



Paul J. Diodati  
Director

# Commonwealth of Massachusetts

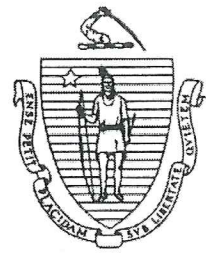
## Division of Marine Fisheries

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Deval Patrick  
Governor

Ian A. Bowles  
Secretary

Mary B. Griffin  
Commissioner

October 15, 2010

### NOTICE OF FINAL AGENCY ACTION

**Final Decision of the Director**  
**Adjudicatory Proceeding**  
**Docket No. SP-0001-10-DH**

*In The Matter of: Otis J. Reed and Commercial Shellfish and Seaworm Permit,*  
DMF ID #149357

Dear Mr. Reed:

Having reviewed the entire record of the above-referenced Adjudicatory Proceeding, I hereby concur with and adopt the findings, conclusions and recommendations of the Administrative Law Magistrate as set forth in the attached Recommended Final Decision issued on October 13, 2010. Therefore, it is my decision to deny your application for renewal of commercial shellfish and seaworm permit, DMF ID #14935; to deny your application for a new commercial shellfish and seaworm permit and to not issue a commercial shellfish and seaworm permit to you.

My decision constitutes **Final Agency Action** for purposes of G.L. c.30A, §14. You have thirty days from your receipt of this **Notice of Final Agency Action** to seek judicial review of my decision pursuant to G.L. c.30A, §14.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul J. Diodati".

Paul J. Diodati  
Director

Recommended Final Decision

cc: James Norcross



COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING  
DOCKET NO. SP-0001-10-DH

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*IN THE MATTER OF:*

OTIS J. REED, and RENEWAL OF )  
COMMERCIAL SHELLFISH AND )  
SEAWORM PERMIT, DMF ID )  
# 149357 )  
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**RECOMMENDED FINAL DECISION**

I. BACKGROUND

The respondent, Otis J. Reed of 54 Partridge Path in Chatham, applied to the Director of the Division of Marine Fisheries (DMF) for renewal of commercial shellfish and seaworm permit, DMF ID # 149357. The issue for adjudication is whether or not the Director should approve the renewal application and issue commercial shellfish and seaworm permit, DMF ID #149357 to Mr. Reed authorizing him to sell shellfish to properly permitted wholesale and retail fish dealers.

A hearing in the above-captioned matter was held on Tuesday, July 20, 2010. In attendance were the applicant Otis J. Reed, his attorney James M. Norcross, and Harwich Natural Resource Officer and Harbormaster Thomas E. Leach.

II. FINDINGS OF FACT

Upon a full and fair review of the documentary evidence and testimony provided at the hearing, I find the following facts:

1. Reed is 37 years old and resides in Chatham.

2. In 1990 Reed began commercial shellfishing in Chatham.
3. During that time Reed held a Chatham town resident commercial shellfish permit authorizing him to harvest shellfish within town shellfish areas.
4. Reed also held a DMF commercial shellfish and seaworm permit authorizing him to sell shellfish he harvests.
5. Reed does not dispute that for a number of years he violated numerous shellfish laws of the Town of Chatham, the Town of Harwich and the Commonwealth of Massachusetts including, specifically, the following:
  - a) 8/18/03 - possession of shellfish in Chatham without a permit and attempted sale of untagged shellfish to a private unlicensed person in Chatham in violation of Massachusetts shellfish laws, G.L. c.130, §80, and 322 CMR §7.01(14)(f);
  - b) 1/3/05 - possessing untagged shellfish in violation of Massachusetts shellfish laws, G.L. c.130, §81;
  - c) 2/16/95 - digging and taking shellfish from the outermost harbor of Chatham in violation of Chatham shellfish laws;
  - d) 3/17/05 - digging and taking shellfish from a closed contaminated area in Chatham in violation of Massachusetts shellfish laws, G.L. c.130, §75, and 322 CMR §7.01(14)(f);
  - e) 12/30/05 - digging and taking shellfish from a closed family shellfish area in Harwich without the required Harwich shellfish permit;
  - f) 9/9/97 - refusing to allow for the official inspection of his Chatham shellfish harvest in violation of Chatham and Massachusetts shellfish laws,

322 CMR §7.01 (5)(g)(3);

- g) 10/17/97 - possessing undersized shellfish in Harwich without the required Harwich shellfish permit and in violation of Massachusetts shellfish laws, G.L. c.130, §69;
- h) 3/7/99 - digging and taking shellfish from a closed family area in Harwich without the required Harwich shellfish permit;
- i) 2/8/06 - digging and taking shellfish from a closed contaminated area in Harwich in violation of Massachusetts shellfish laws, G.L. c.130, §75, and 322 CMR §7.01(14)(f);
- j) 5/20/06 - digging and taking shellfish from a closed contaminated area in Harwich in violation of Massachusetts shellfish laws, G.L. c.130, §75;
- k) 6/1/06 - digging and taking shellfish from a closed contaminated area in Harwich in violation of Massachusetts shellfish laws, G.L. c.130, §75, and 322 CMR §7.01(14)(f); and
- l) 6/13/06 - digging and taking shellfish from a closed contaminated area in Harwich in violation of Massachusetts shellfish laws, G.L. c.130, §75, and 322 CMR §7.01(14)(f).

