



The Commonwealth of Massachusetts

Division of Marine Fisheries

251 Causeway Street, Suite 400, Boston, MA 02114

p: (617) 626-1520 | f: (617) 626-1509

www.mass.gov/marinefisheries



CHARLES D. BAKER
Governor

KARYN E. POLITO
Lt. Governor

BETHANY A. CARD
Secretary

RONALD S. AMIDON
Commissioner

DANIEL J. MCKIERNAN
Director

December 22, 2022

Otis Reed
54 Partridge Path
Chatham, MA 02633

FINAL DECISION

RE: Matter of Otis Reed and Commercial Shellfish and Seaworms Permit DMF ID No. 170295, Shellfish Transaction Card and All Appurtenant Regulated Fishery Permit Endorsements

Dear Mr. Reed:

Upon a thorough review of the administrative record, including the written agreement between the parties, I adopt the attached Recommended Final Decision of the Magistrate in its entirety as my **Final Decision** in this matter.

Therefore, your shellfish and seaworms permit DMF ID No.170295 and your shellfish transaction card are hereby permanently revoked. You may not apply for, hold or otherwise be issued any permit, authorization or regulated fishery permit for shellfish. Any such permit, authorization, or regulated fishery for shellfish that may inadvertently or mistakenly be issued to you shall be null and void.

This **Final Decision** is issued in accordance with G.L. c.30A, §11(8) and 801 CMR §1.01(11)(d). As set forth in the written agreement, the parties have waived their rights to judicial review of this Final Decision. Any permit issued shall be voided

Sincerely yours,

Daniel J. McKiernan, Director

Cc: Otis Reed
Jared Silva, Agency Representative

Enclosed:
Recommended Final Decision

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF FISH AND GAME
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. SSW-170925-JS-22

)
IN THE MATTER OF:)
OTIS REED and COMMERCIAL)
SHELLFISH AND SEAWORMS PERMIT)
DMF ID NO. 170295, SHELLFISH)
TRANSACTION CARD and ALL)
APPURTENANT REGULATED FISHERY)
PERMIT ENDORSEMENTS)

Respondent)
_____)

RECOMMENDED FINAL DECISION

I. Introduction

This matter involves allegations that on or about August 11, 2022, Otis Reed (the “Respondent”) harvested, possessed and sold shellfish from an area classified by the Division of Marine Fisheries (“DMF”) as contaminated and “Prohibited,” that is closed to harvest of shellfish, without a permit authorizing the harvest of contaminated shellfish, in violation of Mass. Gen. L. ch. 130, § 75 and 322 CMR 16.03(2)(e), (2)(f), and 16.09(2). More specifically, DMF has alleged that on or about August 11, 2022, the Respondent harvested, possessed, and sold shellfish from Shellfish Growing Area CCB 22.0 – Paine’s Creek, classified as contaminated and “Prohibited” by the DMF.

For the reasons set forth below, DMF has appropriately sought the permanent revocation of the Respondent’s shellfish and seaworms permit DMF ID No. 170295, shellfish transaction card and all appurtenant regulated fishery permit endorsements.

II. Procedural History

After the incident at issue on August 11th, 2022, DMF took immediate action to suspend the Respondent’s Commercial Shellfish and Seaworms Permit DMF ID# 170295 and shellfish transaction card, and all appurtenant regulated fishery permit endorsements. An expedited adjudicatory hearing was scheduled for September 15, 2022, via Zoom per a Show Cause Order and Notice of Immediate Shellfish Permit Suspension sent to all parties (Docket Nos. 1 and 2). At the first adjudicatory hearing,

after allowing a reasonable time for the Respondent to appear or to contact DMF, the Respondent was found in default for failure to appear. Pursuant to 801 CMR 1.01(7)(g)(2) (failure to prosecute or defend) and 801 CMR 1.02(10)(d) (dismissals for failure to appear), a Notice of Default, Entry of Default Judgment and Order (Docket No. 4) was issued and sent to the parties. On September 23, 2022, the Respondent requested that the hearing be rescheduled (Docket No. 6). On or about September 29, 2022, a Ruling on Motion to Set Aside Default Judgment and Notice of Rescheduled Hearing was issued, and a new hearing was set for October 14, 2022 (Docket No. 7).

