

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

RE: WOOD HOLLOW TRAWLERS, INC.  
NOTICE OF SUSPENSION F/V LUKE AND SARAH

AAD No. 06-002/ENE

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD) pursuant to Respondent's request for hearing on the Notice of Suspension of Commercial Fishing License issued by the Department of Environmental Management, Division of Law Enforcement (Division) on June 16, 2006.

The prehearing conference was conducted on November 9, 2006. Although the matter was originally scheduled for hearing on February 12, 13 and 14, 2007, it was continued several times due to illnesses of Respondent's attorney(s) and of Respondent's primary witness, as well as for attorney or witness unavailability. The hearing eventually was conducted on January 15 and 23, 2008 and on March 19, 2008. The Division was represented by Gary Powers, Esq. Roberta Mulholland, Esq. represented the Respondent at the hearing. The Division's Post Hearing Memorandum was filed on April 25, 2008. The Respondent's Post Hearing Memorandum was filed on June 5, 2008.

The adjudicatory proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. Gen. Laws § 42-17.7-1 *et seq.*); the *Administrative Procedures Act* (R.I. Gen. Laws § 42-35-1 *et seq.*); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD Rules)*; and the *Rhode Island Marine Fisheries Regulations, Part VII Minimum Sizes of Fish/Shellfish (Marine Fisheries Regulations)*.

Subsequent to the hearing and following my review of the pertinent regulations and of the parties' post-hearing memoranda, I requested that the attorneys be present for a settlement conference on July 24, 2008. In order to avoid off-the-record communications from a party that could be challenged as influencing the decision in this matter, the parties were informed of the substance of this decision and urged to settle the matter. The Division declined.

PREHEARING CONFERENCE

The prehearing conference was conducted on November 9, 2006. The parties did not agree to any stipulations of fact.

The Division identified the following as the issue to be considered by the Hearing Officer at the hearing:

1. Whether the Respondent violated the terms of Respondent's aggregate scup agreement on April 20, 2006 in that the vessel had scup on board the vessel in excess of the daily possession limit of Two Thousand (2,000 lbs.) pounds, however, the only person authorized to operate the vessel while participating in the aggregate program was not on the vessel at the time of the inspection.

Respondent identified the following as issues to be considered by the Hearing Officer at the hearing: the outstanding motions; subpoenas; possible summary judgment motions. No further issues were identified nor was any motion for summary judgment filed.

A list of the exhibits as they were admitted at the hearing is attached to this Decision as Appendix A.

HEARING SUMMARY

Respondent Wood Hollow Trawlers, Inc. was cited for a violation of R.I. Gen. Laws § 20-1-4 and *Marine Fisheries Regulations Part 7.11.2-1* in that, during an inspection conducted on April 20, 2006, the Respondent's vessel *Luke and Sarah* was found to be not in compliance with the terms of its permit to participate in the biweekly trip program for scup (referred to in testimony as the scup aggregate program). The Notice of Suspension of Commercial Fishing License was issued on June 16, 2006 and sought to suspend the Respondent corporation's participation in the commercial fisheries for Winter I period 2007 as well as Respondent's commercial fishing privileges for an additional period of thirty (30) days. On July 17, 2006 Respondent filed its appeal at the AAD. The Division bears the burden of proving the allegations set forth in the Notice of Suspension by a preponderance of the evidence.

The Division waived its opening statement and called five (5) witnesses to testify, all of whom are DEM Environmental Police Officers: Wendy L. Knowlton; Michael R. Schipritt; Mark C. Saunders; Charles M. Jackman; and Michael J. Stach. Although Officer Jackman was the fourth witness, his participation in the

inspection was pivotal to its outcome: the confiscation of the catch and the issuance of the Notice of Suspension. Due to his role in the matter, his testimony is discussed first.

#### I. The Violation

Under direct and cross examination Charles Jackman explained his work experience and background. Prior to his employment at DEM Mr. Jackman served twelve years in the Coast Guard as a boat operator for search and rescue. When he began his employment at the DEM in November 2004, he was a Police Officer Trainee and attended the Municipal Police Academy, graduating on March 17, 2005. He stated that individuals in the position are on probation for a year, then are no longer considered trainees. In November 2005 Mr. Jackman obtained the title of Environmental Police Officer 1, the lowest rank in the hierarchy of Environmental Police Officers.