6. DMF permitting records dating back to 2000 establish that Reed was issued a DMF commercial shellfish and seaworm permit for the years 2000-2003, and 2005-2006.

7. These same DMF permitting records establish that Reed was not issued a DMF commercial shellfish and seaworm permit, or any of the DMF commercial fishing permits for the years 2007-2010.<sup>1</sup>

8. Reed began to develop a substance abuse problem in 2002 with the pain

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<sup>1</sup> G.L. c.130, §83, and 322 CMR §7.01(2) contains a list of the various DMF commercial fishing permits.

medication oxycodone as his drug-of-choice.

9. Reed's abuse of the pain medication oxycodone developed into an addiction in 2004.

10. From 2004 through 2006 Reed found himself struggling with his drug addiction.

11. Concurrently with his drug addiction between early 2005 and late 2006 Reed was arrested and convicted on numerous occasions for possession of illegal substances, possession with intent to sell, malicious destruction of property, assault, assault and battery, assault with a dangerous weapon and witness intimidation.

12. From late 2006 until mid 2008, Reed's illegal activities focused on petty crimes to obtain cash for his drug habit; crimes such as credit card and check theft, credit card and check fraud, shoplifting, counterfeiting, breaking and entering with intent to commit a felony, receiving stolen property and larceny.

13. On March 19, 2009, Reed was found guilty of assault with a dangerous weapon, to wit a black folding knife, and sentenced by the Barnstable District Court to six months in the Barnstable House of Correction.

14. Reed testified that during his incarceration at the Barnstable House of Correction he participated in, and received a diploma of graduation from, the Commonwealth's SHOCK program.<sup>2</sup>

15. Reed testified that he completed the SHOCK program while incarcerated at

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<sup>2</sup> The SHOCK program is a residential unit military style substance abuse treatment program within the house of correction that provides substance abuse treatment for eligible inmates. See, Rocheleau, M., Memerich, A., Breitsilber, D., Executive Summary, Barnstable House of Correction, Residential Substance Treatment: A Process Evaluation, December 2000, Massachusetts Executive Office of Public Safety and the National Institute of Justice. Although Reed testified that he received a diploma from the SHOCK program, he did not bring it to the hearing.



Barnstable but provided no documentation such as a certificate of completion to support his testimony.

16. Upon release from Barnstable, Reed continued his illegal activities involving the theft or attempted theft of money including two guilty findings for breaking and entering with intent to commit a felony, and two guilty findings of larceny; one for less than \$500, and one for more than \$500.

17. Reed testified that he attended the substance abuse outpatient treatment programs at the private facilities, *Gosnold on Cape Cod*, and *High Point Treatment Center* in Plymouth, but once again provided no documentation to corroborate his testimony.<sup>3</sup>

18. Harwich Natural Resource Officer and Harbormaster Thomas Leach responding to a subpoena duces tecum, travelled from Harwich with the Town's shellfish records to testify at the hearing that Reed's history of illegal shellfishing in the Town of Harwich was particularly troublesome and difficult to prevent, especially Reed's propensity to harvest shellfish from areas closed due to contamination.

19. Chatham Shellfish Constable Stuart Moore, responding to the same subpoena duces tecum, submitted the Town's shellfish records and a letter introduced at the hearing requesting that DMF issue Reed a commercial shellfish permit.

20. In the absence of shellfishing Reed works on a quahog fishing vessel out of Chatham, he has also worked in other fisheries and as a commercial painter.

21. Since January 2010, Reed has violated no local or state shellfish laws or other

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<sup>3</sup> *Gosnold on Cape Cod*, provides substance abuse treatment and mental health services in southeastern Massachusetts with six inpatient and eight outpatient clinics located across the Cape, in Brockton and North Dartmouth. *High Point Treatment Center* is also a private substance abuse treatment facility with outpatient and inpatient services.

criminal laws.

### III. DISCUSSION

Reed does not dispute the findings that he violated numerous local and state shellfish laws as set forth in paragraphs 5(a) through 5(l) of this recommended decision. Reed readily admits to his other illegal activities as well. He states that his substance abuse problem was at the core of these violations; that he developed an addiction to the pain medication oxycodone and was in constant need of cash to pay for his drug habit. It's a cyclical pattern – Reed's drug addiction required cash; Reed resorted to theft to get that money; the theft led to his history of criminal activities <sup>4</sup>; the money stolen by Reed paid for the drug; and his addiction continued unabated.

Reed states that he is drug free, no longer needs to participate in criminal activities or violate shellfish regulations, and is now able to comply with the responsibilities of a commercial shellfisherman. I hope this to be the case, and I encourage Reed to stay on a drug-free path, one day at a time. Nonetheless, my decision must be based not only on Reed's testimony, but upon the documentary evidence, or in this hearing the lack of documentary evidence to support Reed's drug free assertions.

