

Department of Environmental Management  
Administrative Adjudication Division  
RE: JOSE FERNANDEZ D/B/A BAY VIEW SHELLFISH  
AAD NO. 04-002/ENE  
LICENSE #DSF 10

**DECISION AND ORDER**

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to a letter dated April 20, 2004 filed on behalf of Jose Fernandez, d/b/a Bayview Shellfish ("Respondent") requesting a hearing before the AAD concerning the letter from the Division of Law Enforcement ("Division"), Department of Environmental Management ("DEM") dated April 14, 2004 ("Suspension Letter").

The hearing was conducted in accordance with the statutes governing the AAD (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 § 20-2-13; and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules"). In this enforcement action, the Division bears the burden of proving the allegations by a preponderance of the evidence. Robert J. Caron, Esquire represented the Respondent and Gary Powers, Esquire represented Division.

The Suspension Letter informed Respondent that his Rhode Island Dealer's License #DSF 10 would be suspended for a thirty (30) day period as a result of the January 19, 2004 inspection of the Respondent's operation, when Respondent was found to be in possession of ten (10) bags of untagged shellfish (quahogs) in violation of R.I. GEN. LAWS Chapters 20-1 through 20-10 (Regulation § 19.6.2).

The Prehearing Conference was conducted on September 10, 2004. At the Prehearing Conference, the parties agreed to the following stipulations of fact:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Respondent.
2. Upon the boat's arrival at the dock, two Department of Environmental Management (hereinafter DEM) officers, EPO D. White and EPO J. Buban from the Division of Law Enforcement, were located in the parking lot near a truck owned by Mar Transport, Inc.
3. After the untagged bags of quahogs were discovered by the Environmental Police Officers, Chris Heilborn, an employee of the Respondent, attempted to tag the bags of quahogs.

The issues for consideration in this matter are (1) whether the Division has satisfied its burden of proving the violation as alleged in the Suspension Letter by a preponderance of the evidence; and (2) whether the suspension of Respondent's license should be sustained.

The adjudicatory hearing was held on April 4, 5 and 6, 2005. The post-hearing memoranda were timely filed, and the hearing was deemed closed on May 27, 2005.

The list of exhibits (marked as they were admitted at the hearing), is attached to this Decision as Appendix A.

At the hearing, the Division called three (3) witnesses, viz. Daniel K. White, a DEM Environmental Police Officer, Joseph S. Buban, a DEM Environmental Police Officer, and Thomas Greene, Deputy Chief of the Division. The Respondent called two (2) witnesses, viz. Christopher Heilborn, and Margaret Wilding.

**WITNESS TESTIMONY**

Environmental Police Officer Daniel K. White was the first witness called by Division. He testified that on January 19, 2004, when he and Environmental Police Officer Trainee Joseph S. Buban visited the Oakland Beach boat

ramp, the Gypsy II (a "buy boat") was located in the vicinity of the boat ramp. He observed that the Gypsy II was just finishing the offloading of bags of shellfish from said vessel to a truck owned by Mar Transport, Inc. He immediately observed that one of the bags of shellfish did not have the required shipper's tag on it. It was this witnesses' testimony that further inspection of the shellfish bags revealed that a total of ten (10) bags of shellfish did not have proper shipping tags.

It was explained by EPO White, that the requisite shipper's tag is important in that it can be employed to determine the precise origin of a bag of shellfish which may present a health problem. The identification of the dealer and the area from which the shellfish were harvested is vital in order to limit an investigation into contaminated shellfish to a particular area thereby avoiding the embargoing of all shellfish shipments from the entire state.

EPO White identified the ten (10) bags (which had been emptied of their contents of shellfish) that did not have the requisite shipper's tag. He testified that each of these bags was labeled "Mar Brand, Mar Seafood Incorporated" (Division's full exhibit #8 through 17 inclusive); and that the said ten (10) purple mesh bags each containing approximately thirty to forty-five pounds (30 lbs. - 45 lbs.) of shellfish were seized and disposed of.

