



David E. Pierce  
Director

# Commonwealth of Massachusetts

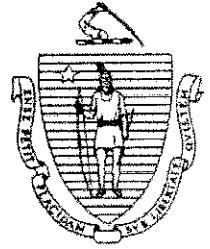
## Division of Marine Fisheries

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George N. Peterson, Jr.  
Commissioner

Mary-Lee King  
Deputy Commissioner

May 15, 2017

Christopher P. Fountain, Jr.  
34 Farley Avenue  
Ipswich, MA 01938

And

Christopher P. Fountain, Jr.  
3 Ropes Street, Apartment 1R  
Salem, MA 01970

Re: **Matter of Fountain, Adjudicatory Proceeding**  
**Docket No. SSP-150031-JH-16**  
**FINAL DECISION**

Dear Mr. Fountain:

Upon review of the administrative record and after reading the Magistrate's findings, discussion, conclusion, and recommendation, I have decided to adopt the Magistrate's Final Decision in its entirety as my final decision in this adjudicatory proceeding.

Therefore, based on the Final Decision I have decided to permanently revoke shellfish and seaworm permit DMF ID #150031, including the shellfish transaction card issued to you.

Pursuant to G.L. c.30A, §14 you have thirty days from the service date of this letter to file an action for judicial review in a court of competent jurisdiction.

Regards,

David E. Pierce, Ph.D  
Director

**FINAL DECISION**

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

SUFFOLK, SS.

ADJUDICATORY PROCEEDING  
DOCKET NO. SSW-150031-JH-16

\_\_\_\_\_  
IN THE MATTER OF: )  
)  
)

CHRISTOPHER FOUNTAIN, Jr. and )  
SHELLFISH and SEAWORM PERMIT )  
DMF ID# 150031 and SHELLFISH )  
TRANSACTION CARD )  
\_\_\_\_\_ )

**FINAL DECISION**

**I. BACKGROUND**

On March 13, 2016, Lieutenant James Hennessey of the Massachusetts Environmental Police (“claimant”) filed a Law Enforcement Report (“report”) with the Division of Marine Fisheries (“*Marine Fisheries*”). Claimant requested the immediate suspension of shellfish and seaworm permit #15031 and shellfish transaction card (“shellfish permit”) issued to Christopher P. Fountain, Jr., 34 Farley Avenue, Ipswich, MA. Claimant charged respondent with digging in a contaminated area in violation of G.L. 130, §75; falsifying monthly shellfish catch reports in violation of G.L. c.130, §21; digging in an area classified as prohibited and closed to shellfishing without a permit in violation of the provisions of 322 CMR §§7.01 and 16.04; and failing to tag shellfish in violation of 322 CMR §16.03.<sup>1</sup>

On March 21, 2016, a Notice of Immediate Permit Suspension and an Order to Show Cause was delivered to respondent.<sup>2</sup> On April 15, 2016, an adjudicatory hearing was held. A Tentative Decision was issued on September 9, 2016. Respondent filed written comments, objections, and arguments to the Tentative Decision on October 7, 2016. In response to respondent’s written comments, the administrative record was reopened in accordance with G.L. c.30A, §11(5), and 801 CMR §1.10(k)(2) to admit agency determinations of contamination made in compliance with the enabling statute, G.L. c.130, §74, for the waters and flats of Lynn Harbor and Broad Sound.<sup>3</sup>

<sup>1</sup> Claimant is a law enforcement officer authorized to investigate and enforce shellfish statutes and regulations of the Commonwealth. In his report claimant “determined that there is reasonable cause to cite this permit holder for not only violations under 322CMR 16.00, but a number of others noted in the” report.

<sup>2</sup> The Order to Show Cause informed respondent that he had the right to request an expedited hearing date.

