original printed signed hard copy of the electronic fish ticket as required by Section 8043 or landing receipt as required by Section 8043.1 shall be retained by the licensee for a period of four years and shall be available for inspection at any time within that period by the department. A copy shall be delivered to an agent

authorized in writing by the majority of the persons who participated in the taking of the fish, excluding the commercial fisherman receiving the original copy.

(2) A person licensed under Section 8033.5 who sells their fish to a licensed receiver may use a transportation receipt pursuant to subdivision (b) to transport those fish only to that licensed receiver. The receiver shall complete an electronic fish ticket for those fish. Transportation receipts shall be completed at the time the fish are transferred from the fishing vessel.

(b) (1) Every commercial fisherman or their designee, who transports, causes to be transported, or delivers to another person for transportation, any fish, except herring, taken from the waters of this state or brought into this state in fresh condition, shall fill out a transportation receipt according to the instructions and on forms provided by the department at the time the fish are brought ashore. Unless otherwise prescribed by regulation, the receipt or transfer of fish shall not occur at sea or from vessel to vessel.

(2) The original signed copy of the transportation receipt shall be delivered by the commercial fisherman to the department on or before the 16th day or the last day of the month in which the fish were landed, whichever date occurs first after landing. A copy of the transportation receipt shall be retained by the commercial fisherman who filled it out

for a period of four years and shall be available for inspection at any time within that period by the department. A copy of the transportation receipt shall be given to and retained by the person transporting the fish until the fish are sold fresh, processed, or otherwise disposed of.

(3) The transportation receipt is required only for transit purposes.

(4) A person transporting fish from the point of first landing under a transportation receipt is not required to be licensed to conduct the activities of a fish receiver as described in Section 8033.

(5) The transportation book receipt shall be issued to an individual fisherman and is not transferable.

(c) The transportation receipt shall contain all of the following information:

(1) The name of each species of transported fish, as designated by the department, or if not designated, the commonly used name of the species.

(2) The date and time of the receipt.

(3) The accurate weight of the species of fish being transported. Sablefish may be reported in dressed weight, and if so reported, shall have the round weights computed,

for purposes of management quotas, by multiplying 1.6 times the reported dressed weight.

(4) The name and identification number of the fisherman.
The signature of the fisherman authorizing transportation.

(5) The name of the person transporting the fish.

(6) The name of the fish business, the fish business identification number, and the corresponding electronic fish ticket or landing receipt number issued by the fish business to the commercial fisherman.

(7) The department registration number of the vessel and the name of the vessel.

(8) The department origin block number where the fish were caught.

(9) The port of first landing.

(10) Any other information the department may prescribe.

(d) The numbered transportation receipt forms in each individual transportation receipt book shall be completed sequentially. A voided fish transportation receipt shall have the word "VOID" plainly and noticeably written on the face of the receipt. A voided fish transportation receipt shall be submitted to the department in the same manner as a completed fish transportation receipt is submitted to the

department. A commercial fisherman who is no longer conducting business as a licensed fisherman shall forward all unused transportation receipts and transportation receipt books to the department immediately upon terminating their business activity.

16. Fish and Game Code section 8050 states:

(a) In addition to the receipt required by Section 8043, every person licensed under Article 7 (commencing with Section 8030), and any commercial fisherman who sells fish to persons who are not licensed under Article 7 (commencing with Section 8030), and any person who deals in fresh or frozen fish for profit, shall keep accounting records in which all of the following shall be recorded:

(1) The name as designated by the department of each different species of fish sold, distributed, or taken, or if not designated, the commonly used name of each species.

(2) The number of pounds sold, distributed, or taken of each different species.

(3) The name of the person to whom the fish were sold or distributed.

(4) The name, address, and phone number of the seller or distributor.

(5) The date of sale.

(6) The price paid.

(7) The intended use.

(b) Accounting record information required by this section that is transmitted from any person identified in subdivision (a) to any business that deals in fish for profit shall be in the English language.

(c) The accounting records shall be maintained by both buyer and seller for a period of three years and upon request, shall be open for inspection during normal business hours by the department. The accounting records shall be maintained within the State of California.