The next witness called by Division was Environmental Police Officer Joseph S. Buban. EPO Buban was an officer in training under the command of EPO White at the time of the January 19, 2004 incident involved in this matter. EPO Buban testified that he examined the contents of the Mar Seafood truck to determine if any untagged bags of shellfish were located in the truck in addition to those which EPO White had already located; and that they ended up finding a total of ten (10) untagged bags (including the three (3) bags tagged in their presence), and about fifty-eight (58) tagged bags. He also testified that he had observed Christopher Heilborn placing tags on three previously untagged shellfish bags; and that he also observed EPO White order Mr. Heilborn to stop tagging these three previously untagged bags. The three tags so affixed were introduced as Division's full Exhibits 4A, 4B and 4C.

Division of Law Enforcement Deputy Chief Thomas A. Greene was the third witness called by Division. Deputy Chief Greene testified that he is currently in charge of the administrative enforcement proceedings for Division and as such reviews requests for license suspensions. This procedure requires that the investigating officer's request be received and approved in turn by his/her sergeant, lieutenant and finally the deputy and the chief of the Division.

It was Deputy Greene's further testimony that he relied upon the pertinent regulations, which provide that the period of time for a suspension/revocation shall be thirty (30) days given that said regulations are established on a tier basis whereby the regulations provide increasingly long periods of suspension/revocations for successive violations. Therefore discretion was not available to impose either a greater or a less severe suspension pursuant to these governing regulations.

Christopher Heilborn was the first witness called by Respondent. He testified that it was extremely cold on January 19, 2004; and that part of bay in East Greenwich was frozen on said date, so the other "buy boat" did not make it out from the dock. However, he was able to get out with the Gypsy II, and he and Margaret Wilding proceeded out to an area where there were approximately thirty (30) smaller boats.

Mr. Heilborn described how the shell fishermen boarded the Gypsy II with their bags of clams, and how the employees of Respondent ran the shell fishermen's bags of clams through a culling machine to separate the undersized clams and to sort those that remained into different sizes. The remaining clams then went into bags (according to size); the bags were then tied and tagged; and the shell fisherman was then paid for said clams.

It was Mr. Heilborn's testimony that they purchased sixty-seven (67) or sixty-eight (68) bags that day, which was well in excess of the usual purchase. He testified that despite the frigid temperature, he was warm on his boat because he was completely enclosed aboard the Gypsy II with two propane heaters and one kerosene heater. He testified that he had a box of about 1000 tags with him, but he had only made out approximately 30 tags. The tags are kept in the wheelhouse, about 7 to 8 feet from the culling machine, and they are put on the bags with what he called a "clip". He stated that it is not unusual for a tag to dislodge by flapping in the wind or by rubbing against one's leg.

Margaret Wildling was the next witness called by Respondent. Margaret Wildling testified that on January 19, 2004 she was employed by Respondent, and in the course of such employment she went aboard the Gypsy II with Christopher Heilborn to purchase clams from shell fishermen in the Bay. It was this witnesses' testimony that the weather was extremely cold on that day (around 17 to 20 degrees); and that they were out in the Bay for about 4 to 4 1/2 hours. She briefly described the culling procedure; and stated that when the bags come off the machine, they are tagged and stacked on pallets. It was the testimony of this witness that there are times when tags come off the bags.

It is the Division's contention that it has met its burden of demonstrating by a preponderance of the evidence that the Respondent committed a violation of Section 19.6.2 of the Rhode Island Marine Fisheries Regulations by failing to properly affix the requisite Interstate Shellfish Conference ("ISSC") shipper's tag on ten (10) bags of shellfish on January 19, 2004 at the Oakland Beach boat ramp. Wherefore, Division maintains that Respondent is subject to the suspension of his dealer's license for a period of thirty (30) days pursuant to the *Rules and Regulations Governing the Suspension/Revocation of Commercial Marine Fisheries, Shellfish Buyer, Lobster Dealer, Finfish Dealer, and Multi-Purpose Dealer, Licenses Issued Pursuant to Title 20 of R.I.G.L. "Fish and Wildlife."*

Division asserts that based on the Division's penalty regulations, there is no discretion available to impose either a greater or a less severe suspension than thirty (30) days; and that given the testimony of Division's witnesses as to the importance of compliance with the ISSC requirements, it is doubtful that a lesser penalty would have been suggested by any of said witnesses.