On April 20, 2006, the date the F/V *Luke and Sarah* was boarded by the four Environmental Police Officers, Charles Jackman was an Environmental Police Officer 1. It was his first year enforcing the *Marine Fisheries Regulations* and possibly the first time he had boarded a vessel to inspect compliance with the aggregate program. The winter period beginning in January 2006 was also the first period, that he was aware of, for the program.

Officer Jackman explained that in boarding a vessel, unless an individual is present who holds the rank of sergeant or above, no one particularly is in charge. In this case Michael Stach initially took the lead.

According to his testimony and narrative statement (Div 5) the three Officers Charles Jackman, Michael J. Stach and Wendy L. Knowlton were on boat patrol in the Point Judith Harbor Refuge I on the morning of April 20, 2006. They observed the F/V *Luke and Sarah* inbound and followed the vessel into Point Judith to determine if the vessel had landed fluke. After the vessel had tied up at the dock, Officer Michael Stach contacted the operator of the vessel, Audrius Sumbaraskas, and asked for his permits, licenses and logs. Mr. Sumbaraskas produced his Rhode Island commercial fishing license and license to land fish.

Upon his review of the vessel's log, Officer Stach established that there was 22,000 pounds of scup on board, at which point Officer Jackman told Mr. Sumbaraskas that he needed to have a scup aggregate permit on board in order to land that amount of scup. Mr. Sumbaraskas was unable to locate the permit in

the vessel's permit binder. Officer Jackman then contacted the dispatch office to ascertain whether the vessel was in the program and was informed that it was, but that the only operator listed was James Thayer, Jr.. Officer Jackman told Mr. Sumbaraskas that he was not on the permit; he was not allowed to bring in more than the current limit of scup, 2000 pounds per day; and that the vessel was in violation of the terms of the program. Mr. Sumbaraskas then placed a telephone call to the owner, James Thayer, Jr., who arrived on the scene approximately twenty minutes later.

Officer Jackman, who by this time had taken charge of the inspection, spoke to an agitated Mr. Thayer upon his arrival. He informed Mr. Thayer that the permit was not on the vessel and that all operators and owners were required to sign the program's application. Mr. Thayer told him that he (Jackman) was "being picky", and that if the operator had called Mr. Thayer when he was supposed to, Mr. Thayer would have been on board when the vessel docked and the Officers would not have known he was not on the trip.

According to the narrative statement, Officer Jackman then advised the owner and operator that the Officers were going to seize the scup. In his testimony Officer Jackman added that he had contacted the marine supervisor, Lt. Dean Lees, and he and Lt. Lees decided to seize the scup and charge the owner of the vessel with the violation. Officer Michael R. Schipritt arrived while the scup was being off-loaded and assumed control of the situation as Officers Jackman, Stach and Knowlton returned to Wickford on the patrol boat. The catch seizure is further discussed below.

Under cross examination the witness was asked about his training and familiarity with the *Marine Fisheries Regulations*. He stated that although there was no in-service training to interpret the regulations, he had been interpreting state regulations since 1998 because part of his Coast Guard duties included enforcing the state laws. He testified that he and the other officers were told of the aggregate permit program by Sergeant Edward Cabral, probably in December 2005. On the day of the vessel inspection, his copy of the *Marine Fisheries Regulations* remained in his bag on the patrol boat.

In Officer Jackman's interpretation of the regulations, operators must be listed on the permit so they understand that they have to comply with the program's requirements. He was unaware whether owners were required to update the information on the permit. He stated that there was no actual list of approved permittees, just a stack of applications that the Division had faxed to the dispatch office. He was unfamiliar

with the requirement set forth in Part 7.11.2-1 (a) that DEM maintain a list of approved applicants in the program. The witness stated that he obtained a copy of Respondent's permit shortly after April 20, 2006. He acknowledged that it was the application itself and that no separate permit was issued; that the application did not contain any DEM signature, any date or other indication of approval; and did not even look like a permit.

The witness conceded that he was not familiar with other regulations concerning operators of vessels and was not aware of any other notices of violation issued to owners for not having listed operators on permits.

The testimony of Officers Knowlton and Stach regarding what transpired on the vessel was similar to that of Officer Jackman. Officer Wendy Knowlton testified that Officers Stach and Jackman were in charge of the investigation. She stated that she had very limited knowledge of the scup aggregate program; did not know how long the program had been in place; had not reviewed all of the scup regulations; nor had she had any discussions regarding the interpretation or enforcement of the regulations. She did not make the decision to bring the administrative enforcement action against Wood Hollow. She stated that when Officer Jackman was explaining the requirements of the program and permit to Mr. Sumbaraskas, he was also educating her.