On October 14, 2022, all Parties and their witnesses attended an adjudicatory hearing. The Respondent, after having the opportunity to obtain counsel, chose to represent himself at the hearing. All witnesses were administered the oath and the hearing was recorded. The administrative record was compiled after the conclusion of the hearing.

On or about October 27, 2022, a Tentative Decision was issued and served on the parties. Neither party filed comments on the Tentative Decision within the thirty day-period set forth at on 801 CMR 1.01(11)(c). For the reasons set forth below, I recommend that the Director of DMF adopt this Recommended Final Decision as his Final Decision, and permanently revoke the Respondent's shellfish and seaworms permit DMF ID No. 170295, shellfish transaction card and all appurtenant regulated fishery permit endorsements.

III. Issues for Adjudication

DMF alleged the following violations of marine fishery laws and regulations.

1. On or about August 11, 2022, the Respondent harvested, possessed, and sold shellfish from Shellfish Growing Area CCB 22.0 – Paine's Creek, classified as contaminated and "Prohibited" by the Division of Marine Fisheries and closed to the harvest of shellfish in accordance with G.L. c. 130, §§ 74 and 74A, in violation of Mass. Gen. L. ch. 130, §75 and 322 CMR 16.03(2)(e).
2. On or about August 11, 2022, the Respondent harvested, possessed, and sold shellfish from Shellfish Growing Area CCB 22.0 – Paine's Creek – classified as contaminated and "Prohibited" by the Division of Marine Fisheries, pursuant to Mass. Gen. L. ch. 130, §§ 74 and 74A, and without a permit authorizing the harvest of contaminated shellfish, in violation of Mass. Gen. L. ch. 130, §75 and 322 CMR 16.03(2)(f).
3. On or about August 11, 2022, the Respondent harvested, possessed, and sold shellfish from a

shellfish growing area, or part thereof, not open to commercial harvest by the Division or the municipality that regulates commercial harvest in its waters, in violation of 322 CMR 16.09(2).

IV. Alleged Facts

The following facts were alleged in DMF's Notice of Immediate Suspension of Commercial Shellfish Permit (DMF ID# 170295) dated August 24, 2022 and the attachments thereto (Docket # 1), including the Incident Report dated August 22, 2022 of David Johnson, Assistant Shellfish Constable for the Town of Brewster, the Show Cause Order and Respondent's Right to Expedited Hearing dated August 24, 2022 (Docket # 2) and during testimony from DMF Assistant Director Story Reed, Assistant Shellfish Constable David Johnson, Dennis Natural Resource Officer Nic Bussian, and the Respondent at the adjudicatory hearing (Hearing Transcript). I took administrative notice of DMF's prior Final Agency Action *In the Matter of Otis J. Reed and Commercial Shellfish and Seaworm Permit DMF ID# 149357*, dated October 15, 2010.

The Respondent holds a 2022 Commercial Shellfish and Seaworms Permit DMF ID# 170295 and Shellfish Transaction Card. The Respondent does not have a permit to harvest clams from a "Prohibited" area. (Testimony of Story Reed, Hearing Transcript, and permit inventory attached to Notice of Immediate Suspension of Commercial Shellfish Permit (DMF ID# 170295) (Docket #1)). The Respondent does not have any permits for harvest of clams, either recreationally or commercially, within the Town of Brewster, Massachusetts (testimony of Nic Bussain and the Respondent, Hearing Transcript).

DMF publishes the areas that it designates as "Approved," "Conditionally Approved," "Restricted," "Conditionally Restricted," or "Prohibited" for shellfish harvest on its website and through other means. On or about December 29, 2021, the Respondent signed a Shellfish Harvesting, Handling and Transport Affidavit as part of his permit renewal process that provided that "Shellfish for direct marketing may only be harvested from waters classified as **Approved or Conditionally Approved** and in **"open status."** The Affidavit further notifies the permit applicant that "[i]nformation on shellfish area classifications can be found by searching 'growing areas' on the DMF website www.mass.gov/marinefisheries." DMF witness Story Reed testified that DMF uses this annual affidavit during the permit renewal process to make permittees aware of the conditions on their permit and areas of permitted harvest, and to comply with requirements of the National Shellfish Sanitation Program to promote shellfish safety for the public.

