

**OFFICE OF ADJUDICATIONS**

**IN THE MATTER OF**

**:DEPT OF AGRICULTURE/  
BUREAU OF AQUACULTURE**

**FAIRHAVEN  
CLAM AND LOBSTER CO., LLC**

**:JUNE 18, 2004**

**PROPOSED FINAL DECISION**

***I*  
SUMMARY**

The respondent Fairhaven Clam and Lobster Co., LLC (FHCL) has appealed from the suspension of its shellfishing licenses by the Department of Agriculture/Bureau of Aquaculture (DA/BA). The DA/BA, which suspended the licenses pursuant to General Statutes §4-182(c), seeks to revoke those licenses until they expire on June 30, 2004, and has proposed conditions to renew the licenses on July 1, 2004.<sup>1</sup> General Statutes §26-192c.

On May 28, 2004, I issued a *Summary and Recommendation*, which found that the DA/BA had sufficient evidence to support its pursuit of the revocation of the respondent's licenses and had not acted unreasonably in summarily suspending those licenses. However, because that suspension effectively revoked the respondent's licenses for thirty-nine days, no further action on those licenses was recommended. In addition, although the facts of this case demonstrate cause for concern, the DA/BA did not present sufficient evidence to support the placement of its proposed conditions on the renewal of the respondent's licenses. Finally, the respondent was reminded of the continuing jurisdiction and critical responsibility of the DA/BA to issue and assure compliance with shellfishing licenses. This *Summary and Recommendation* is incorporated into this *Proposed Final Decision*.

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<sup>1</sup> On February 24, 2004, the Department of Agriculture, acting through its appointed final decision-maker Dr. Bruce Sherman, removed the suspension of the licenses pending the outcome of this proceeding. Dr. Sherman is the Director of the Department's Bureau of Regulation and Inspection.

**II**  
**FINDINGS OF FACT**

**A**  
**The Parties**

**I**  
**The Respondent**

1. Fairhaven Clam and Lobster Co., LLC is located in New Haven. Established in 2000, FHCL holds two licenses to conduct its shellfishing operations. Michael Fraenza owns FHCL and is one of its licensed captains, who also include Carlo Fragola and Miguel Santiago. (Ex. Respon-5; tr. 2/5/04, M. Fraenza, p. 486.)
2. The first license allows FHCL to harvest and ship oysters and clams for market from the indicated “Approved” or “Conditionally Approved-Open” shellfishing areas, listed by lot/lease number. The license provides that the status of these lots should be confirmed before harvesting and advises that shellfish may not be taken from areas that are “Prohibited”, “Restricted” or “Conditionally-Approved-Closed” areas, and advises that the licensee is not exempt from any applicable state and local laws, ordinances or regulations. (Ex. Respon-5.)
3. The second license allows FHCL to relay (transplant) oysters and clams from certain listed/leased lots to other listed/leased lots. The license provides for a fourteen (14) consecutive day minimum purification period and notes that no oysters may be purchased from seed oyster licensees or purchased or harvested from areas classified as “Prohibited or “Conditionally Restricted-Relay (Closed)”, and advises that the licensee is not exempt from any applicable state and local laws, ordinances or regulations. (Ex. Respon-5.)

**2**  
**The Department of Agriculture/Bureau of Aquaculture**

4. The Department of Agriculture is the lead state agency on shellfish in the State. General Statutes §26-192a. The DA/BA administers the state’s shellfish sanitation program to assure safe shellfishing for commercial and recreational harvesting of shellfish, protection of the public health and compliance with the U.S. Food and Drug Administration (USFDA) National Shellfish Sanitation Program (NSSP). The

responsibilities of the DA/BA include leasing submerged state lands as approved lots for shellfish harvesting and the licensing of all commercial shellfish operations. The DA/BA also monitors the location of any contaminated shellfish to prevent any commercial or recreational harvesting until the shellfish are found to be safe for human consumption. The State Standardization Officer is certified by the USFDA to inspect commercial shellfish operations to ensure compliance with NSSP standards. (Test. 2/2/04, L. Romick, pp. 170- 171, 180-183.)

5. Shellfishing licenses are effective from July 1 to June 30. The license application for commercial shellfish operations lists the lot/lease numbers and map designation that a licensee has been assigned to harvest shellfish. The application notes: "I agree to harvest shellfish only from the above described "Approved" or "Conditionally Approved-Open" shellfishing areas. The application also provides that a licensee will stake all actively worked grounds and "conform to all regulatory and statutory requirements pertinent to this operation". Mr. Fraenza signed such an application. The licenses currently held by FHCL were issued on July 1, 2003 and expire on June 30, 2004. (Ex. D/A – 31; ex. Respon - 5.)
6. The Connecticut Shellfish Sanitation Program operates in accordance with the NSSP, a joint effort between the federal/state governments and the shellfish industry to provide consumers with safe bivalve molluscan shellfish. These shellfish may concentrate materials such as bacteria, viruses, chemicals and natural toxins from the water column in which they live and derive their food. Human consumption of shellfish that have concentrated these materials may result in illness and even death. (Test. 2/2/04, L. Romick, pp. 174-186.)
7. Shellfish harvesters can take shellfish only from their lots, assigned and approved in their licenses. Harvesters may relay shellfish from certain restricted beds to approved beds where, after an appropriate period of cleansing (depuration), these shellfish may be harvested for market. Taking shellfish from an unapproved or undesignated bed may result in the harvesting of shellfish that are not safe for human consumption, including shellfish that have not yet fully depurated, and may jeopardize public health. (Test. 2/2/04, L. Romick, pp. 171-186.)

