

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: BEST IN THE BAY, INC.
NOTICE OF SUSPENSION

AAD NO. 98-002/ENE

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Respondent's request for hearing on the Notice of Suspension and Order ("NOS") issued by the Division of Enforcement, Department of Environmental Management ("Division") on December 22, 1998. The hearing was conducted on March 15, 2000.

Following the hearing, both the Division and the Respondent filed post-hearing memoranda. Over Respondent's objection, the Division was granted an extension to file a reply memorandum by May 19, 2000. As provided in the Order Extending Briefing Schedule, the hearing was considered closed on May 19, 2000. The Division's reply memorandum, filed on May 26, 2000, has not been considered in this Decision.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN LAWS §§ 42-17.7-1 et seq.); the Administrative Procedures Act (R.I. GEN LAWS §§ 42-35-1 et seq.); R.I. GEN LAWS § 20-6-24; and the Administrative Rules of Practice and Procedure for the Department of Environmental

Management, Administrative Adjudication Division for Environmental Matters
("AAD Rules").

PREHEARING CONFERENCE

A prehearing conference was conducted on May 7, 1999. At the conference, the parties agreed to the following stipulations of fact:

1. On June 2, 1998 through the date of this prehearing conference, the Respondent operated and continues to operate a shellfish brokerage facility located at 325 Water Street, Warren, Rhode Island (the "facility").
2. An inspection of the Respondent's facility was conducted on June 2, 1998 by Conservation Officer Edward Cabral.
3. Conservation Officer Edward Cabral seized One Hundred-Five (155) (sic)¹ quahaugs as a result of his June 2, 1998 inspection of the Respondent's facility.

The exhibits, marked as they were admitted at the hearing, are attached to this Decision as Appendix A. At Respondent's request, the Order Denying Motion for Summary Judgment is also attached and is marked as Appendix B.

HEARING SUMMARY

At the hearing, the Division called two (2) witnesses: **Edward Cabral, Jr.**, a Conservation Officer in the Division of Enforcement, and **Thomas A. Greene**, Deputy Chief of the Division.

Respondent presented two (2) witnesses: **Scott Shallcross**, Manager of Best in the Bay, Inc., and **D. Steven Shallcross, Jr.**, President of Best in the Bay, Inc.

¹ At the hearing, counsel clarified the discrepancy and stipulated that the correct number was One Hundred Fifty-Five.

I. The Evidence

By letter dated December 22, 1998 (Div 1 Full), Steven Shallcross, as President of Best in the Bay, Inc., was informed that the shellfish buyers portion of the Multi-Purpose Dealer's License would be suspended for a thirty (30) day period. The letter/order of suspension stated that the suspension was the result of an inspection on June 2, 1998 when Best in the Bay, Inc. was found to be in possession of 155 undersized quahaugs in violation of R.I. GEN LAWS § 20-6-11.

Through the testimony of Edward Cabral, Jr., the Division established that on June 2, 1998, Conservation Officer Cabral inspected the facility. He observed Scott Shallcross at the culling machine preparing to sort shellfish and noted what appeared to be undersized shellfish. The Officer began to measure them with his gauge and then, at Mr. Shallcross' suggestion, ran them through the machine to more quickly determine whether there were undersized quahaugs. The Officer then measured the smaller ones with his gauge since some may have been segregated by the machine as undersized but were actually of legal size. He determined that of the 400 quahaugs in the bag, 155 of them were of illegal size. The witness testified that the quahaugs were then seized but were not transplanted due to their smell. The Officer recommended the suspension based upon his normal criteria of the severity of the violation and the past history of the violator.

Under cross examination, the Officer conceded that while he had observed Mr. Shallcross at the culling machine, the machine may not have been on.

Deputy Chief Thomas Greene testified that he reviewed Mr. Cabral's recommendation, Respondent's prior record (although he stated that he considered this to be Respondent's first offense) and the seriousness of the offense. He

considered the offense to be serious due to the high percentage of undersized shellfish in the one bag. The witness testified that the thirty (30) day suspension was the minimum suspension that he would impose; if an offense merited a suspension of shorter duration, then he does not seek a suspension.