To support his drug free assertions Reed answered in response to my questions that he completed the SHOCK program for inmates with addictions when he was serving his sentence at the Barnstable House of Correction. However, when asked, he was unable to provide any written confirmation, documentation or the diploma he said he received establishing that he in fact completed the SHOCK program. Reed also stated that he spent

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<sup>4</sup> It is common knowledge, and I take administrative notice of the fact that contaminated areas closed to shellfishing will, over time, result in a substantial increase in shellfish as the closure prevents the removal of clams which multiplies and increases their abundance. Digging shellfish in a closed area can quickly and easily provide a large harvest of clams.



some time at the two private substance abuse treatment facilities, *Gosnold on the Cape* and *High Point Treatment Center* in Plymouth. However, he never completed the former program, and he was unable to supply any documentation regarding his assertions that he completed the later program. There was no testimony, written confirmation or other documentation establishing that Reed is in a 12-step program for recovering drug addicts such as Narcotics Anonymous or Alcoholics Anonymous, or other substance abuse counseling.

Other than Reed's testimony, the record is empty of any written documentation that he sought, received or completed a treatment program for his addiction. As such, I am unable to find that Mr. Reed is now, or has been drug free.

I am familiar with substance abuse, and have first hand knowledge of the devastation and enormous impacts it can have on the addicted person as well as his or her family and loved ones. I am also aware of how difficult it is for a person to seek out and stay committed to a treatment program for his or her drug addiction, and to remain drug free after successfully completing such a treatment program. Although in rare circumstances it can be done, living a drug free life for the addict is very difficult without assistance from experts and other knowledgeable professionals in this field. I am sympathetic with both the difficulties Mr. Reed has had attempting to conform his conduct to societal norms as a result of this disease, as well as living under the constant and repeated pressure to do whatever it takes to ensure a cash flow to feed the disease. To an addict, the only thing that matters is ensuring a continued supply of the drink or drug.<sup>5</sup>

That being said, of the many duties and responsibilities of the DMF Director, one

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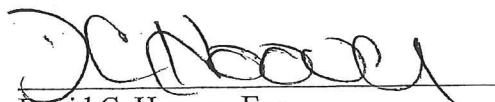
<sup>5</sup> See Hoover, D.C, Alcoholism: Response of the Massachusetts Bar Association, The Advocate, Suffolk University Law School, Vol. 18, No. 2, 1987.

of the most significant is the protection of the public health, welfare and safety from consuming tainted fish or contaminated shellfish.<sup>6</sup> In this regard, the Director must exercise caution when he renews or issues any commercial permit that authorizes the sale of raw fish and shellfish. When, as in this case, the record shows that the applicant for a commercial permit to sell raw shellfish has repeatedly violated shellfish laws that are designed to protect the public from unknowingly consuming contaminated shellfish, it would constitute misfeasance for the Director to issue such a permit to that applicant.

#### IV. CONCLUSION AND RECOMMENDATION

Upon a full review of the record, a fair consideration of the testimony, findings 5(a) through 5(l), and for all the reasons set forth above, I recommend that Reed's renewal application for a commercial shellfish and seaworm permit be denied by the Director, and that the Director not issue Reed a commercial shellfish and seaworm permit.

Dated: October 13, 2010

  
David C. Hoover, Esq.  
Administrative Law Magistrate  
Department of Fish and Game

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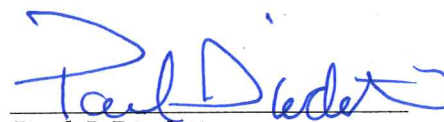
<sup>6</sup> 322 CMR §10.00 contains a pervasive suite of regulations managing the harvest, purification and sale of moderately contaminated shellfish; 322 CMR §7.01(3)(e) requires retail truck dealers to have their vehicle inspected by the local board of health; 322 CMR §7.01(5)(c)(2) requires wholesale and retail fish dealers to submit a certified sanitary health inspection from the Massachusetts Department of Public Health (DPH); 322 CMR §7.01(5)(c)(4) requires holders of a shellfish and seaworm permit to submit a certified sanitary health inspection from DPH if they intend to sell bay scallops; and 322 CMR §7.01(7) authorizes the Director to attach written conditions or restrictions to a commercial permit to protect the public health, welfare and safety. The Legislature found the problem of public consumption of contaminated shellfish serious enough to make it a felony punishable by imprisonment for up to three years in the state penitentiary to dig shellfish from a closed contaminated area at night. G.L. c.130, §75.

### NOTICE

This decision is a recommended final decision of the Administrative Law Magistrate. It has been transmitted to the Director of the Division of Marine Fisheries for his final decision. This recommended decision is therefore not a final decision of the agency and may not be appealed to the Superior Court pursuant to G.L. c. 30A. The Division Director's final decision is subject to court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Division Director, no party shall file a motion to renew or reargue this recommended final decision or any portion of it and no party shall communicate with the Division Director regarding this decision, unless the Division Director, in his sole discretion, directs otherwise.

*I, Paul J. Diodati, Director of the Division of Marine Fisheries hereby concur with and adopt the findings, conclusions and recommendations of the Administrative Law Magistrate as contained in this Recommended Final Decision.*

*Dated:*

  
Paul J. Diodati