8. Harvesters follow the Hazardous Analysis and Critical Control Point (HACCP) principles, which provide that the harvester is responsible to make sure shellfish are taken in accordance with license conditions. Each commercial shellfish operation must have at least one HACCP officer, trained in management of harvested shellfish and maintenance of boats and other equipment such as coolers and other aspects of land operations. The HACCP officer supervises operations to ensure compliance with the law and is obliged to offer for sale to the general public shellfish that is safe in accordance with the NSSP standards. Michael Fraenza is the HACCP officer for FHCL. (Test. 2/2/04, L. Romick, pp. 188-190; test. 2/5/04, M. Fraenza, pp. 486-488.)

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*Department of Environmental Protection  
Division of Law Enforcement*

9. The Department of Environmental Protection Division of Law Enforcement (DEP/DLE) enforces the State shellfish regulations. This includes the enforcement of license conditions that require that shellfish operations take place only on approved leased lots. (Test. 2/2/04, E. Lundin, pp. 122-125.)
10. Enforcement methods include routine patrols of the shoreline by air and periodic investigations. Actions are taken at the initiative of the DEP/DLE or as a result of written or oral complaints. Officers observe and assess the positions of boats through observation from shore, by reference to stakes or buoys placed by harvesters to mark the areas of active shellfishing, or through use of global positioning systems. (Test. 2/2/04, E. Lundin, pp. 116-120, 122-125, 142-149.)
11. An DEP/DLE officer with over nine years of experience testified as to his direct involvement in documenting three incidents involving FHCL that occurred from December 2002 through May 2003. The violations in these incidents included fishing off licensed grounds. The officer saw boats he identified as owned by FHCL in the act of actively shellfishing on lots not assigned to FHCL. The officer made these observations from the shore and from airplane surveillance. The officer took GPS readings and photographs to substantiate his observations and his subsequent reports on these incidents. (Exs. DA – 10, 11, 11a; test. E. Lundin, 2/2/04, pp. 116-149, 154-156, 160-163, 2/9/04, pp. 696-697.)

**B**  
**FHCL**  
**Compliance History**

12. There is a history of incidents, including complaints, warnings and arrests, as well as meetings and correspondence relating to those incidents, involving the respondent, its owner and its captains, and violations or concern about continuing violations of the respondent's licenses. These violations include shellfishing on unlicensed grounds, fishing on unmarked beds, fishing on closed grounds, illegal taking of shellfish between sunset and sunrise, and misuse of shellfishing licenses. (Exs. DA/BA - 2-12, 30, 32; test. E. Lundin, 2/2/04, pp. 116-164, 2/3/04, pp. 257-259, 2/5/04, pp. 431-437; test. L. Romick, 2/5/04, pp. 438-443; test. W. Smith, 2/5/04, pp. 466-469; test. M. Fraenza, 2/5/04, pp. 488-489, 2/9/04, pp. 586-589.)
13. The documentation of arrests, warnings and complaints regarding activities of those conducting fishing operations for FHCL logged with the DEP/DLE date from at least 2000 through 2003. Dates on which specific charges or claims of license violations were brought against Fraenza and/or FHCL captains include: 9/30/00, taking from unmarked grounds; 11/17/01, fishing off grounds; 10/28/02, insufficient number of stakes, fishing off grounds; 12/13/02, illegal taking of shellfish between sunset and sunrise, misuse of a commercial fishing license and failure to display lights when underway; 12/20/02, fishing on unmarked grounds; 12/31/02, taking from unmarked grounds, fishing off grounds; 1/15/03, fishing off grounds; and 7/18/03 (for 5/3/03), fishing off grounds. Records also note occasions on which relay activities were not reported to the DEP as required under FHCL licenses, and at least fifteen complaints from May 2000 through December 2002 regarding violations that include fishing off grounds, selling transplanted clams, and fishing before dawn. (Exs. DA/BA - 2-5, 9-12, 32.)
14. At its request, the respondent (Fraenza and counsel) met with representatives of the DA/BA on January 10, 2003. The purpose of this meeting was to address the "trouble" the respondent had been having with DEP/DLE and the respondent's desire to "find out what to do" about the recent "boarding of [its] boats" by law enforcement. This included arrests of the respondent's captains in December 2002