17. Fish and Game Code section 8252 states:

No spiny lobster less than three and one-quarter inches in length measured in a straight line from the rear edge of the eye socket to the rear edge of the body shell, both points to be on the midline of the back, may be taken, possessed, purchased, or sold.

Every person taking spiny lobster shall carry a measuring device and shall measure any lobster immediately on removal from his trap and if it is found to be undersize the lobster shall be returned to the water immediately.

18. Fish and Game Code section 12154 states:

(a) Upon a conviction of a violation of this code or any regulation adopted pursuant thereto that is punishable pursuant to Section 12012, 12013, 12013.3, or 12013.5, the department may suspend or permanently revoke a person's hunting or sport fishing license or permit privileges.

(b) (1) Any person whose privileges are suspended or revoked pursuant to this section may appeal the suspension or revocation to the commission. The commission shall initiate the appeal process within 12 months of the violator's appeal request. The commission shall consider at least the nature, circumstances, extent, and gravity of the person's violations, the person's culpability for the violations, and the injury to natural resources by the violations, and may restore a person's hunting or sport fishing license or permit privileges.

(2) The department may adopt regulations to implement this subdivision.

(c) Pursuant to subdivision (c) of Section 12157, a judge may order the seizure or forfeiture of any device or apparatus, including a vessel, vehicle, or hunting or fishing gear, that is used in committing an offense punishable under Section 12012, 12013, 12013.3, or 12013.5.

Applicable Regulations

19. California Code of Regulations, title 14, section 122, states in part:

(a) Classes of Spiny Lobster Permits.

[¶] . . . [¶]

(3) Any licensed commercial fisherman who does not possess a valid transferable or non-transferable lobster operator permit may purchase a lobster crewmember permit, authorizing him/her to accompany a lobster operator permit holder and to assist the lobster operator permit holder in the commercial take of spiny lobster.

[¶] . . . [¶]

(e) Records. Pursuant to Section 190 of these regulations, any person who owns and/or operates any vessel used to take lobsters for commercial purposes shall complete and submit an accurate record of his/her lobster fishing activities on a form (Daily Lobster Log, DFW 122 (REV. 03/04/16), incorporated herein by reference) provided by the department.

20. California Code of Regulations, title 14, section 122.1, subdivision (b), states:

(b) Any buoy that marks a spiny lobster trap shall comply with marking requirements set forth in Section 180.5 of these regulations. Any buoy that marks a receiver that contains spiny lobster shall be clearly and distinctly marked with its owner's commercial fishing license identification

number. The numbers shall be at least one and one-half (1.5) inches in height, drawn with a line no less than $\frac{1}{4}$ (0.25) inch thick, in a color that contrasts with the buoy, and maintained so that they are visible and legible.

21. California Code of Regulations, title 14, section 122.2, subdivision (a), states: "No lobster trap shall be pulled or raised or placed in the water between one hour after sunset to one hour before sunrise."

22. California Code of Regulations, title 14, section 190, states in part:

(c) Logbooks shall be kept on the vessel while it is engaged in, or returning from, fishing operations and shall be immediately surrendered upon demand to a peace officer of the department. Unless otherwise specified in Title 14, CCR, logbooks shall be completed immediately with all available information when any of the following first occurs:

(1) prior to passengers or crew disembarking from the vessel, or

(2) at the time of receipt, purchase, or transfer of fish, or

(3) at the end of the calendar day (24 hour clock) during fishing activity through the night.

(d) Logbooks shall be submitted electronically or delivered to the department at 3030 Old Ranch Parkway, Suite 400, Seal Beach, CA 90740, or such other department office as may be specified in regulation on or before the 10th day of

each month following the month to which the records pertain. Logbooks that are mailed shall be postmarked on or before the 10th day of each month following the month to which the records pertain.

[¶] . . . [¶]

23. California Code of Regulations, title 14, section 632, states in part:

(a) General Rules and Regulations:

The areas specified in this section have been declared by the commission to be marine protected areas, marine managed areas, or special closures. Public use of marine protected areas, marine managed areas, or special closures shall be compatible with the primary purposes of such areas. MPAs, MMAs, and special closures are subject to the following general rules and regulations in addition to existing Fish and Game Code statutes and regulations of the commission, except as otherwise provided for in subsection 632(b), areas and special regulations for use. Nothing in this section expressly or implicitly precludes, restricts or requires modification of current or future uses of the waters identified as marine protected areas, special closures, or the lands or waters adjacent to these designated areas by the Department of Defense, its allies or agents.