At the close of Division's case in chief, Respondent moved for entry of judgment; and Division responded by both opposing the Respondent's motion and further moving for an entry of judgment for Division as a matter of law. In accordance with the Hearing Officer's request, Division addressed in its post-hearing memorandum the authority for consideration of Division's motion at this stage of the proceedings. Division asserts that the Hearing Officer was authorized to consider the Division's Motion for Entry of Judgment at the close of its case in chief pursuant to Rule 8.00(a)(1) of the AAD Rules and Rule 50 of the R.I. Superior Court Rules of Civil Procedure.

Rule 8.00(a)(1) of the AAD Rules provides that "The types of motions made shall be those which are permissible under these Rules and the R.I. Superior Court Civil Rules of Procedure. Rule 50 of the Super. R. Civ. P. is entitled "Judgment as a matter of law in actions tried by a jury...." Subdivision (a)(1) of Rule 50 sets forth the standard for granting a motion for judgment as a matter of law in jury trials. However, even if Rule 50 were applicable to other than jury trials, it would appear that Division's Motion should not be granted at the conclusion of Division's case in chief. In any event, there is no doubt that a Hearing Officer (pursuant to said Rule 50) retains the discretion not to act upon the motion until the close of all of the evidence. The Hearing Officer in the instant matter deferred ruling on said motions, and the resolution of same is contained in the discussions, determinations and conclusions that follow herein.

Respondent contends that Division has failed to establish that Respondent was in possession of the subject ten (10) untagged bags of shellfish as alleged in the Suspension Letter. Respondent argues that, although it concedes having exercised dominion and control over the shellfish, the Division has failed to sustain its burden of proving that Respondent made a decision not to return the shellfish to the vicinity from which they were taken, or that Respondent made a decision not to tag the bags of shellfish. It is also argued by Respondent that he is not in violation of § 19.6.2 as shipment of the shellfish had not yet commenced.

It is essentially Respondent's position that the charges should be dismissed because Respondent was never in "possession" of untagged shellfish. Respondent also posits that the Division's investigation was premature, and as such deprived Respondent of a practical opportunity to inspect and attach tags to all bags. Respondent further argues that there can be no violation of § 19-6-2 in the instant matter because said section requires that tags be attached "prior to shipment", and that shipment had not begun since Respondent's employees were merely unloading the bags off the boat and loading the truck at the time of subject incident.

The Respondent also challenges the Division's assertion and witness testimony regarding mandatory license suspension. It is argued by Respondent that the license suspension for such violations is at the "discretion" of the Director; and that the only limit to the Director's discretion is that a suspension for a first time violation may not

exceed thirty (30) days. Respondent avers that the penalty phase should not be reached; but if it is reached, the penalty proffered is excessive.

## **ANALYSIS**

The Letter of Suspension cites the Respondent for being in possession of ten (10) bags of untagged shellfish (quahogs) on January 19, 2004 in violation of # 19.6.2 of the Rhode Island Marine Fisheries Regulations ("R.I.M.F.R."). The Division bore the burden of proving the allegations set forth in the Letter of Suspension by a preponderance of the evidence.

The R.I.M.F.R., Part XIX-FISH/SHELLFISH DEALER REGULATIONS, prescribes the proper conduct of licensed shellfish dealers for the purpose of protecting the public health, safety and welfare. Regulation 19.6 provides as follows:

### 19.6 Handling of Shellfish

19.6.1 Rhode Island licensed shellfish dealers are prohibited from mixing or commingling shellfish taken from Rhode Island waters with shellfish taken from other state's waters.

19.6.2 Shellfish dealers shall properly tag each bag or container of shellfish as follows:

19.6.2-1 The dealer shall keep the harvester's tag affixed to each container of shellfish until the container is (i) shipped, or (ii) emptied to wash, grade, or pack the shellfish.

19.6.2-2 The dealer shall affix his/her dealer's tag to each container of shellfish prior to shipment, and immediately after shellfish emptied from a tagged container have been washed, graded, or packed.

19.6.2-3 When the dealer is also a licensed aquaculturist and he/she elects not to use a harvester's tag, he/she shall affix his/her dealer's tag to each container of shellfish prior to leaving the aquaculture site, removing the shellfish from a vessel, or offering the shellfish for sale.

19.6.2-4 The dealer's tag shall be (i) durable, waterproof and sanctioned by DOH prior to use, and (ii) at least 2 5/8 inches by 5 1/4 inches (6.7 x 13.3 cm) in size.