due to illegal taking of shellfish, fishing off grounds, and fishing on unmarked beds. The DA/BA had amended the respondent's licenses to shorten their terms to March 31, 2003, requiring renewals for licenses to June 30, 2003. This period to March 31 was referred to as "probation" of the respondent's licenses by the DA/BA. The respondent was not aware that its licenses were placed on "probation", but did know their terms had been shortened and would have to be renewed for licensure to June 30. The respondent was concerned about the ramifications of this action and wanted to establish a better relationship with the DA/BA and DEP/DLE. As a result of this meeting, the respondent updated its global positioning system (GPS), agreed to replace or place new stakes at its lots, and fined one of its captains. The respondent reapplied and its licenses were renewed for April 1 to June 30, 2003. (Exs. D/A -6-8, 12, 16, 20a, ex. Respon-2; test. L. Romick, 2/3/04, p. 262, 2/9/04, pp. 673-674; test. J. Volk, 2/3/04 pp. 307-318; test. 2/5/04, W. Smith, pp. 465-473, 480-484, M. Fraenza, pp. 488- 498.)

15. The respondent applied for its licenses for 2003-2004 on April 16, 2003, and was issued licenses for the standard annual period of July 1, 2003 to June 30, 2004. Renewal of a license by the DA/BA is based on a finding that a licensee is in compliance with all lawful license requirements at the time of renewal. On July 18, 2003, two of the respondent's captains, Fragola and Santiago, were arrested on charges related to an incident that occurred on May 3, 2003. The captains were charged with fishing on lots that were "open, undesignated", meaning that no one held a lease on those lots. The DEP/DLE subsequently asked the DA/BA to confirm the names of the captains on May 3 during the course of an inspection of the respondent's records on May 14. The DA/BA did provide those names, but did not have official notice of the probable reason for that request until it had knowledge of the arrests on July 18, 2003. The DA/BA took no immediate actions on the FHCL licenses at that time, as the arrests of the FHCL captains were proceeding through the criminal courts. (Exs. D/A -10, 11, 30, 31; ex. Respon. - 5; test. 2/2/04, E. Lundin, p. 139, L. Romick, pp. 179-182, 2/9/04, pp. 677-680; test. M. Fraenza, 2/5/04, pp. 497-498.)

16. Council for the respondent contacted and spoke to the State Prosecutor and the Director of the DA/BA soon after an October 22, 2003 memo was sent by the DA/BA to the State Prosecutor seeking prosecution and fines in the pending court proceedings regarding the respondent's boat captains and the December 2002 and May 2003 arrests. One of the penalties discussed included license suspension. (Ex. D/A – 12; test. W. Smith, 2/5/04, pp. 474 – 479.)
17. The respondent's captains appeared in court on December 9, 2003. Mr. Fragola entered a plea of nolo contendere to the December 2002 charges; the charge against him stemming from his May 2003 arrest was nolle for eventual dismissal. Mr. Santiago entered a nolo plea to the charges as a result of the May 2003 arrest. (Exs. D/A – 14, 15, 16.)

*C*  
*Notice of Process and Appeal*

18. In a letter dated December 31, 2003, the DA/BA notified FHCL that it was initiating an administrative process against the company as a result of information the DA/BA had received from the DEP/DLE regarding various shellfishing violations by FHCL between 2001 and 2003. The letter also noted that the respondent's licenses had been placed on "temporary probation" during March 2003 due to DEP citations that occurred during December 2002; informed the respondent that the DA/BA considered the nolo contendere pleas to be convictions and pleas of guilty to violations of noted shellfishing laws; notified the respondent that a pre-hearing conference had been scheduled for January 13, 2004, to provide FHCL with an "opportunity to show compliance with all lawful requirements of [General Statutes §]26-192c and the National Shellfish Sanitation Program for the retention of your licenses"; informed the respondent to "[p]repare to discuss ....your DA/BA licenses and leased grounds"; and noted that the respondent could bring legal counsel to the conference. Finally, the letter advised the respondent that its licenses could be suspended if it did not attend this mandatory meeting. (Ex. D/A – 16.)

19. The January 13, 2004 conference was held, with representatives of FHCL, the DA/BA and the DEP DLE present. A memo was given to FHCL at that conference by the DA/BA that set forth some of the “dangers of harvesting on grounds other than those stated on your license”. This memo provided specific information with regard to the seriousness and consequences of fishing on grounds not on a harvester’s license and advised the respondent that illegally harvesting shellfish from closed areas “would be an unnecessary increased risk to public health”. The DA/BA intended this memo to inform the respondent of some of the public health impacts that might not be listed on a license. (Exs. D/A 17, 19; test. L. Romick, 2/9/04, pp. 626-631.)
20. At the prehearing conference, the DA/BA reviewed complaints recorded by the DEP/DLE since the year 2000 regarding the conduct of shellfishing operations by FHCL in closed areas and off of licensed grounds. Specific allegations and incidents were summarized, starting with December 2000 and ending with the violations in December 2002. The DA/BA outlined its responsibilities and noted that enforcement actions were necessary to establish confidence that the respondent would operate in accordance with all federal and state requirements. (Ex. D/A –30; test. L. Romick, 2/9/04, pp. 576-578.)
21. The DA/BA concluded that the respondent did not provide evidence at the prehearing conference to show lawful compliance with its license conditions. FHCL was given a letter at that conference that explained the reasons for the DA/BA actions, and outlined conditions on which the FHCL would need to agree to prevent a hearing on its licenses. This January 13, 2004 letter restated the reasons for the initiation of the current process, listing the charges included in the December 31, 2003 letter and noted that FHCL had had several opportunities to take “corrective actions for the operation of your business” and had neglected to do so, and warned FHCL that it appeared that its captains, Fragola and Santiago, “are not taking adequate measures to be aware of their positions with regards to their leased shellfish bed coordinates”. The letter also advised Mr. Fraenza that as the company owner, president and HACCP supervisor he had had several “options for remediation including the retraining or removal of captains that were not abiding by the conditions of the DA/BA licenses and State Statutes”. The letter noted that “[a]dditional line buoys