<sup>3</sup> The historical pedigree of the enabling statute for agency determinations of contamination is impressively long: St.1941, c.598, §1; St.1945, c.99, §1; St.1948, c.463; St.1954, c.243, §1; St.1967, c.51; St.1975, c.706, §206; and St.1987, c.709, §1. Prior laws include St.1901, c.138, §§1-2; R.L.1902, c.91, §113; St.1919, c.350, §96; St.1926, c.370, §1; G.L. c.130, §137; and G.L. c.130, §70 as added by St.1933, c.329,

Pursuant to 801 CMR §8.01(11)(d), to the extent respondent's written arguments to the Tentative Decision raise substantive issues of fact or matters of law, they are addressed in this Final Decision.<sup>4</sup>

## II. FINDINGS OF FACT

Based on the administrative record, and evidence and testimony provided at the hearing, I hereby make the following findings of fact:

1. On April 30, 1968, the Massachusetts Department of Public Health ("DPH") found that the waters and flats of Lynn Harbor and Broad Sound were polluted from the Lynn and Nahant Sewer Outfall in Broad Sound; from the overflows of the Lynn Sewerage System; and from numerous other sources.<sup>5</sup>
2. On May 27, 1968, DPH made a determination of contamination in full compliance with the statutory requirements of G.L. c.130, §74 that shellfish from the waters and flats of Lynn Harbor and Broad Sound were unfit for food purposes and dangerous to the public health.
3. On May 19, 1972, DPH made a second certified determination of contamination in full compliance with the statutory requirements of G.L. c.130, §74 that shellfish from the waters and flats of Lynn Harbor and Broad Sound were unfit for food purposes and dangerous to the public health.
4. On November 29, 1972, then *Marine Fisheries* Director Frank Grice issued Notice to appropriate state and municipal shellfish officials that the contaminated area of Lynn Harbor and Broad Sound was permanently closed to all shellfish digging.
5. On October 17, 1986, the Massachusetts Department of Environmental Quality Engineering, successor agency to DPH, made a third determination of contamination in full compliance with the statutory requirements of G.L. c.130, §74 that shellfish from the waters and flats of Lynn Harbor and Broad Sound were unfit for food purposes and dangerous to the public health due to continued pollution.
6. On October 28, 1988, then *Marine Fisheries* Director Philip Coates in a written declaration attested under oath that the waters and flats of Lynn Harbor and Broad Sound have "been determined to be so contaminated that shellfish obtained therefrom are unfit

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§2. In 1957, the General Court added an enabling statute for emergency determinations of contamination at G.L. c.130, §74A including amendments St.1956, c.288, §1; St.1975, c.706, §312; and St.1987, c.709, §2. To address overlap a clause "or corresponding provisions of earlier laws" was added.

<sup>4</sup> Respondent asserts that the hearing was "whimsically conducted by the hearing officer" but offers no specifics. There is no support for his assertion assuming, arguendo, that respondent's use of the word "whimsically" means capriciously. I find nothing in the electronic transcript of the hearing to suggest that it was conducted in a capricious manner. To the contrary, the hearing was conducted in a manner fully consistent with the relevant due process requirements of G.L. c.30A, §§10-14 and the Standard Adjudicatory Rules of Practice and Procedure 801 CMR §1.01, et. seq.

<sup>5</sup> The boundary of Lynn Harbor and Broad Sound has been and remains as all waters and flats inside or northwest of a line drawn from Ruckman in Nahant to the easterly extremity of Grovers Cliff in Winthrop.

for food and dangerous to the public health ..." and "... further deposing and stating that the provisions of G.L. c.130, §74 have been complied with."

7. On January 2, 1999, then *Marine Fisheries* Director Paul Diodati re-issued a notification to appropriate state and municipal shellfish officials that: (1) confirmed the existing determinations of contamination of the waters and flats of Lynn Harbor and Broad Sound; (2) confirmed the existing prohibited status of the area; (3) classified the area as N26.0 - Prohibited and Closed to shellfishing; (4) extended indefinitely the existing closure of the area to the taking of any shellfish; and (5) conditioned all shellfish permits issued with a restriction that prohibits the taking, selling or possession of shellfish from the area.<sup>6</sup>

8. Based on information and belief that illegal shellfishing was taking place in Area N26.0, claimant was patrolling the area at low tide from the shoreline in the marked police cruiser EP195 on February 12, 2016.