19.6.2-5 The dealer's tag shall contain the following indelible, legible information in the order specified below:

- the dealer's name and address;
- the dealer's certification number as assigned by DOH and the original shellfish shipper's certification number;
- the date of harvest;
- the most precise identification of the harvest location as is practicable including the initials of the state of harvest, and the DOH/DEM designation of the growing area by indexing, administrative or geographic designation;
- when the shellfish has been placed in wet storage in a dealer's operation, the statement: "THIS PRODUCT IS A PRODUCT OF (NAME OF STATE) AND WAS WET STORED AT (FACILITY CERTIFICATION NUMBER) FROM (DATE) TO (DATE)";
- the type and quantity of shellfish; and
- the following statement in bold capitalized type on each tag: "THIS TAG IS REQUIRED TO BE ATTACHED UNTIL CONTAINER IS EMPTY OR IS RETAGGED AND THEREAFTER KEPT ON FILE FOR 90 DAYS."

19.6.3 Shellfish purchased or acquired by a Rhode Island licensed shellfish dealer may be separately sorted by type, size, or other basis. The original containers with tags must be kept in close proximity while sorting, grading and processing is taking place.

19.6.4 Shell stock shall be washed reasonably free of bottom sediments as soon after harvesting as possible. The harvester shall be primarily responsible for washing shell stock. If shell stock washing is not feasible at the time of harvest, the dealer shall assume this responsibility. Water used for washing shall be from a potable water source, or growing area in the approved classification or open status of the conditionally approved classification.

The major events and occurrences leading up to the issuance of the Suspension Letter are essentially not in dispute. The parties in the Prehearing Conference Record and Order stipulated (1) as to the jurisdiction of the AAD; (2) that upon the boat's arrival at the dock, two EPOs were located in the parking lot near the Mar Transport, Inc. truck; and (3) that after the untagged bags of quahogs were discovered by the EPOs, an employee of Respondent attempted to tag the bags of quahogs.

The testimony of Respondent's witnesses was uncontested as to the extremely cold weather on the date in question, the consequent increase in the amount of shellfish purchased by the Gypsy II ("buy boat"), the procedures employed by Respondent's employees in the culling of the shellfish brought aboard the Gypsy II; the insertion of the culled shellfish in bags bearing the label "Mar Brand, Mar Seafood Incorporated"; and the preparation of the buy slips (which serve as receipts for purchases) as well as the attachment of the requisite dealer's shipping tags on the majority of the bags so filled. The additional pertinent events and circumstances are contained in the discussions and determinations that follow herein of the issues, contentions, and arguments.

A review of the documentary and testimonial evidence clearly establishes that Division has satisfied its burden of proving the violation as alleged in the Suspension Letter by a preponderance of the evidence. The evidence introduced by Division clearly establishes that on January 19, 2004 the Respondent was in violation of Regulation # 19.6.2 of the Rhode Island Marine Fisheries Regulations as alleged in the Suspension Letter, in that Respondent was in possession of ten (10) bags of untagged shellfish (quahogs).

Section 19.6 of R.I.M.F.R., Part XIX, FISH/SHELLFISH DEALER REGULATIONS governs the "Handling of Shellfish." § 19.6.2-2 provides that the dealer shall affix his/her dealer's tag to each container of shellfish prior to shipment, and immediately after shellfish emptied from a tagged container have been washed, graded, or packed.

The Respondent's arguments that there can be no violation of the pertinent regulation, because the Respondent was never in "possession" of the untagged bags of shellfish in violation of the pertinent statute on regulations, and also because the shipment of shellfish had not yet commenced, both lack merit.

In his Post-Hearing Memorandum of Law, the Respondent cites numerous cases in an attempt to demonstrate that (1) the Respondent was never in "possession" of untagged bags of shellfish; and (2) that shipment of the shellfish had not yet commenced. However, a review of the cases cited by Respondent demonstrates that they do not support Respondent's contentions

Contrary to Respondent's contention, there can be no doubt that the Respondent came into possession of the untagged bags of shellfish when it purchased said shellfish from the harvesters on board the buy boat, the Gypsy II. It was the Respondent's witnesses who testified that the shellfish had been culled and placed into bags, which were then tied and the shell fishermen departed the Gypsy II as soon as they were paid.

