

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter of Application for
Reinstatement of Revoked Shellfish Digger's Permit Pursuant to
Environmental Conservation Law Section 71-0927

-by-

KYLE M. FRISINA

Applicant.

DEC Shellfish Permit No. 24333

DECISION OF THE ASSISTANT COMMISSIONER

November 8, 2010

DECISION OF THE ASSISTANT COMMISSIONER

Pending before me is the request of Kyle M. Frisina for reinstatement of his New York State shellfish digger's permit. Mr. Frisina's permit was revoked following his conviction for taking shellfish from uncertified lands, which is a violation of section 13-0309(1)(a) of the New York Environmental Conservation Law ("ECL").¹

Pursuant to ECL 71-0927(1), any person convicted of violating ECL 13-0309(1)(a) two or more times within five years, shall have his or her permit revoked and shall not be re-permitted for a period of at least five years thereafter. Moreover, pursuant to ECL 71-0927(4), revocations for violations of ECL 13-0309(1)(a) shall be automatic upon the second conviction and shall not require any hearing for revocation.

Pursuant to ECL 71-0927(6), any person who has had a permit revoked pursuant to ECL 71-0927(1) may, after the first sixty days of revocation, apply to the Commissioner of the New York State Department of Environmental Conservation ("Department") for reinstatement of the permit. The Commissioner may reinstate a revoked permit upon such conditions as he determines to be appropriate and necessary to protect public health and natural resources of the State, including, but not limited to posting of a bond.

By letter dated May 11, 2010, James Gilmore, the Bureau Chief of the Department's Bureau of Marine Resources, informed Mr. Frisina that, pursuant to ECL 71-0927, Department staff intended to revoke his shellfish digger's permit (no. 24333) for a minimum period of five years. Attached to Department staff's letter was a notice of intent dated May 11, 2010 to revoke the shellfish digger's permit. As grounds for the revocation, Department staff stated that Mr. Frisina had been convicted of taking shellfish from uncertified lands in violation of ECL 13-0309(1)(a) on three separate occasions within a five-year period (May 22, 2006, April 16, 2007, and April 8, 2008).

Department staff provided Mr. Frisina with the opportunity to dispute the accuracy of the convictions, and he responded in two letters, both dated May 16, 2010. He did not dispute the revocation of his permit or the accuracy of the convictions. He stated, however, that he had learned a valuable lesson and that the absence of income

¹Although the papers in this matter also reference the shellfish digger's permit as a license, for purposes of this decision the statutory term "permit" is used (see, e.g., ECL 13-0311).

from harvesting shellfish had significantly impacted his family. He indicated that he had been a commercial fisherman for over fifteen years and requested a "conditional permit" so that he could resume harvesting shellfish. He also stated that he was willing to undergo "any form of supervision and special conditions" in order to be able to resume harvesting of shellfish. Mr. Frisina also noted that he had been denied a renewal of his shellfish digger's permit in January 2010.

Subsequently, by letter dated June 15, 2010, attached to which was a document entitled "Mandatory Revocation," Department staff informed Mr. Frisina that his shellfish digger's permit had been revoked for five years, effective on May 20, 2010, and that the revocation would be in force until May 19, 2015. Mr. Frisina was advised that he could apply for reinstatement of the permit sixty days after the date of revocation. Because Mr. Frisina had previously made such a request, Department staff stated that it would hold his request in abeyance until the 60-day period had passed, and then forward it to the Assistant Commissioner of Hearings and Mediation Services.²

Under cover of a letter dated July 19, 2010, James Gilmore and Peter Fanelli, the Department's Director of the Division of Law Enforcement, forwarded Mr. Frisina's request for permit reinstatement to me. As Department staff's letter was not copied to Mr. Frisina, Chief Administrative Law Judge James T. McClymonds forwarded Department staff's July 19, 2010 letter to Mr. Frisina and offered him an opportunity to respond. The Chief Administrative Law Judge set October 4, 2010 as the deadline for Mr. Frisina's response. No response was received.

Department staff, in its July 19, 2010 letter, stated its opposition to Mr. Frisina's May 16, 2010 request for reinstatement of his permit. Staff notes that Mr. Frisina "has consistently harvested shellfish in uncertified waters in violation of the ECL," as evidenced by his convictions in 2006, 2007, and 2008. Department staff also reports that Mr. Frisina was charged twice in 2009 for the same violations, but that the charges were dropped in consideration of his pleading guilty to more significant Penal Law charges filed by Suffolk County. Department staff contends that Mr. Frisina's actions demonstrate a "wanton disregard for public health and safety" by selling shellfish taken from uncertified lands that have been uncertified since at least the 1920s.

² Pursuant to Commissioner Policy CP-2 (issued on August 22, 1997), the Assistant Commissioner for Hearings and Mediation Services (or his or her designee) is authorized to hear and consider applications for permit reinstatement and to issue decisions on applications to reinstate licenses and permits that had been revoked pursuant to ECL 71-0927.

Although Mr. Frisina did not respond to Department staff's July 19, 2010 letter, I have duly considered the statements in his two prior letters dated May 16, 2010. I recognize that he has expressed contrition for his past violations as well as a willingness to accept a permit subject to supervisory and other conditions. However, it is clear that Mr. Frisina violated the prohibition against harvesting shellfish from uncertified lands on a number of separate occasions, even after his initial conviction in 2006. No justification exists for such repeated offenses. I concur with Department staff that his taking of shellfish from uncertified lands constitutes a serious disregard for public health and safety.

Therefore, having considered this matter and having been duly advised, the request of Kyle M. Frisina for reinstatement of his shellfish digger's permit (no. 24333) is denied.

For the New York State Department of
Environmental Conservation

/s/

By: _____
Louis A. Alexander
Assistant Commissioner for Hearings
and Mediation Services

Albany, New York
November 8, 2010