(1) Protection of Resources in MPAs and MMAs, as defined in Public Resources Code Section 36710:

(A) State Marine Reserves: In a state marine reserve, it is unlawful to injure, damage, take, or possess any living, geological, or cultural marine resource, except under a scientific collecting permit issued by the department pursuant to Section 650 or specific authorization from the commission for research, restoration, or monitoring purposes.

1. Notwithstanding the classification specified in this section, the boundaries of all state marine reserves exclude any pre-existing artificial structure when that structure is being actively maintained, repaired, or operated by the leaseholder(s), permittee(s), or their agent(s).

(B) State Marine Parks: In a state marine park, it is unlawful to injure, damage, take, or possess any living or nonliving marine resource for commercial purposes. Any human use that would compromise protection of the species of interest, natural community or habitat, or geological, cultural, or recreational features, may be restricted by the commission as specified in subsection 632(b), areas and special regulations for use. The department may issue scientific collecting permits pursuant to Section 650. The commission may authorize research, monitoring, and educational activities and certain recreational harvest in a

manner consistent with protecting resource values. Take of marine resources incidental to the operation, maintenance, repair, removal, and replacement within the existing footprint of pre-existing artificial structures is allowed in state marine parks pursuant to any required federal, state, and local permits and leases or if otherwise authorized through any applicable federal, state, and local law. This subsection does not authorize retention or possession of any marine resource taken pursuant to this subsection.

[¶] . . . [¶]

(D) State Marine Recreational Management Areas: In a state marine recreational management area, it is unlawful to perform any activity that would compromise the recreational values for which the area may be designated. Recreational opportunities may be protected, enhanced, or restricted, while preserving basic resource values of the area. No other use is restricted unless specified in subsection 632(b), areas and special regulations for use. Take of marine resources incidental to the operation, maintenance, repair, removal, and replacement within the existing footprint of pre-existing artificial structures is allowed in state marine recreational management areas pursuant to any required federal, state, and local permits and leases or if otherwise authorized through any applicable federal, state, and local law. This subsection does

not authorize retention or possession of any marine resource taken pursuant to this subsection.

[¶] . . . [¶]

(116) Santa Barbara Island State Marine Reserve.

(A) This area is bounded by the mean high tide line and straight lines connecting the following points in the order listed except where noted:

33° 28.500' N. lat. 119° 01.813' W. long.;

33° 28.500' N. lat. 118° 58.051' W. long.; thence along the three nautical mile offshore boundary to

33° 24.842' N. lat. 119° 02.200' W. long.; and

33° 27.911' N. lat. 119° 02.200' W. long.

(B) Area restrictions defined in subsection 632(a)(1)(A) apply.

24. California Code of Regulations, title 14, section 746, sets forth procedures for license or permit revocations, suspensions, reinstatements, transfers or waivers of renewal requirements, including hunting and sport fishing license or permit privileges.

Precedential Decision

25. Government Code section 11425.60 authorizes agencies to designate decisions as precedential that contain "a significant legal or policy determination of

general application that is likely to recur." Precedential decisions may be expressly relied upon by the administrative law judge and the agency.

26. At its April 20, 2022, board meeting, the commission designated 10 decisions as precedential decisions, pursuant to Government Code section 11425.60, including *In the Matter of the Accusation Against Troy Tecklenburg*, Case No. 15ALJ04-FGC, OAH No. 2016060664.

27. In that case, Mr. Tecklenburg, who held a commercial fishing license and a lobster operator permit, was cited for taking lobster out of season. Two months later, he was cited for having an undersized fish, just a few weeks after he had been advised of recent changes in the law regarding undersized fish. The following year, Mr. Tecklenburg was cited for catching fish without having a valid sports fishing license. That same year, he was convicted of taking undersized spiny lobster when WLO's discovered 18 undersized spiny lobsters after boarding his vessel.