Respondent's first witness was Scott Shallcross. Mr. Shallcross stated that he was the manager of Best in the Bay, Inc., a wholesale seafood distributor. He testified that on June 2, 1998 he had taken the bag of shellfish to the grading room to determine if there were any undersized shellfish. The quahaugs, originally from a company in North Carolina, had been returned to Best in the Bay by one of their customers, Captain's Catch Fish Market, because there were some small shellfish in the bag. He was just starting, and may have already emptied the bag on the machine, when Mr. Cabral began his inspection.

According to this witness, the shellfish had been shipped from North Carolina to Boston at the end of May and then trucked directly to the customers. The shellfish were never in the building prior to their delivery to Captain's Catch. The witness stated that the first time he saw the shellfish was on June 2, 1998 when he emptied the bag on the machine to determine whether there were any undersized shellfish.

D. Steven Shallcross, Jr., president of Best in the Bay, also testified. On June 2, 1998 he had received a telephone call from Captain's Catch. He sent an employee to retrieve the shellfish and credited the company with a replacement bushel of littlenecks. The witness stated that he never saw the disputed shellfish.

The president of the company stated that in the normal course he would return improper shellfish to the seller and obtain a credit. In this instance he was

never asked by Officer Cabral what he intended to do with the undersized product.

Shallcross testified that it had been his intent to return the shellfish to North Carolina for a refund.

II. "Possession" of Undersized Shellfish – The Argument

There is no real dispute between the parties that the 155 shellfish seized from Best in the Bay by Officer Cabral on June 2, 1998 were undersized. In argument, however, it became clear that one of the issues (another was whether the suspension should be of shorter duration) centered on whether Respondent had been in "possession" of the undersized shellfish. The pertinent statutes are set forth below.

The letter/order of suspension (Div 1 Full) cites Best in the Bay, Inc. for a violation² of RIGL §20-6-11:

20-6-11. Minimum size of shellfish – Penalty. – *No person shall take and/or possess* any quahaugs less than one inch (1") shell thickness (hinge width), soft shell clams or mussels of a diameter less than one and one half inches (1 ½ ") taking the maximum shell diameter, or any oysters measuring less than three inches (3") measured parallel to the long axis of the oyster, unless greater minimum sizes are established by the marine fisheries council. ***Any person who takes and/or possesses*** shellfish of less than the minimum size, upon conviction, shall be fined not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) for each and every fifteen (15) shellfish taken. Additionally, any person who takes and/or possesses shellfish of less than the minimum size commingled and/or otherwise stored or contained with shellfish of not less than the minimum size, where the percentage of the less than minimum size shellfish is not less than ten percent (10%) of the total piece count of the commingled and/or otherwise stored or contained package, shipment, or container shall be subject to seizure and/or forfeiture of the entire commingled and/or otherwise stored or contained package, shipment, or container, in

² The letter from the Division specifically cites Respondent for "possession" in violation of the statute. The chapter defines "possession" but not "taking". "Take or taking" is defined in the regulations, however, and means the process to remove the resource from its natural habitat "**until the time at which possession begins.**" It was not a subject of argument at the hearing or in the briefs filed by the parties and the distinction is therefore not discussed further in this Decision.

accordance with the provisions of §§ 20-1-8(e) and (f) and 20-1-8.1.
(emphasis added)

Title 20, entitled "Fish and Wildlife", covers Chapters 1 through 37, from "General Provisions" to "Endangered Species of Animals and Plants", and includes Chapter 6 on "Shellfish" and the above-quoted statute. Chapter 1 includes the following definition section:

20-1-3. Definitions. – (a) When used in this title, the following words and phrases shall have the following meanings, unless the context indicates another meaning:

(1) ***

(2) ***

(3) ***

(4) ***

(5) ***

(6) ***"Possession" means the exercise of dominion or control over the resource commencing at the time at which a decision is made not to return the resource to the immediate vicinity from which it was taken. The decision must be made at the first practical opportunity***
(emphasis added);

(7) ***

(8) ***

In the Division's Post Hearing Memorandum, the Division does not address the statute but cites the same definition of "possession" from the Rhode Island Marine Fisheries Council Regulations. The Division argues that Respondent had "dominion and control" over the undersized shellfish "for at least five (5) days prior to their discovery and seizure by Officer Cabral." Division's Memorandum, at 2. The Division contends that there need not be physical possession of the contraband; all that is needed is the power and intent to control the product's disposition. The Division thus begins the count of possession from the day Respondent sold the quahaugs to Captain's Catch. *Id.* at 3.

