

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

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

AAD NO. 98-002/ENE

MODIFICATION AND REMAND OF RECOMMENDED DECISION

I am in receipt of the recommended Decision and Order in the above-entitled matter, dated July 7, 2000. After review of the Hearing Officer's Decision and Order and the record I cannot affirm the decision of the Hearing Officer. Although I concur with each of the Hearing Officer's Findings of Fact (*I particularly note the Hearing Officer's statement at Page 5 of her recommended Decision and Order that it was virtually undisputed that 155 undersized shellfish were seized from Best of the Bay, Inc. ("Best" or "Respondent") on June 2, 1998*), I do not concur with the Hearing Officer's stated Conclusions of Law. Specifically, I disagree with the Hearing Officer's interpretation of the definition of the term "possession" as set forth in R.I.G.L. Section 20-1-3(a)(6) and her proposed Conclusions of Law 2 and 3¹ that arise from that interpretation.

As the administrative agency charged with the administration of the provisions of R.I.G.L. Title 20, the Department of Environmental Management ("DEM"), bears the initial responsibility of interpreting the statutes in question.

¹ The Hearing Officer's proposed Conclusions of Law 2 and 3 read as follows:

2. The Division has failed to prove by a preponderance of the evidence that Respondent had "possession" of the undersized quahaugs as the term is defined in R.I.G.L. §20-1-3(a)(6) and in the regulations.
3. The Division has failed to prove by a preponderance of the evidence that Respondent violated R.I.G.L. §20-6-11 as alleged in the letter of suspension dated December 22, 1998.

Such an interpretation is generally accorded great weight so long as it is consistent with policies or obvious purposes of the legislative enactment. Gryguc v. Bendick, 510 A.2d 937, 939 (RI 1986).

In the present matter, the relevant question to be answered in determining whether Best violated the provisions of R.I.G.L. Section 20-6-11 is when did Best first have "possession" of the undersized quahaugs that were seized by DEM on June 2, 1998.

R.I.G.L. Section 20-1-3(a)(6) defines "possession" as follows:

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

The interpretation and application of R.I.G.L. §20-1-3(A)(6) involves answering a two-pronged question: (1) Did Best exercise dominion and control over the quahaugs and (2) Did Best make a decision not to return the quahaugs to the vicinity from which they were taken. In interpreting this statute, R.I.G.L. Section 20-1-22 requires that the provisions of Title 20 "shall be interpreted and construed liberally in aid of its declared purpose."

As to the first prong of the definition of "possession," I hereby find that Best exercised "dominion and control" over the undersized quahaugs commencing at the time that it accepted delivery of the product from the shipping company in Seekonk and delivered the undersized quahaugs for sale to a paying buyer, Captain's Catch. Possession of and the right to dictate the destiny of a bundle of goods are two clear examples of "dominion and control."

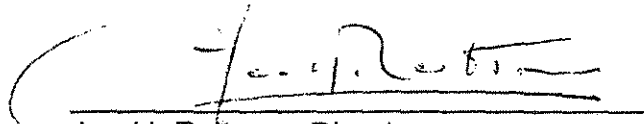
As to the second prong of the "possession" test, I find that Best made its decision "not to return the resource to the immediate vicinity from which it was taken" when it delivered the quahaugs to a paying customer in a commercial transaction and, thereby, relinquished its dominion and control over the quahaugs. I further find that Best's decision to tranship the quahaugs directly to its buyer without first measuring them to determine their compliance with State law was tantamount to a voluntary waiver of its first "practical" opportunity to measure the quahaugs. Best's argument that the "first practical opportunity" to inspect the quahaugs to determine whether they were of legal size was only after the shellfish had been sold and returned is wholly unpersuasive. Best has an obligation to determine whether the shellfish and other resources that it sells are legal. Best can not shift that obligation to its customers. If Best chooses to exercise "dominion and control" over quahaugs at a location other than at its place of business and to ship those quahaugs to a customer directly from that location, then that becomes Best's "first [and only] practical opportunity" to inspect the resource for compliance by default. Practical alternatives for Best would have been either to have the shellfish delivered directly to its place of business in Warren or to simply tranship the shellfish to its customers via its Warren facility for measuring. If Best insists on transhipping shellfish directly from a remote shipping dock to its customers, then it needs to provide a means to measure the shellfish (either at that remote location or another intermediate location) before it relinquishes possession of the shellfish to a buyer.

Finally, I disagree with the Hearing Officer's conclusion that DEM must show that a respondent had "knowledge and intent" to possess undersized

shellfish in order to be found in violation of R.I.G.L. Section 20-6-11 (see recommended Decision and Order at 9). Requiring proof of knowledge and intent in every case would ignore the fact that the definition of "possession" places an affirmative duty on the possessor to determine whether the resource in his/her possession is legal at the first practical opportunity. Although proof of knowledge and intent is one way for DEM to establish a violation of R.I.G.L. Section 20-6-11 it is not the only way to establish such a violation. Based on the definition of the term "possession" and my interpretation and application of that definition herein, I find that in the absence of proof of a respondent's knowledge or intent to possess undersized shellfish, it is sufficient for DEM to show that the respondent has had a practical opportunity (under the facts and circumstances of each individual case) to inspect the shellfish for compliance with State laws and regulations and has either failed or elected not to do so.

Best has a duty to insure that it possesses and sells only legal size quahaugs. Best cannot profit from the sale of quahaugs and then remove itself from potential liability under applicable law by simply enacting a sales procedure that keeps Best ignorant of the illegality of the product that it is selling. If it were determined that "possession" only commenced on the date that a shellfish dealer knew that he/she was in possession of contraband, then there would be a strong incentive for dealers not to examine their products in order to avoid liability. In conclude that to interpret "possession" so as to create such a "willful ignorance" loophole would seriously undermine the public confidence in this important natural resource and would also conflict with the stated purposes of Title 20 to manage and preserve the precious natural resources of this State.

WHEREFORE, the papers of this case are hereby remanded to the
Hearing Officer for new Conclusions of Law consistent with this decision.



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

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded by regular mail, postage prepaid, to Deborah A. Barclay, Esquire, c/o Kristen Barkett, Esquire, 572 Main Street, Warren, RI 02885; by interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, Fish and Wildlife, Oliver Stedmen Government Center, 4808 Tower Hill Road, Wakefield, RI 02879 on this ^{KTH}~~28~~ day of July, 2000.