The determination of the meaning of possession is resolved by a review of the pertinent statute and the cases considering same. The authority and responsibility over fish, lobsters, shellfish and other biological resources of marine waters of the state is vested in the Director by Chapter 1 of Title 20 of the R.I. GEN. LAWS. § 20-1-3(a)(6) defines "possession" when used in this title (except in cases of aquaculture crops) as follows:

"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.

The legislature has provided the definition considered herein, and I have therefore applied the definition of "possession" as it has been set forth in the statute to the particular facts in this case. The Respondent concedes having exercised dominion and control over the shellfish; and there can be no doubt that Respondent did not

make the decision to return the resource to the immediate vicinity from which it was taken at the first practical opportunity. See Best in the Bay, Inc. AAD No. 98-002/ENE (July 28, 2000).

Contrary to Respondent's protestations concerning the commencement of shipment, any decisions or determinations of who is liable for the tax implications of ownership of certain goods in the stream of commerce are not germane to the determinations required to be made in the instant matter.

I find the testimony of the Division's witnesses that the Respondent was in possession of ten (10) untagged bags of shellfish at the time of Division's inspection on the date in question to be most credible. There was no testimony or evidence to support a conclusion that the tags may have fallen off as suggested by Respondent. § 19.6.2-4 requires that the dealer's tag shall be durable and waterproof, and § 19.6.2-5 provides that the tag contain the statement "This tag is required to be attached until container is empty or is retagged and thereafter kept on file for 90 days." Indeed, it was the testimony of Respondent's witness that the tags are now more durable than they used to be, and that the bags of shellfish were carried away from one's legs.

Having determined that Division has satisfied its burden of proving the alleged violation by a preponderance of the evidence, I now address the second issue of whether the suspension of Respondent's license should be sustained. Undoubtedly the evidence clearly mandates that a penalty be imposed. However, a reading of the pertinent statute and regulations governing the imposition of a penalty in this matter demonstrates that, contrary to Division's contention, the imposition of a thirty (30) day license suspension is not mandatory in this matter.

The enabling statute for license suspension is found in R.I.G.L. § 20-6.24, entitled "License for shellfish buyers - Suspension or Revocation." Subsection (d) provides that "The director may suspend, revoke, or deny the license of a shellfish buyer or fisher of shellfish for the violation of any provision of this title or the rules, regulations, or orders adopted or issued pursuant to this title.

The pertinent penalty regulations are contained in the Rules and Regulations Governing the Suspension/Revocation of Commercial Marine Fisheries, Shellfish Buyer, Lobster Dealer, Finfish Dealer, and Multi-Purpose Dealer, Licenses Issued Pursuant to Title 20 of R.I.G.L. "Fish and Wildlife." Rule 6, subsection 4 provides:

#### **4. Shellfish Buyer, Lobster Dealer, Finfish dealer, Multi-purpose Dealer**

The license of any Shellfish Buyer, Lobster Dealer, Finfish dealer, Multi-purpose Dealer and the privilege to barter or trade in shellfish, lobster or Finfish in this state, of any person who has violated the provisions of Title 20 "Fish and Wildlife", Chapters 1 "General Provisions", 2 "Licensing", 3 "Marine Fisheries Council", 4 "Commercial Fisheries", 4.1 "Menhaden Management Area", 5 "Fish Traps", 6 "Shellfish", 7 "Lobsters and other Crustaceans", 8.1 "Shellfish Grounds", and 10 "Aquaculture" of the Rhode Island General Laws or who has violated any rule or regulation adopted in accordance with said title and chapters, may be suspended or revoked as the Director or his/her designee in his/her discretion determines, for the time periods listed as follows:

- 1) First violation - up to thirty (30) days suspension;
- 2) Second violation - up to ninety (90) days suspension;
- 3) Third violation - up to three hundred and sixty-five days suspension;
- 4) Fourth and successive violations - revocation

A clear reading of the governing statute and regulation demonstrates that the license suspension for such violations is at the discretion of the Director, subject to the limitation that for a first violation the suspension may not exceed thirty (30) days. Despite the fact that the imposition of a thirty (30) day license suspension is not mandatory, I am compelled to find that the imposition of the full thirty (30) day license suspension is warranted in this matter. The Respondent failed to introduce any evidence whatsoever to support his argument that the penalty proffered is excessive, nor was any valid reason advanced which would warrant a reduction of the penalty.