The Division also asserts that "the first practical opportunity" for Respondent to discover the violative nature of the product was the date Respondent received the shellfish from the North Carolina company (which is the same day it was then sold to Captain's Catch). If it were determined that possession only commenced when a subsequent purchaser returned the product to the dealer, the Division argues, then dealers would attempt to shield themselves from statutory prohibitions by not examining the products upon their initial acquisition. *Id.*

The Division also argues that the definition of "possession" set forth in the Rhode Island Marine Fisheries Council Regulations applies to shellfish harvesters, not shellfish dealers. Counsel contends that the definition is intended to protect harvesters who capture product and opt "to return the resource to the immediate vicinity from which it was taken" as soon as the harvesters have had an opportunity to examine the catch to determine if the species is large enough and of an appropriate type to keep." *Id.* at 4-5.

Respondent's Post-Hearing Memorandum presents opposing argument on the issue. To determine if Respondent was in "possession" of undersized quahaugs, counsel argues, one must look to the provisions of R.I.G.L. §§ 20-6-11 and 20-1-3; if the statutory definition of "Possession" is applied, then the Division has failed to prove that Respondent was in "possession" of undersized quahaugs during the Division's inspection on June 2, 1998. Respondent's Post-Hearing Memorandum, pp. 1-2. Counsel contends that when the statutory definition is applied, the Respondent must first determine that the quahaugs are undersized before making a decision not to return the quahaugs to the immediate vicinity from

which they were taken. The question, therefore, according to the Respondent, is when that "first practical opportunity" arose to make such a determination. Id. at 2.

According to Respondent's recitation of the evidence (which is not materially inconsistent with my notes or recollection of the testimony), Respondent had ordered several bags of shellfish, including the bag in question, from a company in North Carolina. The bags were received at a trucking terminal in Seekonk, Massachusetts that is utilized by Respondent, on May 27, 1998. On the same day, a bag of the shellfish was delivered to Captain's Catch Seafood, North Providence, Rhode Island. Id. at 3. Respondent asserts in the memorandum, as in the testimony of Scott and Steven Shallcross, that the first time the bag came to their business in Warren was the day of the shellfish inspection by Officer Cabral.

Respondent contends that while May 27, 1998 may have been the first opportunity for Best in the Bay to determine whether the quahaugs were undersized, it was not the first practical opportunity. Respondent states in the memorandum that the trucking terminal is not equipped with the proper machinery, like the culling machine, to determine the size of a large quantity of quahaugs. Id. at 3. The first practical opportunity to determine the size of the shellfish, according to counsel, was when the quahaugs were returned to Respondent's business on June 2, 1998. It was also the first opportunity for Respondent to make the decision to retain the quahaugs or to return them to the immediate vicinity from which they were taken. Id. at 4.

Respondent states that Scott Shallcross was about to begin the process of running the shellfish through the culling machine to determine if they were undersized when Officer Cabral began manually gauging the shells. Therefore,

according to counsel, "before Respondent could begin processing the quahaugs, the Division's investigation officer took control over the quahaugs." Id. at 4.

The Memorandum cites testimony from Steven Shallcross that had he been given the opportunity to make a decision regarding the undersized shellfish, he would have returned them to the place of purchase and received either a refund or a credit. Id. at 6.

III. "Possession" of Undersized Shellfish – Analysis

The Division's analysis of the regulatory definition focuses on their case having proved Respondent's "dominion and control" over the shellfish and that the "first practical opportunity" for the discovery of the illegal shellfish was upon Respondent's receipt of the goods on May 27, 1998. But the analysis disregards other aspects of the definition; that is, that "possession" commences **at the time at which a decision is made** not to return the resource to the immediate vicinity from which it was taken. In this respect, I find Respondent's argument regarding the necessity to prove knowledge and intent persuasive.

The definition, both in statute and regulation, imposes a burden on the Department to show that there was some knowledge of the illegality and a decision not to return the shellfish to the immediate vicinity from which it was taken. This could be proven by direct or indirect evidence. It was established in evidence that Respondent certainly had suspicions that the shellfish was undersized. Respondent even admits to preparing to run the shellfish through the culling machine because of that very concern. There may be circumstantial evidence, particularly of past behavior, to establish that a violator had already made a decision not to return the shellfish if they were indeed undersized.

