

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 § 71-0927

- by -

KYLE M. FRISINA,

Applicant.

DEC Shellfish Permit No. 24333

DECISION OF THE ASSISTANT COMMISSIONER

September 12, 2013

DECISION OF THE ASSISTANT COMMISSIONER

Pending before me is the May 25, 2013 letter request of Kyle M. Frisina for reinstatement of his New York State shellfish digger's permit. Mr. Frisina's permit was revoked by staff of the New York State Department of Environmental Conservation (DEC or Department) in 2010 for a period of five years following his conviction for taking shellfish from uncertified lands (on three separate occasions within a five-year period) in violation of section 13-0309 of the Environmental Conservation Law (ECL).

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. Pursuant to ECL 71-0927(4), revocations for violations of ECL 13-0309(1)(a) are automatic upon the second conviction and do not require a hearing.

The revocation period of Mr. Frisina's permit became effective on May 20, 2010 and will expire on May 19, 2015. Prior to that revocation, Department staff provided Mr. Frisina with the opportunity to dispute the accuracy of the convictions and he responded in two letters dated May 16, 2010. He did not dispute the accuracy of the convictions, but indicated the financial hardship that revocation would cause him and his family. Mr. Frisina requested that the decision be reconsidered and his permit restored.

ECL 71-0927(6) provides that sixty days subsequent to a revocation, a permittee is entitled to apply to the Commissioner for reinstatement. 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. Department staff opposed Mr. Frisina's May 16, 2010 application for reinstatement because of his repeated illegal harvesting in uncertified lands. By decision dated November 8, 2010, I denied Mr. Frisina's application for reinstatement of his shellfish digger's permit.¹

As noted, Mr. Frisina has now again requested reinstatement of his permit. In Mr. Frisina's May 25, 2013 letter request, he explains that he "fully understand[s] the severity of uncertified harvesting" and that he is requesting reinstatement based on the "impact the revocation has had on my dependents." He notes that the loss of his "life on the water" has had a devastating impact on his quality of life and his ability to provide for his children.

Mr. Frisina states that his history of almost 20 years of long lining and shellfishing has been in compliance with the exception of these instances that he says were the result of a substance addiction. He states that he has spent nearly a year studying at the Hope House Ministries and completed the Willard drug treatment program, and as a result, he has changed his life for the better. The following was submitted in further support of his application for

¹ As noted in footnote 2 of my November 8, 2010 decision in this matter, Commissioner Policy CP-2, which was issued on August 22, 1997, authorizes the Assistant Commissioner for Hearings and Mediation Services to hear and consider applications for reinstatement of a shellfish digger's permit, and to issue decisions on applications to reinstate licenses and permits that have been revoked pursuant to ECL 71-0927.

reinstatement: (1) a letter dated July 1, 2013 from his ex-wife Anne Moston addressing the financial burden that the revocation has caused the family and attaching a copy of a May 2013 child support bill showing arrears; (2) a letter dated July 2, 2013 from Margaret Buckley, CASAC, Program Director for the Hope House Ministries (Hope House); (3) a letter dated July 3, 2013 from John F. German, the president of the Long Island Sound Lobstermen's Association; (4) a letter dated July 7, 2013 from Jacob Engel, an individual who describes Mr. Frisina as a mentor; and (5) a letter dated July 11, 2013 from Monica Prino, MSW, of the Brookhaven Family Center.

Department staff opposes Mr. Frisina's most recent application in a letter submission signed by James Gilmore, Chief, Bureau of Marine Resources, Division of Fish, Wildlife and Marine Resources on August 13, 2013 and Colonel Walter Heinrich, Acting Director, Division of Law Enforcement on August 15, 2013. Chief Gilmore and Colonel Heinrich explain that the fact that Mr. Frisina completed a court-mandated drug treatment program as part of a jail sentence is not a basis for reinstatement.

The Chief and Colonel add that Assistant Regional Attorney Jennifer Ukeritis and Shellfisheries Section Head Debra Barnes met with Mr. Frisina on July 12, 2013. Staff reported that, at this meeting, Mr. Frisina stated that the revocation was the result of people targeting him and he did not appear to accept that his permit revocation was due to his shellfishing convictions. According to staff, Mr. Frisina "seemed motivated to find a technicality for circumventing the revocation process." Although Mr. Frisina offered to accept conditions to his permit that would provide for supervision, a bond, or seeding oysters during his dives, staff did not find these conditions to be either realistic, given the lack of DEC resources or staff to supervise his activities, or otherwise feasible. Based on their meeting, staff questioned Mr. Frisina's commitment to rehabilitation and his willingness to comply with the applicable legal requirements. Staff recommended that, based on the serious threat that taking shellfish from uncertified lands poses to the public's health and safety, the full five year revocation period be enforced against Mr. Frisina.

I have reviewed the submissions on Mr. Frisina's behalf, and I do not find that these would support reinstatement. Ms. Moston, Mr. Frisina's former wife, stresses in her letter the fact that her family would benefit from his increased revenue resulting from "making bay man wages again." However, as staff indicates, the family's financial situation, however sympathetic, cannot be the basis to restore a permit to an individual who has failed to comply with laws that are critical to public health. Ms. Buckley of Hope House states that Mr. Frisina was diagnosed for substance dependence on two separate occasions - in June 2011 and, upon his return and readmission, in May 2012. While she states that he attended group and individual sessions, she concludes that he "did not successfully complete treatment either time, and left Hope House on his own."

Mr. German's letter specifically indicates that it is not a character reference but rather a letter described as "in support of Kyle's work ethic and sense of wanting to contribute to the support [of] his children." However, the issue is not how hard Mr. Frisina is willing to work but rather whether he will comply with the law and regulations governing his chosen profession. Mr. Engel's support for Mr. Frisina indicates that the applicant helped this individual through a

personal crisis. While Mr. Frisina's efforts are commendable, those efforts do not outweigh the serious nature of Mr. Frisina's violations. Ms. Prino's letter confirms that applicant completed the Willard drug treatment program and is "work[ing] on his sobriety and maintaining honesty." These are positive personal developments but these developments are not a sufficient basis to reinstate the permit.

I have taken into consideration Mr. Frisina's application for reinstatement, his efforts to alter his behavior, and the letters submitted on his behalf. I have also considered staff's letter report regarding their meeting with Mr. Frisina and their evaluation of the submissions on Mr. Frisina's behalf. On balance, due to the serious public health and safety concerns with respect to the taking of shellfish from uncertified lands, I concur with staff that the permit should not be reinstated prior to the completion of the five-year revocation period.

Therefore, having considered this matter and having been duly advised, the application 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
September 12, 2013