9. Claimant made note of the morning's temperature on that date which was approximately 5° F with a wind chill factor below zero.<sup>7</sup>

10. On that date, at approximately 7:48 a.m. claimant was traveling on the General Edwards Bridge in Lynn and observed what turned out to be two individuals digging on the tidal flats of Area N26.0.

11. Claimant drove to the back of the Walmart Store in Lynn and confirmed that it was in fact two white males digging with short handled clam rakes on the tidal flats of Area N26.0.

12. Claimant called out to these individuals; identified himself as an Environmental Police Officer; told them to stop digging and to proceed to his location; and told them to bring whatever they had with them.

13. Claimant identified both individuals one of which was the respondent, Christopher P. Fountain, Jr.

14. Respondent and the second individual carried up from their digging location on the tidal flats two plastic market hand-baskets, one blue and one red, and five onion

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<sup>6</sup> The Director emphasized in his Notice that it was not notification of a "new" closure. Rather, it was re-notification of the existing *Marine Fisheries* closure of 1972 and was being re-issued in order to keep the agency shellfish "closure record current." The Director's Notice also applied conditions to all shellfish permits prohibiting the taking, possessing or selling of any shellfish from Area N26.0. 322 CMR §7.01(7) authorizes the Director to attach any written conditions or restrictions to a fishing permit deemed necessary or appropriate or to protect the public health, welfare and safety. *Sea Rover Fishing Inc., and others v. Paul Diodati, et al*, Suffolk Superior Court, CV08-1106-BLS2, May 28, 2008 (the Director acted within his powers to condition a commercial fishing permit to prohibit catching bluefin tuna by purse seine within Cape Cod Bay under authority of 322 CMR §7.01(7), found by to be a valid and lawful regulation).

<sup>7</sup> Such frigid conditions at that early morning hour are relevant to the credibility of respondent's statement made to claimant that he was digging shellfish in the area for his own use including bait purposes.

bags.<sup>8</sup>

15. The blue plastic basket contained approximately twenty pounds of razor clams (*Ensis directus*).

16. The red basket contained approximately ten pounds of razor clams.

17. The five "onion" bags were empty.

18. There was no shellfish tag affixed to the baskets.

19. Respondent had no shellfish tags with him.<sup>9</sup>

20. Claimant found no seaworms and no trace evidence of seaworms in the blue and red baskets or in the onion bags.<sup>10</sup>

21. After clamant asked respondent to stop digging and come to the shore where claimant was waiting the following statements were made by respondent.<sup>11</sup>

(a) Respondent stated they [he and the other individual with him] were digging clams and [sea] worms for recreational and bait use.

(b) Respondent identified Mr. Carlos Fountancz as his acquaintance and the person who had told them to dig in that area [N26.0].<sup>12</sup>

(c) Respondent knew the area he was digging in [N26.0] was a contaminated area closed to shellfishing.

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<sup>8</sup> Claimant testified that onion bags are commonly used in the shellfishing industry to carry shellfish dug from tidal flats. By immersing the onion bag with its contents in water the bag mesh allows the shellfish to be cleaned of the mud from the tidal flats.

<sup>9</sup> 322 CMR §16.03(1)(a)(2).

<sup>10</sup> Seaworm's are normally used for bait purposes. *Ad. Notice*.