could also have been placed along the ‘sides’ of your [leased] grounds so that the captains would know exactly where they were at all times”. The letter concludes that “[y]ou have not taken actions that would prevent such behavior from continuing as proven by the most recent 5/03/03 citations”. The letter stated that based on DEP/DLE incidents involving FHCL and the discussion of its shellfishing activities, the DA/BA “has been given no reason to believe that [FHCL] has been or is willing to abide by the regulations set forth by the CT DA/BA, CT DEP and USFDA”, and notified FHCL that it had until noon on January 16, 2004 to agree to listed terms or a hearing would be scheduled. (Ex. D/A-20a; test. L. Romick, 2/5/04, pp. 444-446.)

22. The proposed conditions in that letter were discussed, but not resolved by noon on January 16, 2004. In a letter faxed to the FHCL office at 6:40 PM that day, the DA/BA notified FHCL that its shellfishing licenses were suspended, effective immediately. FHCL was informed that its suspension could be limited to 90 days if the proposed terms were agreed to by January 20 at 10:00 AM. The next day, notice of the suspension was sent to the DEP/DLE. This notice, a copy of which was sent to FHCL, indicated that the FHCL office was officially notified on January 17 at 8:00 AM. (Exs. D/A 23, 24, ex. HO-1; test. L. Romick, 2/2/04, pp. 90-91.)
23. The January 16 letter restated the reasons for the action of the DA/BA, and summarized the administrative process that had taken place to that point. The letter informed the respondent that it had not demonstrated compliance at the prehearing conference and concluded that because the respondent had rejected terms presented to retain its licenses, public health and safety required the immediate suspension of its license. (Exs. D/A -23, 24.)
24. In a January 19, 2004 letter, FHCL requested a hearing and further discussions. Negotiations took place. In a January 20 letter, FHCL made a counter-offer to the DA/BA and repeated its request for a hearing if these terms were not accepted. In a January 21 letter, the DA/BA notified FHCL it had rejected the counter-proposal and had scheduled a hearing for February 2, 2004 at the Department’s offices in Hartford.<sup>2</sup> (Exs. D/A-26, 27, 28.)

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<sup>2</sup>Sometime after the January 21 notice but prior to the February 2 hearing, the DA/BA sent the respondent copies of its proposed exhibits pursuant to a request to produce documents. (Tr. 2/2/04, pp. 24-25.)

25. Hearings were conducted on five days between February 2 and 10, 2004.<sup>3</sup> On February 13, the DA/BA filed a “Notice of Penalty”, which listed the following conditions for license renewal.

- a. No relay and market harvest of shellfish on the same day for at least one year.
- b. Records submitted for copy by the DA/BA every six months for one year.
- c. No relay to land to the FHCL cooler until adherence to the NSSP-Model Ordinance regulations can be demonstrated. A request to reinstate this privilege may be reviewed by the DA/BA after a period of twelve months.
- d. Carlos Fragola and Miguel Santiago not to be captains until such time that it can be demonstrated that they will comply with the license requirements.
- e. All new captains must attend a HACCP training course.
- f. Any future inspection failures not resolved in five working days, DEP fine or arrest, violation of Connecticut General Statutes, or conviction will result in a minimum 180-day suspension of all DA/BA licenses.

(Ex. HO-2.)

### ***III*** ***CONCLUSIONS OF LAW***

#### ***A*** ***Notice***

Possession of a commercial shellfishing license is a property right. See *Burton v. Mottolese*, 267 Conn. 1 (2003) (license to practice law). General Statutes §26-192c and due process provide that this right cannot be revoked except for cause after notice and an opportunity to be heard. Section 4-182(c) of the General Statutes provides that prior to instituting revocation proceedings, an agency must give a licensee notice of the facts or conduct that warrant revocation, and the licensee must be given an opportunity to show compliance with all lawful requirements for the retention of its license. *Id.* at 18-19. Section 4-177(b) describes “reasonable notice” under the Uniform Administrative Procedures Act.<sup>4</sup>

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<sup>3</sup> The Commissioner of Environmental Protection delegated his authority to me to hear evidence and render a proposed final decision in this matter. General Statutes §22a-2.