Mr. Tecklenburg was convicted the following year of again taking undersized spiny lobster when WLOs discovered three undersized spiny lobsters after boarding his vessel. Mr. Tecklenburg had a history of prior discipline wherein his license and permit were previously suspended. That suspension ended when he paid all fines, assessments, and restitution. At the administrative hearing, Mr. Tecklenburg argued that WLOs had harassed him, boarding his vessel at least 30 times, acknowledged that he had made some mistakes because he was "new" to the fishing industry, and admitted to breaking a few rules.

The commission determined that Mr. Tecklenburg had an extensive history of violating applicable laws and regulations. The commission discounted his claim of being new to the industry, noting that he had been cited for wildlife violations every

year for the past three years. The commission held that his “repeated violations of the [d]epartment’s laws and regulations show a disregard for the [d]epartment’s mission of managing wildlife resources for the public’s use and enjoyment. Additionally, [his] lack of sincere remorse suggests that he has not accepted personal responsibility for his wrongdoing.” The commission determined that public protection required the permanent revocation of Mr. Tecklenburg’s commercial fishing license and lobster operator permit.

Appellate Decision Cited by Respondent

28. Respondent cited *People v. Estes* (2013) 218 Cal.App.4th Supp. 14 in support of his position. In that case, Mr. Estes, the ship’s captain, appealed the finding that he was strictly liable on a charge of violating Fish and Game Code section 8278, subdivision (a), for taking undersized Dungeness crabs. He also argued the \$47,000 fine imposed was excessive. (*Id.* at p. 17.) In a case of first impression as to the mental state required to prove a violation of Section 8278, the Court of Appeal found that the trial court had properly determined that taking undersized crab did not require proof of mens rea. However, the court did find the fine excessive and disproportionate to the harm Mr. Estes caused, a violation of the Eighth Amendment. (*Ibid.*)

In that case, WLOs determined that 2.2 percent of Mr. Estes’s crabs caught were undersized, which was 1.2 percent above the amount of undersized crabs permitted by law. Mr. Estes’s entire load was seized, the undersized crabs were returned to the ocean, and the proceeds from the sale of the properly sized crabs, \$75,962.64, was placed in the Fish and Game Preservation Fund. (*Id.* at p.18.) The trial court found that the law was designed to protect public health and safety, so was regulatory in nature, and not one for punishment or correction, making strict liability the appropriate standard, and upheld the \$47,000 fine. (*Id.* at pp. 18-19.)

The appellate court held that the trial court made the proper determination regarding strict liability. (*Id.* at pp. 19-20.) The appellate court next examined the fine imposed and determined it was grossly disproportionate to Mr. Estes's offense. (*Id.* at pp. 21-22.) The appellate court, citing to a federal case, noted the four factors courts may examine to determine if a forfeiture is grossly disproportionate. Those factors are (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused. (*Id.* at p. 21.) The appellate court then determined that the proper fine should have been \$1,000 and that the actual fine imposed constituted nearly two-thirds of the value of the entire load which was a disproportionate amount. (*Id.* at p. 22.)

29. Respondent argued the *Estes* holding found the ship's captain strictly liable for violating the undersized catch law, not any of the crew. As such, respondent should not be held responsible for the 2014 undersized catch. (Of note, in closing, complainant assumed respondent's cite to *Estes* was to argue the penalty being sought herein was excessive, but that was not respondent's argument.)

Evaluation of Causes for Discipline

CONTESTED ALLEGATIONS

30. Complainant established by preponderance of evidence that on December 15, 2022, respondent violated California Code of Regulations, title 14, section 632, subdivision (a), because he unlawfully took living marine resources from a State Marine Reserve when he caught lobsters at SBI SMR. (Cause for Discipline No. One.) Respondent knowingly entered SBI SMR and caught lobster. Respondent's claim that he only used three traps in SBI SMR and caught the rest of his lobsters at Cortez

Bank was not credible. WLOs plotted 16 points where respondent dropped traps in SBI SMR, saw no traps on board when respondent turned his lights back on after dropping the traps, later observed respondent engage in trap retrieval activities approximately a dozen times, and found 14 traps on board in the morning when they boarded his vessel. Respondent then dropped his plotter overboard so as to hide where he had fished, so could not prove he had been at Cortez Bank or refute the WLOs' observations of 16 GPS points in SBI SMR. Moreover, even if it were true that he had only fished three traps at SBI SMR, that is three more than allowed by law.