The Division has established that there have been other occasions over the years when Respondent has been cited with possession of undersized shellfish. (On April 23, 1994, see Div 4 Full; on July 19, 1994 and April 8, 1992, see Div 12 Full; and on June 26, 1969, see Div 8 Full). But the most recent alleged violation for possession of undersized shellfish occurred more than four years prior to the one in this matter. Deputy Chief Thomas Greene testified that he considered the June 2, 1998 violation to be a first offense because he could not locate the consent agreement on the earlier case (presumably the one in April 1994). He also disregarded the other contacts with the Department because they occurred more than four to five years ago. Under these circumstances, and not knowing the terms of the consent agreement, I cannot conclude that any past possible illegal "possession" means that in this case, Respondent had already made his decision to retain the suspect shellfish even before running them through the culling machine.

The Division, therefore, has not proven that Respondent made any decision to retain the undersized shellfish. The testimony from Respondent's President was that in the normal course of business he would return improper shellfish to the seller and obtain credit; he stated that in this particular case he would have returned the shellfish to North Carolina for a refund. I have nothing in evidence to persuade me that this would not be the case.

The Division has also argued that such a limited interpretation of "possession" would encourage shellfish dealers to shield themselves from enforcement by not examining the products upon initial acquisition. I can agree that the definition set forth in the statute and regulation does not easily "fit"

circumstances involving a shellfish dealer, and thus the definition might be considered ambiguous. The legislature, however, has provided the definition considered herein and the Rhode Island Marine Fisheries Council, in its regulations, has not sought to make a distinction between possession by harvesters and possession by shellfish dealers. I have therefore applied the definition of "possession", as it has been set forth in the statute and regulation, to the particular facts of this case.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. On June 2, 1998 through the date of the hearing, the Respondent operated and continues to operate a shellfish brokerage facility located at 325 Water Street, Warren, Rhode Island (the "facility").
2. An inspection of the Respondent's facility was conducted on June 2, 1998 by Conservation Officer Edward Cabral.
3. At the time of the inspection, Officer Cabral found Scott Shallcross, manager of the facility, at the culling machine.
4. Scott Shallcross was preparing to run a bag of shellfish through the culling machine.
5. The bag of shellfish had been received at a trucking terminal in Massachusetts that is utilized by Respondent on May 27, 1998 and then sold by Respondent and delivered to Captain's Catch in North Providence, Rhode Island on the same date.
6. The bag of shellfish was retrieved from Captain's Catch by Best in the Bay, Inc. and taken to the facility in Warren, RI on June 2, 1998.
7. On June 2, 1998 Officer Cabral began to measure individual shellfish from the bag with his gauge.
8. Scott Shallcross offered to run the shellfish through the culling machine to determine whether there were undersized quahaugs from the bag.

9. One Hundred Fifty-Five (155) of the 400 quahaugs from the bag were discovered to be undersized.
10. Conservation Officer Edward Cabral seized One Hundred Fifty-Five (155) quahaugs as a result of his June 2, 1998 inspection of the Respondent's facility.
11. By letter dated December 22, 1998, Steven Shallcross, as President of Best in the Bay, Inc., was informed that the shellfish portion of the Multi-Purpose Dealer's License would be suspended for a thirty (30) day period.
12. Respondent, through its attorney, filed a request for hearing with the AAD.

CONCLUSIONS OF LAW

After due consideration of the legal arguments presented by the parties and based upon the above findings of fact, I conclude the following as a matter of law:

1. The Division has proved by a preponderance of the evidence that the One Hundred Fifty-Five (155) quahaugs seized from Respondent were smaller than the minimum size of shellfish allowed pursuant to R.I.G.L. §20-6-11.
2. The Division has failed to prove by a preponderance of the evidence that Respondent had "possession" of the undersized quahaugs as the term is defined in R.I.G.L. §20-1-3 (a) (6) and in the regulations.
3. The Division has failed to prove by a preponderance of the evidence that Respondent violated R.I.G.L. §20-6-11 as alleged in the letter of suspension dated December 22, 1998.

Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

The letter of suspension issued to Best in the Bay, Inc. on December 22, 1998 is herewith DISMISSED.

Entered as an Administrative Order this 7th day of July, 2000 and herewith recommended to the Director for issuance as a Final Agency Order.