<sup>4</sup> The respondent also cites Regs., Conn. State Agencies §22-7-25; this regulation has been repealed.

A licensee must be given adequate notice and a meaningful opportunity to be heard. Notice is adequate when charges are sufficiently described to enable a licensee to produce relevant evidence at the hearing, to cross-examine witnesses, and to offer rebuttal evidence. (Citations omitted.) *Burton v. Mottolese*, supra, 267 Conn. 19, citing *Briggs v. McWeeney*, 260 Conn. 296, 318 (2002); *Grimes v. Conservation Commission* 243 Conn. 266, 273 (1997). See also *Jarvis Acres, Inc. v. Zoning Commission*, 163 Conn. 41, 47 (1972) (notice allows parties to prepare intelligently for the hearing). Due process is a flexible concept and is evaluated with regard to the facts of a case that require these procedural protections. *Burton v. Mottolese*, supra, 267 Conn. 19, citing *Thalheim v. Greenwich*, 256 Conn. 628, 648 (2001).

FHCL claims that it did not receive proper notice of the hearing because the January 21 letter only advised it of the date, time and place of the hearing and did not contain the “substance of the facts” that would be the subject of the hearing. This argument places form over substance and ignores the facts that show that FHCL was fully informed of the conduct that would be the subject of the hearing, was given an opportunity to be heard on that conduct and was able to fully participate in a hearing with which it was promptly provided at its request.

FHCL was informed that an administrative process had been initiated when it received the December 31, 2003 letter from the DA/BA. This letter notified FHCL of the January 13, 2004 prehearing conference, which would provide an opportunity for FHCL to be heard and show compliance with the lawful requirements of the relevant law and standards in order to retain its licenses. The letter also advised FHCL to be prepared to discuss its licenses and assigned lots at the prehearing conference; that it needed to show compliance to retain those licenses; and that an agency hearing would be scheduled if a satisfactory agreement were not reached at this conference.

During that conference, the DA/BA reviewed complaints recorded by the DEP/DLE since 2000 regarding FHCL shellfishing operations in closed areas and off of its licensed grounds. Specific allegations and incidents were summarized, starting with December 2000 and ending with the violations in December 2002. The DA/BA outlined its responsibilities

and noted that enforcement actions were necessary to establish its confidence that FHCL would operate in accordance with all federal and state requirements. The DA/BA also gave FHCL a memo outlining the dangers of harvesting off leased grounds and warning FHCL that illegally harvesting shellfish would be an unnecessary increased risk to public health.

The letter given to FHCL at that conference listed past incidents, including charges listed in the December 31, 2003 letter, noted that FHCL had not taken “corrective actions”, and that it appeared that FHCL captains were “not taking adequate measures to be aware of their positions with regard to their leased shellfish bed coordinates”. The letter advised Fraenza that he had not taken several “options for remediation”, including retraining/removing offending captains or placing additional line buoys along the sides of lots so captains would know their locations. The letter noted that the citations for the May 3, 2003 incidents demonstrated that no actions had been taken to prevent this behavior from continuing and concluded that based on the incidents involving FHCL and shellfishing activities discussed at the prehearing conference, the DA/BA had no reason to believe that FHCL had been or was willing to abide by relevant regulations. The letter advised FHCL that it had until noon on January 16, 2004 to agree to outlined terms or a formal hearing would be scheduled.

The respondent was aware of the conduct that caused action by the DA/BA. The December 31 letter advised of specific charges; the January 13 letter restated those charges and advised FHCL of measures it could take, but had not, to assure that shellfishing operations would take place inside its assigned lots. FHCL also knew its history of incidents, complaints, warnings, and arrests on charges that included fishing off grounds and other violations of its licenses. FHCL knew that the terms of its licenses had been shortened in January 2003 to expire on March 31, 2003, regardless of whether it understood that this was referred to as “probation” of its licenses by the DA/BA.<sup>5</sup> Correspondence and testimony

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<sup>5</sup> Although the term “probation” was not consistently used to describe this action taken by the DA/BA, FHCL knew its license periods had been shortened and why. It is difficult to resist the labeling of the lengthy argument presented by the respondent on this issue as a “red herring” in this appeal.

indicate that the respondent understood the potential seriousness of the issues it faced.<sup>6</sup> FHCL knew that the May 3, 2003 incidents concerned allegations of fishing off grounds, and was therefore conscious that this issue continued, despite the eventual pleas of those captains in court.

Throughout this appeal, the respondent has maintained that it did not – and has not -- received adequate notice as to *how* it has failed to comply with the lawful requirements for the retention of its license. As a licensee, the respondent agreed to conduct its shellfishing activities within the boundaries of its assigned lots. A licensee has an affirmative obligation to understand and comply with the laws and regulations that govern the privilege of obtaining and maintaining its license. See e.g. *Metzger v. Liquor Control Commission*, 5 Conn. Supp. 118 (1937) (duty of licensee to ensure that terms of license not violated).