31. Complainant established by preponderance of evidence that on December 15, 2022, respondent violated California Code of Regulations, title 14, section 122.2, subdivision (a), because he unlawfully pulled lobster traps at SBI SMR between one hour after sunset and one hour before sunrise. (Cause for Discipline No. Two.) The times of respondent's activities in SBI SMR, as observed and recorded by the WLOs, took place during prohibited times.

32. Complainant established by preponderance of evidence that on December 15, 2022, respondent violated California Code of Regulations, title 14, section 122, subdivision (e), because he failed to complete and submit an accurate record of his lobster fishing activities on a form provided by the department. During the encounter, it was discovered that respondent's logbook was incomplete. Even if he had been fishing at Cortez Bank, his logbook contained no such entries nor had he inputted the required initial information for his SBI SMR fishing activities. (Cause for Discipline No. Three.)

33. Complainant established by preponderance of evidence that on February 27, 2019, respondent violated California Code of Regulations, title 14, section 122, subdivision (e), because he took and possessed two undersized spiny lobsters. During

WLO Potter's inspection, two spiny lobsters in respondent's possession were less than three and one-quarter inches in length, and respondent was not sure how he missed them. (Cause for Discipline No. Two Hundred and Ten.)

34. Complainant established by preponderance of evidence that on November 7, 2019, respondent violated Fish and Game Code section 7850, subdivision (b), because he failed to register the presence of a person not required to hold a commercial fishing license. Respondent's friend, who was on board as an observer to help him retrieve lost traps, was not registered in respondent's logbook. (Cause for Discipline No. Two Hundred and Eleven.)

35. Complainant established by preponderance of evidence that on March 14, 2019, respondent pled guilty in San Diego Superior Court to six violations of Fish and Game Code section 7121, unlawfully selling fish taken under the authority of a sport license. (Cause for Discipline No. Two Hundred and Twelve.)

36. Complainant established by preponderance of evidence that on March 14, 2019, respondent pled guilty in San Diego Superior Court to violating Fish and Game Code section 2012, failing to exhibit an unmarked cage receiver holding 10 spiny lobsters on October 3, 2018, upon demand by WLOs, and failing to exhibit three receivers holding spider crab, one receiver holding 11 spiny lobsters, and two single live spiny lobsters on October 4, 2018, upon demand by WLOs. (Cause for Discipline Nos. Two Hundred and Thirteen and Two Hundred and Fourteen.)

37. Complainant established by preponderance of evidence that on March 14, 2019, respondent pled guilty in San Diego Superior Court to violating California Code of Regulations, title 14, section 122.1, failing to mark the lobster trap or receiver impounding lobsters with an individual buoy. WLOs observed three unbuoyed

receivers holding spider crabs and one unbuoyed receiver holding 11 spiny lobsters, all of which were under respondent's control. (Cause for Discipline No. Two Hundred and Fifteen.)

38. Complainant did not establish by preponderance of evidence that on December 29, 2014, respondent violated Fish and Game Code section 8252, taking and possessing undersized lobster. Respondent was not the captain of the vessel, was only just learning how to measure lobsters, and was under the supervision of his captain who measured the lobsters. No authority was offered to demonstrate that a crew member is strictly liable for the actions of his captain. (Cause for Discipline No. Two Hundred and Sixteen.)

STIPULATED ALLEGATIONS

39. Based upon respondent's stipulation, complainant established Causes for Discipline Nos. Four through Two Hundred Nine. Accordingly, respondent is found to have committed the following violations:

40. On 14 separate and distinct occasions, between 2019 and 2022, respondent violated Fish and Game Code section 8033.5, when he failed to obtain a fisherman's retail license for the purpose of selling fish taken to the ultimate consumer. (Causes for Discipline Nos. Four through Eighteen.)