It is indeed unfortunate that the Respondent's employees were confronted with the weather conditions and the increased workload on the date in question, but this is not a valid excuse for failure to comply with the regulations. Respondent's employees were certainly aware of the importance of complying fully with the nationally imposed shellfish marking requirements imposed on dealers by the State's DEM and Department of Health consistent with the requirements of the Interstate Shellfish Conference. In any event, the R.I.M.F.R., Part XIX - Fish/Shellfish Dealer Regulations clearly provides the proper conduct of licensed shellfish dealers for the purpose of protecting the public health, safety and welfare. It would be ill-advised to impose a less severe penalty than the full thirty (30) day license suspension taking into consideration that there were ten (10) untagged bags, and the dire consequences that might arise from failure to properly tag.

#### FINDINGS OF FACT

After considering the testimonial and documentary evidence of record, I find as a fact the following:

1. On January 19, 2004, the Respondent, Jose Fernandez, d/b/a Bayview Shellfish held a Rhode Island Marine Dealer's License #DSF 10 (license to barter, trade and possess shellfish taken by persons licensed under R.I. Law).
2. On January 19, 2004, the Respondent was the owner of the vessel, Gypsy II, a "buy boat", which was piloted by one of Respondent's employees, Christopher Heilborn.
3. On January 19, 2004, the Respondent's employee, Christopher Heilborn, piloted the Gypsy II to the boat's designated area in Greenwich Bay to purchase shellfish.
4. Christopher Heilborn, in accordance with his usual practice, had prepared thirty (30) dealer's shipping tags, which he felt would have been sufficient for the usual acquisition of twenty-five (25) to thirty (30) bags of shellfish.
5. The weather was extremely cold on January 19, 2004, which prevented the other "buy boat" (which usually operates in the area) from buying shellfish as it was frozen in dock.
6. The absence of the other "buy boat" increased the amount of shellfish available for purchase by the Gypsy II on January 19, 2004.
7. The employees of Respondent, who were aboard the Gypsy II on January 19, 2004, were extremely busy (because of the unexpected increase in the amount of shellfish purchased) as they prepared buy slips, which serve as receipts for purchases, as well as more dealer's shipping tags to be attached to the bags used for shipping.
8. The Respondent's employees aboard the Gypsy II "buy boat" purchased sixty-one (61) bags of shellfish ("quahogs") from different shell fisherman and then proceeded to the dock on January 19, 2004.
9. Upon the arrival of the Gypsy II at the dock on January 19, 2004, two Officers of the Division of Law Enforcement of the Department of Environmental Management (hereinafter "Officers"), EPO D. White and EPO J. Buban, (hereinafter "Officers"), were located in the parking lot near a truck owned by Mar Transport, Inc.
10. The Respondent's employees were in the process of unloading the purchased bags of shellfish from the Gypsy II to the dock and loading them aboard the nearby Mar Transport truck when the Officers discovered some untagged bags of quahogs located on the ground near the Mar Transport, Inc. truck.
11. The Officers observed that Chris Heilborn, an employee of the Respondent was attempting to tag two of the bags of quahogs that had been taken from the Gypsy II (which were on pallets on the ground) that did not have the required tags.
12. On January 19, 2004, EPO White and EPO Buban conducted an inspection of the Respondent's operation

(i.e. the bags of quahogs that had been on the ground as well as those that had been placed on the Mar Transport truck).

13. The Officers discovered that in addition to the two (2) bags of quahogs on the ground that the Officers observed being tagged, there were eight (8) additional bags of quahogs that were untagged aboard the Mar Transport truck for a total of ten (10) bags that did not have the requisite tags.
14. The Officers ultimately took possession of and disposed of a total of ten (10) untagged bags of quahogs as a result of their January 19, 2004 inspection.
15. At the site of the inspection, the Officers informed the Respondent that administrative proceedings would be instituted against the Respondent.
16. By letter dated April 14, 2004, the Respondent, Jose Fernandez, d/b/a Bayview Shellfish, was informed by the Division of Law Enforcement that Respondent's Rhode Island Shellfish Dealer's License #DSF 10 would be suspended for a period of thirty (30) days.
17. Respondent, through his attorney, filed a request for a hearing with the AAD.

#### CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based on the findings of fact as set forth herein, I conclude the following as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over Respondent.
2. The Division of Law Enforcement has proved by a preponderance of the evidence that on January 19, 2004 the Respondent violated Section 19.6.2 of the Rhode Island Marine Fisheries Regulations by failing to properly affix the requisite Interstate Shellfish Conference shipper's tag on ten (10) bags of shellfish.
3. The imposition of a thirty (30) day suspension of Respondent's Rhode Island Dealer's License for a violation of R.I.M.F.R. #19.6.2 is appropriate and warranted in this matter.

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

#### ORDERED

1. The Suspension Letter issued to the Respondent dated April 14, 2004 is hereby SUSTAINED, except as modified herein as to the dates of the suspension.
2. The Rhode Island Dealer's License of the Respondent, Jose Fernandez, d/b/a Bayview Shellfish is hereby suspended for thirty (30) days for the period commencing at 12:01 a.m. on August 27, 2005 and terminating at 11:59 p.m. on September 25, 2005.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this \_\_\_\_ day of August, 2005.

Joseph F. Baffoni  
Hearing Officer

Entered as a Final Agency Decision and Order this \_\_\_\_ day of \_\_\_\_\_, 2005.

W. Michael Sullivan, Ph.D  
Director

## **APPENDIX A**

### **LIST OF EXHIBITS**

#### **DIVISION'S EXHIBITS**

DIVISION 1 Full	Copy of the April 14, 2004 notice that the Respondent's Rhode Island Dealer's License# DSF10 would be suspended for a period of thirty (30) days as a result of the January 19, 2004 Inspection of the Respondent's operation. 1Page.
DIVISION 2 Full	Copy of the request dated April 20, 2004 on behalf of the Respondent for a formal hearing before the AAD concerning the Division's letter of April 14, 2004. 1Page.
DIVISION 3 For ID	Copy of the R.I. Department of Environmental Management Case Report of the Respondent concerning the January 19, 2004 inspection. 3Pages.
DIVISION 4a,4b,4c Full	The three (3) tags which were attempted to be placed on the untagged bags after the January 19, 2004 inspection revealed the fact that the bags were untagged.
DIVISION 5,6,7 Full	Three photographs of the ten (10) empty bags in which the untagged quahogs were discovered during the January 19, 2004 inspection.
DIVISION 8-17 Full	Ten (10) empty mesh bags (attached together, but each marked individually)
DIVISION 18 Full	Division of Law Enforcement evidence tag dated January 19, 2004 (attached to Division's Exhibits 8 through 17)
DIVISION 19 for ID	Seizure report dated 1-19-04
DIVISION 20 Full	Full statement of EPO Daniel K.White
DIVISION 21 Full	Full statement of EPO Joseph S.Buban

#### **RESPONDENT'S EXHIBITS**

Resp A Full	Copy of Marine Dealer's License issued by DEM to Bayview Shellfish dated December 30, 2003.
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Resp B Full	Copy of samples of Bayview Shellfish shipping tags similar to the ones that were used on January 19, 2004 and a single sample tag offered to display the metal fasteners used to secure the tag to the bag.
Resp C for ID	Copy of affidavit of Mr.Christopher Heilborn dated September 1, 2004.
Resp D(1) and D(2) Full	Copy of two (2) photographs taken of Gypsy II and bay on January 20, 2004
Resp E Full	Copy of buy slips dated January 19, 2004.
Resp F for ID	Copy of "End of Day Report" or Statement indicating the shellfish purchased dated January 19, 2004.
Resp G Full	Copy of documents charging Mar Seafood, Inc. and Bayview Shellfish with possession of ten (10) bags of untagged shellfish in violation of RIGL Chapters 20-1 through 20-10 (Regulation 19-6-2).
Resp H for ID	Model Ordinance of the Interstate Shellfish Sanitation Conference establishing a minimum standard that Rhode Island complies with as a guideline for the Rhode Island Marine Fisheries Regulations.
Resp I for ID	Copy of Interstate Shell fish Sanitation Conference Guideline Document Ch.3 04 regarding untagged shellfish.
Resp J Full	Copy of Bills of Lading
Resp K Full	Copy of registration certificate of transportation truck owned by Mar Transport, Inc.
Resp L for ID	Summons notice of incident (used as a slip of paper to write on- not as a summons)

**NOTICE OF APPELLATE RIGHTS**

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws 42-35-12. Pursuant to R.I. Gen. Laws 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.