On August 11, 2022, Natural Resource Senior Administrative Assistant Andreanna Sideris and Dennis Natural Resource Officer Nick Bussian observed an individual, who was later identified as the

Respondent, taking soft-shelled clams from the tidal beds inside the prohibited area of Paines Creek, identified as CCB22 “Prohibited” on a DMF map attached to the Incident Report (Docket #1). Witnesses and photographs taken that day identify the Respondent as the person who removed clams from this area (Testimony of Nic Bussian, Hearing Transcript, the Incident Report (Docket #1) and photographs attached to Notice of Immediate Suspension of Commercial Shellfish Permit (DMF ID# 170295) (Docket #1)). The Respondent confirmed that he was at this location on August 11th, and had harvested some clams from Paines Creek, but claimed that he harvested small amounts of soft-shelled clams for personal use. (Testimony of Respondent, Hearing Transcript).

The vehicle at the scene that day was registered to Ben C. Hermes. (Hearing testimony of David Johnson and Incident Report, Docket #1). According to the Incident Report prepared by Assistant Shellfish Constable David Johnson, Mr. Hermes later identified the Respondent as the individual with him who was digging clams, and further stated that the Respondent told him that he sold the clams that evening somewhere in Orleans, Massachusetts (Incident Report, Docket # 1). At the hearing, the Respondent contended instead that he collected the clams from the Prohibited area for his own personal use and sold other clams harvested that day from Chatham to Orleans Seafood (Testimony of the Respondent, Hearing Transcript).

The SAFIS report for the clams that Respondent sold to the Orleans Seafood Market on August 11, 2022 reported that the clams were harvested in Chatham. (SAFIS Report attached to Incident Report (Docket #1)). The Respondent as the harvester was the only person who represented where the clams were harvested as reported in the SAFIS report. (Testimony of Story Reed, Hearing Transcript).

V. Findings of Fact

1. In 2010, DMF revoked a prior commercial shellfish and seaworms permit (DMF ID#149357) held by the Respondent. As reported *In the Matter of Otis J. Reed and Commercial Shellfish and Seaworm Permit DMF ID# 149357*, dated October 15, 2010, the Respondent did not contest three instances of harvesting clams from contaminated, closed areas in Harwich that were part of the allegations in this prior matter.

2. DMF issued a new shellfish and seaworms permit to the Respondent some years after his prior shellfish and seaworms permit was revoked in 2010.

3. The Respondent currently holds a 2022 Commercial Shellfish and Seaworms Permit DMF ID# 170295 issued by DMF and also holds a Shellfish Transaction Card.

4. The Respondent does not hold a permit to dig clams from an area designated as “Prohibited” for

shellfish harvest by DMF.

5. The Respondent does not have any permits to harvest clams in the Town of Brewster, Massachusetts, for either recreational or commercial purposes.

6. Even if the Respondent had been harvesting clams for personal use during the August 11, 2022 incident, he did not have a permit for shellfish harvest in the Town of Brewster at the time of this incident.

7. The Respondent signed an Affidavit dated December 29, 2021, as part of his permit renewal process that stated that shellfish for direct marketing may only be harvested from waters classified as Approved or Conditionally Approved, and in “open status.”

8. Paines Creek area CCB22 is an area DMF currently designates as closed and “Prohibited.”

9. On August 11, 2022, the Respondent was observed and photographed a witness taking soft-shelled clams from the tidal beds inside the prohibited area of Paines Creek, identified as CCB22 closed and “Prohibited” by DMF.

10. The Respondent harvested these clams from the “Prohibited” CCB22 area in Paines Creek in the Town of Brewster. He told Ben Hermes that he sold them later that day in Orleans, Massachusetts.

11. The Respondent sold clams on August 11, 2022 to Orleans Seafood.

VI. Applicable Statutes and Regulations

1. Mass. Gen. L. ch. 130, § 74 provides that DMF may examine, sample and determine whether the coastal waters and flats of the Commonwealth and shellfish obtained therefrom are unfit for food and dangerous to public health. After such examination, either the Department of Public Health or DMF may by written order promulgate definite bounds of the area or areas determined to be contaminated.