Mary F. McMahon
Hearing Officer
Administrative Adjudication Division
Department of Environmental Management
235 Promenade Street, Third Floor
Providence, Rhode Island 02908
(401) 222-1357

Entered as a Final Agency Order this _____ day of _____ 2000.

Jan H. Reitsma, Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by via regular mail, postage prepaid, to Deborah A. Barclay, Esquire, c/o Kristen Barkett, Esquire, 572 Main Street, Warren, RI 02885; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, Fish and Wildlife, Oliver Stedman Government Center, 4808 Tower Hill Road, Wakefield, RI 02879 on this _____ day of _____, 2000.

APPENDIX A

The below-listed documents are marked as they were admitted into evidence:

DIVISIONS EXHIBITS:

- DIV 1 FULL The December 22, 1998 letter from the Division notifying the Respondent that the shellfish buyer portion of its Multi-Purpose Dealer's License would be suspended for a period of thirty (30) days. 1 Page (Copy).
- DIV 2 FULL The request dated December 23, 1998 on behalf of the Respondent for a formal hearing concerning the Division's letter of December 22, 1998. 1 Page (Copy).
- DIV 3 FULL R.I. Department of Environmental Management Violation Report of the Respondent for the June 2, 1998 possession of undersized shellfish. 4 Pages (Copy).
- DIV 4 FULL R.I. Department of Environmental Management history of violation for the Respondent's April 23, 1994 possession of undersized shellfish. 1 Page (Copy).
- DIV 5 FULL R.I. Department of Environmental Management Violation No. 36409 issued for the Respondent's December 17, 1996 violations of certain transaction slip requirements. 1 Page (Copy).
- DIV 6 FULL R.I. Department of Environmental Management Violation No. 36413 issued for the Respondent's December 8, 1996 purchase of oysters in excess of limit. 1 Page (Copy).
- DIV 7 FULL R.I. Department of Environmental Management Violation No. 37658 issued for the Respondent's June 24, 1997 purchase of undersize Sea Bass. 1 Page (Copy)
- DIV 8 FULL R.I. Department of Environmental Management Violation No. 30120 issued for the Respondent's July 19, 1994 possession of undersize shellfish. 1 Page (Copy)
- DIV 9 FULL R.I. Department of Environmental Management Violation No. 6125W issued for the Respondent's October 2, 1996 possession of untagged shellfish. 1 Page (Copy)

- DIV 10 FULL R.I. Department of Environmental Management Violation No. 38644 issued for the Respondent's June 27, 1998 transportation of untagged shellfish. 1 Page (Copy)
- DIV 11 FULL R.I. Department of Environmental Management Violation No. 38638 issued for the Respondent's June 20, 1998 possession of untagged shellfish and possession of shellfish with misdated purchase slips. 1 Page (Copy)
- DIV 12 FULL R.I. Department of Environmental Management Violation No. CR 92-184 for April 8, 1992 possession of undersize shellfish; R.I. Department of Environmental Management Violation No. CR 94-2236 for July 19, 1994 possession of undersize shellfish; and R.I. Department of Environmental Management Violation No. CR 96-3381 for October 2, 1996 possession of untagged shellfish. 1 Page (Copy)
- DIV 13 FULL R.I. Department of Environmental Management Violation No. CR 93-1379 issued for the Respondent's June 28, 1993 possession of mutilated lobsters. 1 Page (Copy)
- DIV 14 FULL R.I. Department of Environmental Management Violation issued for the Respondent's December 17, 1996 violation of slip transaction requirements and December 18, 1996 violation for purchasing in excess of the purchase limit. 1 Page (Copy)
- DIV 15 FULL R.I. Department of Environmental Management Violation issued for the Respondent's June 24, 1997 possession of undersize sea bass. 1 Page (Copy)

RESPONDENT'S EXHIBITS

- RESP 1 FOR Id Carolina Atlantic Seafood Shipping and Harvest Information slip.
- RESP 2 FOR Id Carolina Atlantic Seafood tag reading 38 degrees to 40 degrees.
- RESP 3 FOR Id Carolina Atlantic Seafood Bill to Best in the Bay, slip #94454.
- RESP 4 FOR Id Best in the Bay's March 27, 1998 bill to Captain's Catch.
- RESP 5 FULL Best in the Bay's credit to Captain's Catch dated June 2, 1998.