<sup>11</sup> Respondent argues that the statement he made to clamant concerning his knowledge that the area was contaminated should have been inadmissible because claimant "willfully failed" to read him his *Miranda* rights. This argument is misplaced. Respondent filed no motion to suppress his statement and did not object to claimant's testimony at the hearing that the statement was made. Moreover, respondent was not arrested; he was not taken into custody; he was not officially detained; and he was not questioned in a custodial setting. Respondent's statement was not coerced, but rather freely made. This is an adjudicatory proceeding conducted by an administrative agency designed to take remedial action regarding a permit issued by the agency to an individual. This is not a judicial proceeding or a criminal case designed to take punitive actions resulting in fines and/or incarceration. The right to remain silent applies to statements that can be used against the person making them in a court of law which an administrative remedial permit hearing is not. (Citations omitted). Moreover, respondent's signature on his 2015 and latter 2016 shellfish permit acknowledges that he read and is familiar with all applicable marine fishery laws and constitutes an agreement to comply. For example, respondent has agreed to display his permit and all fish and shellfish in his possession upon request of an environmental police officer. G.L. c.130, §13; 322 CMR §§7.01(5)(g)(2) and 7.01(5)(g)(3). Claimant was under no legal obligation to read respondent his *Miranda* rights. On these facts, respondent's statement that he knew the area where he was digging was contaminated is and remains admissible. (Citations omitted).

<sup>12</sup> See *Matter of Fontancz*, Docket No.SSW-171771-16-DM-2016 (revocation of commercial shellfish permit for digging in a prohibited/closed contaminated area).

22. On February 12, 2016, respondent did not hold a valid shellfish permit and/or shellfish transaction card issued by *Marine Fisheries*.

23. All fishing and shellfishing permits issued by *Marine Fisheries* for the calendar year 2015 expired on December 31 of that year.

24. On February 25, 2016 respondent applied to *Marine Fisheries* for renewal of the shellfish permit issued to him in 2015 and included his required monthly catch reports.

25. The required monthly catch reports were completed and signed by respondent under the pains and penalties of perjury attesting to the fact that all the information provided therein was true and accurate to the best of his belief.<sup>13</sup>

26. Protection of the public health, welfare and safety from unknowingly consuming contaminated shellfish is a material matter when it comes to regulating, managing and enforcing the *Marine Fisheries*' classification of shellfish areas, shellfish permit conditions established by the Director, lawful use of a shellfish permit and the harvest and handling of shellfish.

27. The Standard Atlantic Fisheries Information System ("SAFIS") that collects fishery data from seafood dealers show that respondent conducted approximately 200 individual commercial transactions selling razor and soft shell clams he harvested by hand rake from shellfish areas in Ipswich, Newbury, and Gloucester during 2015.<sup>14</sup>

28. Between January 6, 2016 and February 13, 2016, respondent harvested approximately 1,177 pounds of razor and soft-shell clams from intertidal flats in Newbury and Gloucester and sold this harvest to Red's Best in Ipswich and Intershell Seafood Co. in Gloucester.<sup>15</sup>

29. Federally permitted dealer transaction slips corroborate the state dealer reporting data collected by SAFIS showing that respondent sold the following amounts of razor and soft-shell clams on the following dates.<sup>16</sup>

- (a) January 6, 2016, 113 pounds of razor clams.
- (b) January 7, 2016, 5 pounds of razor and 82 pounds of soft-shell clams.
- (c) January 8, 2016, 32 pounds of razor and 12 pounds of soft-shell clams.

<sup>13</sup> 322 CMR §7.01(5)(g).

<sup>14</sup> Fishery data collected by SAFIS is the principal source of real-time Atlantic coast marine fisheries data and statistics for state, regional and federal fishery managers. <http://www.accsp.org/safis>. Massachusetts authorized primary buyers and wholesale dealers are required to report their purchases of fish and shellfish from fishermen to SAFIS including data on names, dates, species, quantity, area and method of harvest. See also 50 CFR §648.7. *Marine Fisheries* also requires commercial fishermen to file monthly and annual catch reports pursuant to G.L. c.130, §21.

