



David E. Pierce
Director

Commonwealth of Massachusetts

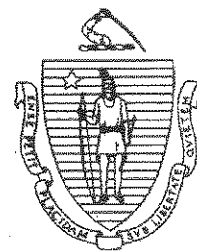
Division of Marine Fisheries

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Deputy Commissioner

January 4, 2016

David Paine
1897 US Highway 6
Wellfleet, MA 02667

Re: **Matter of Paine, Case No. SPP-149677-15-KC**
FINAL DECISION AND FINAL AGENCY ACTION

Dear Mr. Paine:

I have attached the Magistrate's **FINAL DECISION - DEFAULT JUDGMENT AND RECOMMENDATION** in the above referenced proceeding.

After a full review of the administrative record in this case and thoughtful consideration of the Magistrate's Findings, Conclusions and Recommendation, I have decided to adopt the Magistrate's Final Decision in its entirety.

Therefore, shellfish propagation permit ID #149677, shellfish and seaworms permit ID #162579 and DMF shellfish transaction card are hereby revoked, and will not be renewed. In addition no new shellfish permit of any kind will be issued to you or any individual, corporation or business seeking one on your behalf.

This decision is based on my duties and responsibilities to protect the public health, welfare and safety from consuming raw oysters that may contain the vibrio virus if not handled as required by regulation of the Vibrio Control Plan. The record in this case shows that you did not participate in any capacity or at any point in the adjudicatory process, either by yourself or through an authorized representative. The record clearly establishes that it was your intent not to avail yourself of a full and fair hearing in accordance with G.L. c.30A, §§8 and 11 or to otherwise deny the charges filed against you by the Environmental Police.

Pursuant to G.L. c.30A, §14 you have thirty days from the service date of this letter to file an appropriate action for judicial review of my final decision in an appropriate court of law.

Regards,

A handwritten signature in cursive script, appearing to read "David E. Pierce".

David E. Pierce, PhD
Director

Docket Sheet
Magistrate's Final Decision
Administrative Record

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. SPP-149677-15-KC

IN THE MATTER OF:

DAVID PAINE and SHELLFISH)
PROPAGATION PERMIT DMF ID #)
149677, SHELLFISH and SEA WORMS)
PERMIT DMF ID #162579 and SHELLFISH)
TRANSACTION CARD)
_____)

FINAL DECISION AND
JUDGEMENT BY DEFAULT
FAILURE TO APPEAR OR DEFEND

This is a Final Decision issued pursuant to G.L. c.30A, §§8 and 11 and 801 CMR §1.01(7)(g)(2).

On June 30, 2015 Sgt. Kevin Clayton of the Massachusetts Environmental Police (MEP) filed a Law Enforcement Report and Request for an Adjudicatory Proceeding with the Director of the Division of Marine Fisheries (DMF) charging the Respondent David Paine with violations of DMF's regulations implementing the Commonwealth's Vibrio Control Plan and codified at 322 CMR §16.00. The regulations govern the handling and tagging of all shellfish and the icing and requirements applicable to the transport of raw oysters. These regulations are designed to ensure that the Commonwealth's shellfish industry complies with the National Shellfish Sanitation Program which regulates the harvest and transportation of shellfish, and the Food and Drug Administration's requirements for minimizing the risk of food borne illnesses to consumers within and outside Massachusetts.

BACKGROUND

On July 9, 2015 DMF issued a Notice of Immediate Permit Suspension and an Order to Show Cause. The Order, Notice and Law Enforcement Report and hearing request were served on Mr. Paine by the Environmental Police. Under authority of G.L. c.130, §80 and 322 CMR §16.05(6)(a) the Notice automatically suspended Mr. Paine's shellfish propagation permit No.149677, shellfish and seaworms permit No.162579 and shellfish transaction card. The Order notified Mr. Paine that an expedited adjudicatory hearing had been scheduled for July 21, 2015 to provide him or his authorized representative with an opportunity to be heard on these charges and the grounds for the immediate permit suspension.

The adjudicatory hearing was held as scheduled on July 21, 2015. Sgt. Clayton was in attendance. Mr. Paine was not. The hearing was electronically recorded and remained open for approximately 60 minutes to provide Mr. Paine or his authorized representative with an opportunity to notify the agency of his delay, absence and/or request a continuance. None was forthcoming.

A Notice of Default was issued and served on Mr. Paine by UPS Second day mail with proof of delivery. The Notice informed Mr. Paine that he was allowed ten days from its receipt to request that DMF vacate or set aside the Default. Such request could be made orally, in writing or electronically. He failed to do so.

Judgment by Default shall be entered by the Administrative Law Clerk consistent with this Final Decision.

FINDINGS AND CONCLUSION

The Administrative Law Clerk is hereby directed to enter on the docket Judgment by Default against Mr. Paine for failure to appear or otherwise show any intention to participate in the adjudicatory process, to attend the hearing, to communicate in any way with DMF about the hearing or to deny the charges filed against him by Sgt. Clayton.

Based on the record of this proceeding I hereby **FIND** and **CONCLUDE** that Mr. Paine violated the provisions of 322 CMR §16.03, Tagging of Shellfish and the provisions of 322 CMR §16.05, Vibrio Management Plan for Harvest and Handling of Oysters. Specifically, on or about June 13, 2015 in the town of Truro Mr. Paine failed to attach shellfish harvest tags to raw oysters that he harvested and possessed in violation of 322 CMR §16.03(1)(a); that he possessed and transported for commercial purposes raw oysters that were not affixed with shellfish harvest tags in violation of 322 CMR §16.03(1)(c); that he did not adequately ice raw oysters in accordance with 322 CMR §16.05(2) within two hours of the time of harvest or exposure or prior to leaving the harvest site, whichever occurred first, in violation of 322 CMR §16.05(3)(c); that he transported for commercial purposes market bound raw oysters to a location other than a primary buyer's facility in violation of 322 CMR §16.05(3)(e); and that he sold raw oysters directly to an entity that is not a primary buyer in violation of 322 CMR §7.01(14)(a).

RECOMMENDATION

Based on all of the above, I hereby **RECOMMEND** that the DMF Director not renew shellfish propagation permit No.149677, shellfish and seaworms permit No.162579 and shellfish transaction card or otherwise issue any new shellfish permit(s) to Mr. Paine for the harvest or possession of shellfish.

Dated: 1/4/16

By: D.C. Hoover
David C. Hoover, Esq.
Administrative Law Magistrate