FHCL was also provided with written statements of the conduct that formed the basis for the action to revoke its licenses. The letter given to FHCL at the January 13, 2004 prehearing conference also indicated that FHCL had had opportunities to take corrective actions and listed “options for remediation”, including retraining or removing captains who had violated FHCL licenses and the placement of additional line buoys to mark FHCL lots more effectively. The DA/BA and respondent’s counsel were in regular contact over the weeks and days after the prehearing conference, discussing the terms of a possible settlement of this matter. While the specific terms of the negotiations cannot be considered, these discussions are additional evidence of the respondent’s awareness of the nature of the claims it faced and that a hearing would be scheduled if no agreement were reached.

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<sup>6</sup> Despite the fairly hollow assertion of the respondent’s former counsel, appearing as a fact witness, that his client was truly puzzled by the enforcement actions taken in December 2002 against FHCL, the January 2003 meeting was requested to discuss law enforcement “troubles” and develop a better relationship with the DA/BA and DEP/DLE to prevent action being taken on the respondent’s licenses. The need to conduct its fishing operations within the boundaries of its assigned lots was discussed at that meeting and, as a result, the respondent agreed to take actions to prevent that license violation. See *Richards v. Richards*, 82 Conn. App. 372, 376 (2004) (noting a fact-finder’s exclusive province to determine the credibility of witnesses).

Due process requires adequate notice of the facts or conduct that will be the subject of a hearing. The respondent was advised of the “facts or conduct” that would be the basis of the hearing, as required by §4-182(c). At the respondent’s request, the DA/BA scheduled a hearing for February 2, 2004, and so advised the respondent on January 21, 2004. The respondent knew what would be discussed at the pending hearing. The respondent presented relevant evidence at the hearing, cross-examined witnesses, and offered rebuttal evidence. The respondent’s argument that because the final letter advising of the hearing date, time and place, did not recite information it already knew does not support a finding that the respondent was unfairly denied due process to its detriment. See *In re Dodson*, 214 Conn. 344 (1990) (noting that the essence of due process is fairness).

***B***  
***License Suspension/Revocation***  
***I***  
***Substantial Evidence***

The DA/BA may revoke any commercial shellfishing license for cause, after notification and hearing. General Statutes §26-192c. Licenses may be suspended pending revocation proceedings if operations are a public health hazard or if the licensee “has violated” any provision of that section, other listed statutes and applicable regulations and sections of the Public Health Code. A license may be summarily suspended if an emergency situation exists and the DA/BA determines that public health and safety is at risk. §4-182(c). The DA/BA has the burden of proving that cause exists to suspend, revoke or otherwise impose restrictions on the respondent’s licenses.

Administrative fact-finding is governed by the substantial evidence rule. §4-183(j)(5). There is substantial evidence if the record provides a substantial basis of fact from which a fact in issue could be reasonably inferred. *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn. App. 391, 400, cert. denied, 245 Conn. 917 (1998). The fact-finder is free to contrast conflicting versions of events and determine which are more credible; the trier may also determine the credibility of witnesses and decide how much of a witnesses’ testimony to accept or reject. *Richards v. Richards*, 82 Conn. App. 372, 376 (2004).

There is substantial evidence that the respondent's boats have not always been positioned inside its lots when engaged in shellfishing operations. The respondent's pattern of behavior, revealed in documents and testimony, demonstrates a disregard for the requirement that all shellfishing operations be conducted on approved and assigned lots to safeguard public health and safety, and is a violation of the respondent's licenses. The evidence of the circumstances surrounding its action also shows that the DA/BA acted reasonably at the time by suspending the respondent's licenses to address an immediate threat to public health.

2

*Nolo Contendere Pleas*

The respondent maintains that evidence of the May 3, 2003 arrests of its captains cannot be admitted as these arrests were the subject of pleas of nolo contendere. It is true that a plea of nolo contendere, a declaration by an accused that he will not contest a charge, is not admissible as an admission of conduct or evidence of an arrest, even though a finding of guilty and the imposition of a penalty follow this plea. *Lawrence v. Kozlowski*, 171 Conn. 705 (1976). Therefore, the charges that were the subject of these pleas are not admissible to show that either captain admitted to fishing off grounds or was arrested for that conduct.

However, even without an admission to the alleged behavior that resulted in the arrests, independent evidence was introduced through the testimony of a DEP/DLE officer, along with supporting documents, which demonstrated that the captains were conducting fishing operations outside the boundaries of lots assigned to the FHCL on the dates noted by that officer.<sup>7</sup> The nolo contendere pleas do not erase this testimony and documentation from the record in this administrative appeal. Finally, even without this evidence, the DA/BA introduced sufficient evidence of other conduct attributed to FHCL to support a finding that agents of FHCL violated or were warned about violating provisions of FHCL licenses to support action by the DA/BA to revoke those licenses. An agency finding that is supported by substantial evidence will not be rejected merely because the agency discusses incompetent or irrelevant evidence that was not relied on. *Lawrence v. Kozlowski*, supra, 171 Conn. 715.

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<sup>7</sup> These documents were evidence of respondent's awareness and notice of the pattern of conduct that resulted in this administrative action. See supra.