<sup>15</sup> This amount of shellfish was harvested and sold by respondent during the period between expiration of the 2015 permit and issuance of the 2016 permit.

<sup>16</sup> Individuals or businesses that transport, buy and sell raw fish and shellfish in Massachusetts require both a state and a federal dealer permit. G.L. c.130, §80; 322 CMR §7.01; 50 CFR §§648.7, 697.6 and 635.5.

- (d) January 15, 2016, 48 pounds of razor and 26 pounds of soft-shell clams.
- (e) January 29, 2016, 220 pounds of soft-shell clams.
- (f) January 30, 2016, 247 pounds of soft-shell clams.
- (g) January 31, 2016 - 100 pounds soft-shell clams.
- (h) February 1, 2016, 98 pounds of soft-shell clams.
- (i) February 7, 2016, 84 pounds of soft shell clams.
- (j) February 13, 2016, 25 pounds soft shell clams.

30. SAFIS dealer reporting also show that respondent harvested shellfish from two separate intertidal shellfish areas in Newbury in Ipswich, selling 106 pounds to the dealer Captain Hutches Fryers in Newbury and 214 pounds to the dealer Red's Best in Ipswich all on the single tide of the same day.<sup>17</sup>

31. Respondent's signature verifying the truthfulness and accuracy of the completed information he provided in his 2015 monthly catch reports that he did not fish was willfully false and made in a material matter.

32. Respondent knowingly falsified his monthly catch reports for the year 2015 by reporting he did not fish.

33. Respondent's signature on his 2015 and 2016 shellfish permit constitutes a statement that he has read and is familiar with all applicable marine fishery laws and agrees to comply.<sup>18</sup>

### III. CONCLUSIONS OF LAW

1. It is a violation of G.L. c.130, §75 for any person to dig or take shellfish

<sup>17</sup> On December 4, 2015, respondent travelled to and between Ipswich and Newbury; harvested approximately 300 pounds of shellfish from both intertidal shellfish areas during the same low tide; selling 104 pounds to an Ipswich dealer and 204 pounds to a Newbury dealer. Claimant testified that the ability to dig shellfish by hand rake during low tide in two separate municipalities approximately 22 miles apart ... on a single day ... was a "dubious anomaly."

<sup>18</sup> 322 CMR §7.01(5)(g). Respondent "vehemently objects/denies" that he received any rules, guidelines, or regulations governing the use of his permit. It is unclear as to what in the Tentative Decision he is referring to. It may be enough to say that ignorance of the law is not a defense. Citations omitted. Respondent may be referring to 322 CMR §7.01(5)(g). See Fact #33. This provision places responsibility of knowing what the shellfish regulations are, which shellfish areas are prohibited and closed, and the lawful use of a commercial shellfish permit squarely on the shoulders of the shellfish permit holder. However, the *Marine Fisheries*' website provides everything that a shellfish permit holder needs to know - in 51 different languages. Information on shellfish management programs; agency classification of shellfish areas; contaminated shellfish areas; maps showing the boundaries of prohibited, closed and contaminated shellfish areas; permitting requirements; responsibilities required of the permit holder; shellfish statistical reporting assistance; requirements of the shellfish sanitation program and public health protection; monthly and annual catch reporting; shellfish tagging requirements; FAQ's; links to G.L. c.130 and 322 CMR including summaries of these laws; legal notices of the Director; and links to state and municipal shellfish officials as well as *Marine Fisheries* specialist contacts. Permit holders can request that they be kept informed of openings and closings; quota managed fisheries; regulatory updates; emergency shellfish area closures from red tide, flooding or contaminants; public hearing announcements and other special information and advisories by adding an e-mail address to *Marine Fisheries*' e-list service.  
([www.mass.gov/eea/agencies/dfg/dmf/programs-and-projects/shellfish-sanitation-and-management](http://www.mass.gov/eea/agencies/dfg/dmf/programs-and-projects/shellfish-sanitation-and-management)).

any purpose from any area determined under §74 or under corresponding provisions of earlier laws to be contaminated, while such determination is in force, without a permit or contrary to the provisions of such permit.