41. On 14 separate and distinct occasions, between 2019 and 2022, respondent violated Fish and Game Code section 8050, when he failed to complete and maintain accounting records for inspection. (Causes for Discipline Nos. Nineteen through Thirty-Three.)

42. On 14 separate and distinct occasions, between 2019 and 2022, respondent violated Fish and Game Code section 8043, when he failed to deliver the original signed copy of the paper landing receipt or electronically submit completed records to the department. (Causes for Discipline Nos. Thirty-Four through Forty-Eight.)

43. On 14 separate and distinct occasions, between 2019 and 2022, respondent violated Fish and Game Code section 8046, when he failed to deliver the original signed copy of the paper landing receipt or electronically submit completed records to the department. (Causes for Discipline Nos. Forty-Nine through Sixty-Three.)

44. On four separate and distinct occasions in 2021, respondent violated Fish and Game Code section 7121, when he unlawfully sold fish taken under the authority of a recreational fishing license and taken on a vessel which carried sport fishermen. (Causes for Discipline Nos. Sixty-Four through Sixty-Seven.)

45. On 11 separate and distinct occasions in 2022, respondent violated Fish and Game Code section 7121, when he unlawfully sold fish taken in Mexico and brought into the United States under the authority of a recreational fishing license. (Causes for Discipline Nos. Sixty-Eight through Seventy-Six, and Seventy-Eight through Seventy-Nine; as noted above, Cause for Discipline No. Seventy-Seven was withdrawn.)

46. On 12 separate and distinct occasions, between 2021 and 2022, respondent violated Fish and Game Code section 2353, subdivision (a), when he unlawfully imported fish taken in Mexico. (Causes for Discipline Nos. Eighty through Eighty-Nine, and Ninety-One through Ninety-Two; as noted above, Cause for Discipline No. Ninety was withdrawn.)

47. On 14 separate and distinct occasions, between 2020 and 2021, respondent violated Fish and Game Code section 8046, when he failed to deliver the original signed copy of the paper landing receipt or electronically submit completed records to the department. (Causes for Discipline Nos. Ninety-Three through One Hundred and Six.)

48. On 14 separate and distinct occasions, between 2020 and 2021, respondent violated Fish and Game Code section 8050, when he failed to complete and maintain accounting records for inspection. (Causes for Discipline Nos. One Hundred and Seven through One Hundred and Twenty.)

49. On 14 separate and distinct occasions, between 2020 and 2021, respondent violated Fish and Game Code section 8047, subdivision (c), when he failed to complete and deliver transportation receipts to the department. (Causes for Discipline One Hundred and Twenty-One through One Hundred and Thirty-Four.)

50. On 19 separate and distinct occasions, between 2019 and 2022, respondent violated Fish and Game Code section 8033 when he failed to obtain a fish receiver's license. (Causes for Discipline One Hundred and Thirty-Five through One Hundred and Fifty-Two.)

51. On 19 separate and distinct occasions, between 2019 and 2022, respondent violated Fish and Game Code section 8043 when he failed to make a landing receipt record on a form furnished by the department at the time of receipt, purchase, or transfer of fish, which ever occurred first. (Causes for Discipline One and Fifty-Three through One Hundred and Seventy-One.)

52. On 19 separate and distinct occasions, between 2019 and 2022, respondent violated Fish and Game Code section 8046 when he failed to deliver the

original signed copy of the paper landing receipt or electronically submit completed records. (Causes for Discipline One Hundred and Seventy-Two through One Hundred and Ninety.)

53. On 14 separate and distinct occasions, between 2019 and 2022, respondent violated Fish and Game Code section 8050 when he failed to complete and maintain accounting records for inspection. (Causes for Discipline One Hundred and Ninety-One through Two Hundred and Nine.)

Evaluation of Discipline to Impose

54. Cause having been found to impose discipline, the issue is what discipline to impose. That determination includes consideration of respondent's rehabilitation. Here, that was sorely lacking given the multitude of violations respondent committed, and his remorse seemed ingenuine, at best. Even if it were true, respondent's apology was insufficient on this record as mere remorse does not demonstrate rehabilitation.