3  
*Estoppel*

The respondent argues that action on its licenses cannot be based on any alleged conduct of FHCL or its agents prior to July 1, 2003, the date on which its license was renewed. The respondent argues that by renewing its licenses on that date, the DA/BA admitted that the FHCL was in compliance with all applicable standards for its licenses. FHCL maintains it was punished for prior violations when its licenses were amended to a shorter expiration date in January 2003, and argues that since the only new offenses were the subject of the nolo pleas and inadmissible, it cannot now be punished twice for the earlier offenses. The respondent also claims that the DA/BA cannot take this action because it took action to comply with all the requirements for the retention of its licenses.

Section 26-192c provides that action may be taken if a licensee “has violated” provisions of that section, other statutes and regulations, and sections of the Public Health Code. There is nothing in the clear language of the statute that prescribes the timing of those violations, that violations must be on-going or that administrative actions are limited to one sanction per violation. See *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 658 (2001) (great deference accorded to the construction given a statute by the agency charged with its enforcement.) Also, at the time of the July 1, 2003 license renewal, the DA/BA did not have official notice of any misconduct on the part of any agents of the FHCL. Even if the DA/BA had officially known about the arrests and had rejected the license application because it found FHCL out of compliance, its actions would have been premature pending the conclusion of criminal proceedings due to the July 18 arrests.

The respondent was aware of the incidents on which this action was based and provided no evidence that it challenged or inquired as to the inclusion of charges prior to July 1, 2003, which it now maintains the DA/BA cannot include. FHCL also fails to note its receipt of any information on which it relied to its detriment. FHCL cannot support its claim that the DA/BA is estopped from proceeding on its licenses. See *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221, 247 (1995)(evidence necessary to support claim of estoppel).



The respondent also offers no persuasive argument that the DA/BA was prevented from taking this administrative action because FHCL met with the DA/BA to foster a better relationship and that it took actions, such as purchasing an updated GPS system, to comply with the requirements for the retention of its licenses. The respondent did offer evidence that it fined one of its captains, and testified as to the updating of its GPS and its improved system of staking its lots. The respondent has offered no support for the proposition that just because it sought an improved relationship with the DA/BA and has taken certain actions to prevent certain conduct, the DA/BA is estopped from taking action based on sufficient evidence of that conduct.

#### **4**

#### ***Threat to Public Health***

The DA/BA summarily suspended the respondent's licenses on January 16, 2004. The DA/BA found that considerations of health and safety "imperatively required emergency action" and took immediate action to stop the respondent from conducting its activities.

Section 4-182(c) requires the timely initiation of administrative proceedings following a license suspension. The respondent first requested a hearing on January 19, 2004, and repeated this request in a counter-offer on January 20. In a January 21 letter, the DA/BA informed FHCL that it had rejected the counter-offer, and notified FHCL that a hearing would be promptly provided on February 2, 2004, at a listed time and place.

Without admitting to the allegations, FHCL argue that the alleged active shellfishing on May 3, 2003 in areas marked "open, undesignated" by two of its captains does not amount to a threat to public health. Therefore, to the extent that this was the basis for revocation or an emergency suspension of the respondent's licenses, the respondent argues that the concern of the DA/BA on this issue was "purely speculative", not based on any evidence of harm (i.e. the selling of shellfish from those areas), and therefore not a proven threat to public health. The respondent also appears to argue that because there was no evidence introduced as to what other shellfishing operations were doing to establish a standard of care, the DA/BA cannot prove the actions of the respondent were not in compliance with its licenses.

The purpose of issuing licenses pursuant to the state shellfishing laws and regulations is to assure that shellfishing operations are conducted on assigned lots. The act of conducting commercial shellfishing operations off licensed grounds is itself a threat to public health and safety. The clear language of §26-192c does not provide that a license may only be revoked or suspended when an *actual* threat to public health has been proved. See *Rocque v. Freedom of Information Commission*, supra, 255 Conn. 658 (great deference accorded to construction given a statute by the agency charged with its enforcement.)

It is abundantly clear that shellfish harvested from unassigned lots are a potential risk to public health and safety. Harvesters that take shellfish from unassigned lots are in violation of their licenses. Where, as here, the DA/BA has evidence that a licensee – any shellfishing company – has exhibited behaviors demonstrating a pattern of failures to assure that shellfishing operations are conducted in only in assigned lots, it must take action.

The apparent argument that open, undesignated lots are not proven unsafe and therefore are not proven health risks is of no merit, and indeed, precariously unsound. The potential for harm is present in lots that have not been assigned because the harvester taking shellfish from those lots does not know the condition of the shellfish in lots to which it has not be given permission to harvest

Similarly unpersuasive is the respondent's argument that the DA/BA needed to offer proof of harm; in other words, that the shellfish had been marketed. This startling contention would entirely frustrate the preventative purpose of the shellfishing regulations. If the agency entrusted with the obligation to protect public health and safety needed to wait until it had proof of harm (here, the marketing of shellfish), one can only imagine the consequences.