2. It is a violation of G.L. c.130, §21 for any person to knowingly falsify any catch report filed with *Marine Fisheries*.

3. It is a violation of 322 CMR §7.01(14)(a) for any person to conduct any shellfishing activities without a permit issued to that person by *Marine Fisheries*.

4. It is a violation of 322 CMR §7.01(14)(b) for any person to falsify any application form or documentation in conjunction with any application form.

5. It is a violation of 322 CMR §7.01(14)(d) for a commercial shellfish permit holder to violate or fail to comply with any conditions or restrictions established by the Director for the use of that shellfish permit.

6. It is a violation of 322 CMR §7.01(14)(g) for any fishermen to fail to produce a fishing permit upon demand of any environmental police officer.

7. It is a violation of 322 CMR §16.03(1)(c) for a commercial shellfish permit holder not to attach to all containers of shellfish before transport from the harvest site to the landing site a tag with the features and harvest information specified in 322 CMR §16.03(1)(a)2.

8. It is a violation of 322 CMR §16.04(2) for a shellfishermen to harvest or possess for commercial purposes any shellfish from a classified shellfish area that is not open for commercial harvest.

9. It is a violation of G.L. c.268, §1 to sign a written statement containing a written declaration that the statement is made under the penalties of perjury if the written statement is willfully false in a material matter.

#### IV. DISCUSSION

A. Determination of Contamination. Claimant, a Lieutenant in the Coastal Bureau of the Massachusetts Environmental Police testified under oath that the waters and flats of Lynn Harbor and Broad Sound was and has been a contaminated area for many years. The *Marine Fisheries* shellfish area classification map shows the waters and flats of Lynn Harbor and Broad Sound to be 'Prohibited'. Claimant further testified that the area was prohibited and closed by *Marine Fisheries* to any shellfishing due to the contamination. Respondent knew the area in which he was digging was contaminated. Not surprising given his many years of shellfish digging experience, as well as the fact that his father before him was a shellfisherman.<sup>19</sup>

<sup>19</sup> Respondent testified that he has been a shellfishermen for many years and that his father was a shellfisherman before him.



Nonetheless, respondent argues that in order to find a violation of G.L. c.130, §75 claimant is required to carry his burden of proof and the Magistrate is required to “verify” that an effective determination of contamination had been made for the waters and tidal flats of Lynn Harbor and Broad Sound in compliance with the provisions of G.L. c.130, §74.<sup>20</sup> Respondent is correct. A violation of G.L. c.130, §75 requires substantial evidence in the record that an effective determination of contamination was made in compliance with §74’s notice, publication, posting and certification requirements.<sup>21</sup>

The administrative record in this proceeding was re-opened for the limited purpose of including agency documentation showing the historical status of this area. The agency documentation entered establishes that over the last 50 years the waters and tidal flats in Lynn Harbor and Broad Sound have been determined to be contaminated by multiple state agencies on multiple occasions pursuant to the process and procedures of §74. Those determinations were in effect on February 12, 2016.<sup>22</sup> Substantial evidence in this record supports a finding that respondent violated G.L. c.130, §75 by digging shellfish from an area determined to be contaminated pursuant to G.L. c.130, §74 without a permit or contrary to the terms of a permit.