A truer indication of rehabilitation is presented by sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) The evidentiary significance of an applicant's 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.) Here, the passage of time only led to respondent engaging in additional violations, even admitting in 2022 he did so to make money before his license and permit were revoked. His written statement and testimony were more focused on the harm that befell him due to the notoriety of his crimes, as opposed to showing any real remorse or rehabilitation. He lacked an awareness that his own actions led to his current situation.

Further, it was hard to understand how the raid conducted at his home was a “big wake-up call,” causing his reputation to be “shot,” and yet he still illegally caught lobster at the SBI SMR after that raid. Moreover, his violations covered a broad spectrum of laws regulating the fishing industry, demonstrating a blatant disregard for, or inability to comply with, applicable law. In short, nothing the department or WLOs did seemed to stop respondent from engaging in illegal fishing activities.

Respondent’s written statement that he never lied or made excuses was false. In 2022, when his vessel was in the SBI SMR, he lied to WLOs about his activities, only admitting them when told he had been under surveillance. Even when caught, he tried to dispose of his GPS plotter in an attempt to destroy evidence. In 2019, he claimed not to know applicable logbook laws, despite those laws having been previously explained to him. Further he had undersized lobsters in his possession which he knew was illegal. In 2018, when caught illegally mixing and selling lobster and having an incomplete logbook, he played games with the WLO. Respondent’s actions during his encounters with WLOs did not portray an individual who told the truth and owned up to his violations, rather they showed one who tried to escape liability, even in the face of undeniable evidence.

Respondent’s claims that he did not know about various requirements do not aid him because ignorance of the law is no defense. (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661-1665.) While respondent’s explanation for not being properly trained when he began his career and being “young and dumb,” may be true, that does not excuse his repeated violations of the law. WLO Cabral’s observation regarding respondent’s laissez-faire attitude seemed accurate and was behavior documented repeatedly in the WLOs’ reports and borne out in both respondent’s written statement and his testimony. Respondent really did not seem to care that he

repeatedly violated laws, he seemed more concerned that he got caught and that his actions were posted on social media. Moreover, even when caught, he initially denied violating the applicable laws, and only admitted doing so when confronted with incontrovertible evidence of his illegal activities.

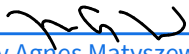
But for getting caught, respondent did not care that he retained undersized lobsters. He did not care that he combined recreationally caught lobsters with commercially caught lobsters. He did not care that he fished in a marine protected area. He did not care that he sold lobsters without the proper licenses. He did not care that he illegally caught fish in Mexico. He did not care that he sold fish caught in Mexico to buyers in the United States. He did not care that he lied to WLOs when they initially encountered him. He only acknowledged his violations when confronted with unrefutable facts, told he had been under surveillance, or when his brother told him they “know everything.” Even when confronted, respondent played games in attempts to misdirect WLOs, even going so far as to try and destroy evidence by dropping his GPS plotter overboard. As noted, his claim that the raid at his home was a “wake-up call” rang hollow given that just a few months later he illegally caught lobsters at the SBI SMR, and admitted doing so to make money before his permit and license were revoked.

Respondent’s widespread violations, coupled with his nonplussed attitude, were concerning. Admitting to a violation only after being presented with indisputable evidence after initially lying or trying to hide or destroy evidence does not demonstrate rehabilitation, in fact, far from it. On this record, public protection requires that respondent’s lobster permit and commercial fishing license be revoked, the department’s lifetime ban on his sport fishing license be affirmed, and his Commercial Fish Business License be revoked.

ORDER

The appeals filed by respondent Tanner Whitmarsh are denied. The Commercial Fishing License issued to Tanner Whitmarsh is revoked. The Lobster Operator Permit issued to Tanner Whitmarsh is revoked. The department's decision to permanently revoke Tanner Whitmarsh's sport fishing privileges is affirmed, and those sports fishing privileges are permanently revoked. Tanner Whitmarsh's Commercial Fish Business License is revoked.

DATE: November 25, 2024


[Mary Agnes Matyszewski \(Nov 25, 2024 08:34 PST\)](#)
MARY AGNES MATYSZEWSKI

Administrative Law Judge

Office of Administrative Hearings