The respondent had a pattern of failing to assure that its shellfishing operations were conducted within the boundaries of its assigned lots. At the time it suspended the FHCL licenses, the DA/BA had concluded that this behavior was a threat to public health and summarily suspended the licenses. The Department subsequently removed those suspensions, pending the outcome of the respondent's appeal in which the record could be

more thoroughly examined to determine grounds for revocation. This action of the Department does not impact the conclusion that in view of all the evidence available to it at that time, the DA/BA acted reasonably, legally and logically to prevent the potential for harm to the public health and safety. The summary suspension of the respondent's licenses addressed the immediate concerns of the DA/BA regarding the threat to public health caused by the respondent's conduct, and was a reasonable and responsible action by the DA/BA.

### *C*

#### ***Request for Penalties/Conditions on License Renewal***

The DA/BA has proposed six conditions for the renewal of the respondent's licenses on July 1, 2004. Although the DA/BA demonstrated that it has good cause to propose these conditions, it did not introduce sufficient evidence to show a connection between its proposals and the prevention of potentially harmful conduct by the respondent.

The DA/BA cites terms discussed in settlement negotiations as support for its proposals. Although relevant to the issue of notice and admissible to show that such discussions took place, the particular conditions that were the subject of negotiations, the offers of compromise to settle a disputed claim, are not generally admissible. Tait, *Handbook of Connecticut Evidence* §4.25.2, 3<sup>rd</sup> ed. 2001.

The DA/BA did not present sufficient evidence to support its proposed conditions that would impose a one-year prohibition on relay and market harvest of shellfish on the same day, and ban the relay to land to the FHCL cooler at 265 Front Street until such time that adherence to the National Shellfish Sanitation Program-Model Ordinance (NSSP-MO) regulations can be demonstrated. The DA/BA did not show how these conditions would prevent unsafe shellfish from being harvested or marketed. A fact-finder cannot base a finding on speculation or conjecture. *Roy v. Michaud*, 5 Conn. App. 695, 699 (1985), cert. denied, 198 Conn. 806 (1986).

The DA/BA also did not demonstrate how requiring FHCL to submit its records for copy by the DA/BA every six months for one year would result in additional assurance of license compliance. No evidence suggested that if records were in error, a review of those records would reveal activities or results that would indicate license violations. In any event, if the DA/BA believes a review of the records is warranted, an inspection of those records is within the parameters of its general authority and responsibility pursuant to §26-192c.

The DA/BA cites no authority that would allow it to prohibit Fragola and Santiago from working as captains for FHCL until they can show compliance with FHCL licenses and to require that all new FHCL captains take HACCP training. As agents for FHCL, the captains are ultimately liable to FHCL for the consequences of their actions. Also, as required, Mr. Fraenza is the FHCL officer, who is trained and required to assure that shellfish operations, and the actions of all agents for FHCL, adhere to HACCP principles.

Finally, the DA/BA seeks a condition that “[a]ny future inspection failures not resolved in five working days, DEP fine or arrest, violation of Connecticut General Statutes, or conviction will result in a minimum 180-day suspension of all DA/BA licenses”. The DA/BA presents no support for this overbroad and fairly vague condition that could result in an automatic six-month suspension. In addition, because a suspension of this length would effectively revoke a license for a significant period of time, this proposed condition would deny a commercial licensee its right to earn a living, a property right, without due process.

#### ***IV*** ***CONCLUSION***

The DA/BA has presented sufficient evidence to support this action to revoke the respondent’s licenses. The respondent has exhibited a pattern of behavior in disregard of its obligation to conduct its shellfishing operations within the boundaries of its assigned/leased lots, in violation of its licenses. The respondent received adequate notice of the facts or conduct that was the subject of this administrative proceeding and was provided with a meaningful opportunity to be heard. The suspension of those licenses, warranted by the responsibilities of the DA/BA to protect public health, addressed the threat presented by the

respondent's continued license violations and effectively revoked the FHCL licenses for thirty-nine days. Although the evidence presented demonstrated clear motivation for its request for conditions on any renewal of the respondent's licenses, the DA/BA did not provide sufficient evidence to justify the placement of those conditions on renewed licenses.

V

**RECOMMENDATION**

The Department should *deny* the request of the DA/BA to further revoke the respondent's licenses until they expire on June 30, 2004, and *deny* the request that certain conditions, listed above, be placed on license renewal. The Department should *affirm* the continuing duty of the DA/BA to safeguard public health and safety through its authority to inspect, regulate and license shellfishing operations.

The respondent should be strongly advised to remain cognizant of its obligation under its licenses to conduct its shellfishing operations within the boundaries of its assigned lots. The respondent should be advised that its licenses, if renewed, will remain within the jurisdiction of the DA/BA, which has the authority and responsibility under §22a-192c to revoke, suspend or amend the licenses it grants, and which can refuse to issue a license if an applicant has violated any provision of relevant shellfishing statutes, regulations or applicable section of the public health code.

6/18/04 \_\_\_\_\_  
Date

/s/ Janice B. Deshais \_\_\_\_\_  
Janice B. Deshais, Hearing Officer