B. Shellfish Area Classification and Use of Shellfish Permit. *Marine Fisheries’* shellfish area classification map for the waters and flats of Lynn Harbor and Broad Sound received into evidence at the hearing is one of 290 such maps that establish the sanitary classification of Massachusetts’ coastal waters.<sup>23</sup>

The waters and tidal flats of Lynn Harbor and Broad Sound are classified by

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<sup>20</sup> G.L. c.130, §74 requires that a determination of contamination made by an authorized agency becomes effective when that agency publishes the results of its determination in local newspapers; files the results of its determination with municipal officials in the affected area; posts on or near the affected area a statement setting forth the boundary of the area that is contaminated; and filing with the appropriate state agencies authenticated copies, certified by the Secretary of State’s office, of the determination, publication, filing and posting. The prosecution *may* present into evidence a “document” attested to by the agency making the determination that the provisions of §74 have been complied with and such document is prima facie evidence of an effective determination. *Id.*

<sup>21</sup> The case *Melendez-Diaz v. Commonwealth of Massachusetts*, 557 U.S. 305 (2009) is not applicable here. The Constitution’s Sixth Amendment right to confront witnesses applies in criminal proceedings, not in agency administrative proceedings. (Citations Omitted). In addition, the *Melendez-Diaz* Court held that the “certificate” or “affidavit” of the laboratory analyst presented by the prosecution as prima facie evidence that the substance tested was cocaine violated defendant’s Sixth Amendment right. Here, the evidence showing an effective determination of contamination of the waters and flats of Lynn Harbor and Broad Sound is not in the form of an affidavit or certificate offered as prima facie evidence that the notice, publication, posting and certification requirements of G.L. c.130, §74 have been complied with. Evidence of compliance with §74 is in the agency documentation itself entered into the reopened record.

<sup>22</sup> Findings of Fact 2-5, p.2, *supra*.

<sup>23</sup> See G.L. c.130, §75 for enabling authority. The sanitary classification of all 1,745,723 acres of coastal waters in Massachusetts was made by *Marine Fisheries* in accordance with the recommendations of the National Shellfish Sanitation Program (NSSP). The NSSP is the state-federal cooperative program recognized by the U.S. Food and Drug Administration (“FDA”) and the Interstate Shellfish Sanitation Conference (“ISSC”) for the sanitary control of shellfish in the commercial marketplace. Shellfishermen are advised to confirm with *Marine Fisheries* or municipal shellfish officials the status of a classified shellfish area before digging in that area. 322 CMR §16.01. See also: <http://www.mass.gov/eea/agencies/dfg/dmf/programs-and-projects/shellfish-sanitation-and-management.html>.

*Marine Fisheries* as Prohibited. This classification was in effect on February 12, 2016. This classification is not required by any provision of law to include a determination of contamination made pursuant to G.L. c.130, §74. The Prohibited classification of the area operating in conjunction with the conditions and restrictions to respondent's shellfish permit imposed by the Director that closed this area to the digging of any shellfish support the finding that respondent violated provisions of the *Marine Fisheries* permit regulations at 322 CMR §§7.01(14)(a), (b), (g) and (d).<sup>24</sup>

Respondent continued shellfishing notwithstanding an expired shellfish permit. He did so from January 1 to February 12, 2016 before being stopped by claimant. Respondent dug in the area of Lynn Harbor and Broad Sound knowing the area to be contaminated. Respondent willfully falsified his 2015 monthly catch reports to hide his shellfishing activities. Respondent had no shellfish tags with him on February 12, 2016. It can be inferred that respondent did not intend to affix a tracking tag to the shellfish he was digging from the tidal flats of Lynn Harbor and Broad Sound on February 12, 2016.

C. Regulations for the Harvest and Handling of Shellfish. The record establishes violations by respondent of the *Marine Fisheries*' shellfish harvesting and handling regulations.<sup>25</sup> It is a violation of 322 CMR §16.03(1)(c) to possess and transport any shellfish not affixed with a shellfish tag containing the harvest information as specified in 322 CMR §16.03(1)(a)2. Respondent had no shellfish tags with him when he was digging on February 12, 2016. Although respondent had not finished digging or begun to transport the harvest from the site he had no tags to do so. His testimony that the dealer would supply the tags when the shellfish was purchased avails him little because the responsibility to do so remains with the digger.