2. Mass. Gen. L. ch. 130, § 75 provides that the Director of DMF may grant, and may revoke, permits for the digging or taking of shellfish from an area determined under Mass. Gen. L. ch. 130, § 74 to be contaminated, and prevent the use of said shellfish as food until it is purified by a plant or by another method approved in writing by the Commissioner of Public Health.

3. 322 CMR 16.03(2)(e) provides that the “harvest of shellfish from a Prohibited shellfish growing area is prohibited, except as provided at 322 CMR 16.03(2)(f).”

4. 322 CMR 16.03(2)(f) provides for four types of fisheries, none of which are applicable here, that may occur in shellfish growing areas that are otherwise Prohibited, including a contaminated bait fishery, contaminated shellfish relay, depuration fishery, and nursery culture.

5. 322 CMR 16.09(2) provides, in part, that it shall be unlawful for a “Commercial fisherman to harvest, attempt to harvest, sell, or attempt to sell any shellfish from any growing area, or part thereof,

that is not open to commercial harvest by the Division [DMF] or the municipality that regulates commercial harvest in its waters.

VII. Discussion

It is clear from witness testimony at the hearing and documents and photos in the administrative record that on August 11, 2022, the Respondent illegally harvested soft shell clams from a closed, Prohibited area of Paines Creek in Brewster, Massachusetts. Respondent did not dispute that he harvested clams from this closed area, and instead asserted that he harvested a small amount for personal consumption.

The testimony and documents in the administrative record, however, make it clear that the Respondent did not have the necessary permits from either DMF or from the Town of Brewster to harvest clams from a closed, Prohibited area, either for commercial sale or for personal consumption. According to the Incident Report prepared by the Assistant Shellfish Constable for the Town of Brewster, the Respondent's companion at Paines Creek that day, Hermes, said the Respondent told him that he sold the clams that evening in Orleans, Massachusetts. The SAFIS report for Respondent's transactions later that day include the sale of clams to an establishment named Orleans Seafood. While the Respondent himself reported that the clams were harvested in Chatham, the Respondent offered no persuasive evidence to corroborate that the clams were from Chatham rather than Brewster where witnesses observed him harvesting.

Shellfish are a potentially high hazard food. As noted in the affidavit the Respondent signed to obtain his 2022 permit from DMF, shellfish can become contaminated by filtering contaminated water through their gills during feeding or respiration. Pathogens in clams from contaminated areas when eaten raw or undercooked can be toxic to humans. DMF issues shellfish permits and works with the Department of Public Health to delineate areas closed to shellfish harvest due to contamination to protect public health and ensure that our state shellfish program complies with the overarching requirements of the National Shellfish Sanitization Program necessary for sale of shellfish in Massachusetts. These are responsibilities that the Director of DMF must strictly enforce to protect human health and maintain public trust in Massachusetts shellfish markets.

At DMF's request during the hearing, I take judicial notice *In the Matter of Otis J. Reed and Commercial Shellfish and Seaworm Permit DMF ID# 149357*, dated October 15, 2010, where the Respondent did not contest three instances of harvesting clams from contaminated, closed areas in Harwich that were part of the allegations in this prior matter. As a result of this prior administrative proceeding, the Respondent's prior shellfish and seaworms permit was revoked for a lengthy period,

and then later reinstated.

The Respondent is now involved in this second, separate administrative action to revoke his permit also involving harvest of shellfish from a closed area. Based upon the evidence in the present case, I find that the Respondent has violated state fishery laws and regulations prohibiting unpermitted harvest of shellfish from contaminated, closed areas for a second time. Specifically, the administrative record supports findings that the Respondent violated the state fishery laws and regulations violations alleged in Section III of this decision.

VIII. Recommendation

For the reasons discussed above, based upon witness testimony at the adjudicatory hearing and the facts set forth in the administrative record, DMF has appropriately sought the permanent revocation of the Respondent's shellfish and seaworms permit DMF ID No. 170295, Shellfish Transaction Card and all appurtenant regulated fishery permit endorsements.

Date: December 16, 2022



Mary B. Griffin, Esq.
Presiding Officer
Department of Fish and Game