Respondent's signature on the shellfish permit issued to him constitutes both a statement that he has read and is familiar with all marine fishery laws applicable to use of the shellfish permit, and an agreement that he will fully comply.<sup>26</sup>

Nonetheless, on February 12, 2016, respondent harvested twenty pounds of razor clams from a prohibited shellfish area closed to any digging. He admitted to knowledge of the contaminated status of the area he was digging in. The five onion bags with him on that day suggest that digging would have continued but for the intervention of claimant. It is understandable that given these circumstances respondent did not bother to bring any shellfish tags with him on that day to affix to the shellfish containers identifying the date, time and area of digging as required for shellfish tracking purposes. The fact that respondent's 2015 shellfish permit expired on December 31, 2015 and he had not yet

<sup>24</sup> The enabling statutes for the *Marine Fisheries* permit regulations codified at 322 CMR §7.01 include G.L. c.130, §§2, 17, 17A, 75 and 80.

<sup>25</sup> These regulations also derived from the NSSP established standards and guidelines for the harvest and handling of shellfish. On a nationwide basis, the regulations establish safeguards for the harvest and transport of shellfish and, together with the U.S. Food and Drug Administration sanitary measures for the shellfish industry minimize the risk of food borne illnesses to consumers both inter and intra-state. 322 CMR §16.01(1). G.L. c.130, §75. See also G.L. c.130, §§52, 81 and 82, municipal shellfish management authority.

<sup>26</sup> 322 CMR §7.01(5)(g.)

applied for a 2016 permit did not stop him from entering this contaminated area to dig shellfish for commercial purposes. In fact, respondent had been digging and selling shellfish from January 7 to February 13, 2016 without a permit. When respondent finally did apply for a 2016 shellfish permit he included monthly catch reports for the previous year containing the written statement that he did not fish – a written statement he knew to be false and misleading.

State and federal permitted dealer reporting data show that respondent conducted over 200 commercial shellfish transactions involving shellfish he harvested and sold in January and February 2016 after expiration of the 2015 shellfish permit issued to him. The same state and federal permitted dealer reporting data show that respondent's numerous commercial transactions also directly contradict his 2015 monthly shellfish catch reports claiming he did not fish during 2015. Respondent admitted at the hearing that he knowingly and willfully falsified his 2015 monthly catch reports by checking the 'did not fish' box and signing under the penalties of perjury.

## V. CONCLUSION

Respondent violated multiple provisions of the Commonwealth's sanitary shellfish management program such as timely and accurate catch reporting; observing contaminated and closed shellfish area prohibitions; the lawful use of a commercial shellfish permit and transaction card, compliance with shellfish permit conditions and restrictions; and tagging requirements designed to identify shellfish from its point of origin. Respondent maintained no records of his commercial shellfish transactions and concealed his unlawful commercial shellfishing activities. All of which makes it that much more difficult for the Commonwealth to ensure that the shellfish industry in Massachusetts complies with NSSP and FDA requirements for minimizing the risk of food borne illnesses to consumers within and outside of the Commonwealth.

In no other fishery is the need for voluntary compliance by a permit holder with all relevant marine fishery laws more crucial than it is in the shellfish fishery.<sup>27</sup>

Respondent's shellfish activities pose a serious and significant threat to the public health, welfare and safety; undermine public confidence in the Massachusetts shellfish industry; and place an unnecessary burden on marine law enforcement resources. On this record, respondent has displayed a longstanding disregard for the legal requirements established by *Marine Fisheries* for the responsible and lawful use of a shellfish permit.

In light of this record, authorizing the respondent to harvest and sell shellfish in any capacity would not be in the best interest of the Commonwealth and would jeopardize its compliance with NSSP and FDA national requirements for sanitary shellfish management

<sup>27</sup> See discussion and note 23, p.8, *supra*.

## VI. RECOMMENDATION

Based on all of the above, it is my recommendation that the Director not reinstate, not renew, not reissue or issue a shellfish permit of any kind to respondent.

Dated: 5/15/17

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