In Officer Michael Stach's narrative report (Div 7), he recites that Officer Jackman asked Mr. Sumbaraskas for the aggregate permit; explained to Mr. Sumbaraskas the need to be part of the scup aggregate program to be in possession of that amount of scup; contacted dispatch; and advised Mr. Sumbaraskas that he could only be in possession of the current scup limit of 2,000 pounds per day. The report states that upon Mr. Thayer's arrival, Officer Jackman explained the situation, informed him of how the aggregate program worked and stated that the instructions were on the permit. Officer Stach testified that he did not participate in any discussions with superiors regarding the violation of the scup aggregate program. He acknowledged that he has been involved in very few, if any, violations of this section of the *Marine Fisheries Regulations*. He was not aware of any other violations due to an operator not being listed on a permit.

The fourth Environmental Police Officer, Michael R. Schipritt, arrived on the scene after the fisheries violation had already been determined and the scup was being seized due to the landing violation.

Div 6. He testified that he knew that the regulations were violated because Officer Jackman had stated that the operator of the vessel was not listed on the scup aggregate permit; he understood from Officer Jackman that operators were required to be listed on the permit. Officer Schipritt acknowledged during cross examination that he had been unaware that that constituted a violation. He added that he has since looked at the regulations and found that the operator has to be listed on the permit.

Although Mark Saunders was also called as a Division witness, under direct and cross examination he stated that he had no involvement in the inspection of the F/V *Luke and Sarah*; in initiating the proceeding against Wood Hollow; or in drafting, interpreting or applying the *Marine Fisheries Regulations*' aggregate program. Mr. Saunders indicated that the decision to proceed against Wood Hollow was made by the Division's former Deputy Chief Thomas Greene (now retired), as were all determinations to pursue administrative enforcement actions. He explained that this process has since been changed so that the officers in the field make the initial determination and if there are any questions, the officers are to consult their sergeant.

Following the conclusion of the Division's case, Respondent's counsel made an opening statement. Attorney Mulholland argued that participants in the scup aggregate program were not informed that they would have to update their applications to list new operators. She maintained that the cover letter sent with the application (Resp 1 at 1) specifically states that the permit is issued for the vessel and that the application itself also states that the permit is for the vessel. Resp 1 at 2. Counsel contended that notice was not provided that another application was required to add an additional operator, nor were there any forms other than the application. Ms. Mulholland claimed that the determination of a violation was based on one individual's interpretation of the regulations, and that that individual then chose the most onerous result: to seize the catch.

Respondent presented one witness: James S. Thayer, Jr. Mr. Thayer testified that he is the President and a stockholder of Wood Hollow Trawlers, Inc., the corporation that owns the F/V *Luke and Sarah*. He stated that in December 2005 he received the cover letter and application to participate in the aggregate landing program for scup. See Resp 1. At the time he completed the application, around January 1, 2006, he was the only operator of the vessel.

The witness testified that on the last day of March or first of April, Mr. Sumbaraskas accompanied him for the first time for a 10-day trip so that Mr. Thayer could familiarize Mr. Sumbaraskas with how everything worked on the vessel. Reassured that Mr. Sumbaraskas could handle it on his own, Mr. Thayer allowed Mr. Sumbaraskas to operate the vessel for the trip that ended on April 20, 2006. Mr. Thayer, now 64 years old, stated that he had agreed to the new operator because he was tired and needed a break; he had expected Mr. Sumbaraskas to operate the vessel throughout the summer.

The witness testified that he understood that it was the vessel that was permitted for the scup aggregate program; he had not been told or received anything in writing that he needed to add the operator; and no form was provided to add an operator after the initial application. He believed that he was in compliance with the program when he let Mr. Sumbaraskas captain the vessel. Mr. Thayer had spoken to Mr. Sumbaraskas every night and had a "pretty good idea" of the catch on board.

Mr. Thayer stated that he had told Mr. Sumbaraskas to call him when he came in to dock the boat because he was concerned about the tide and Mr. Sumbaraskas' ability to properly dock the vessel. Unfortunately, Mr. Sumbaraskas failed to call until the boat was already tied up and had been boarded by the enforcement Officers who were talking about seizing the catch. Mr. Thayer believed it to be a mistake or misunderstanding that DEM was seizing the catch and he was upset; he knew the aggregate permit was on board the vessel.

When he arrived at the vessel, the fish was already being off-loaded. He proceeded to the wheelhouse to locate the permit. Officers Jackman, Knowlton and Stach were present. Mr. Thayer stated that Officer Knowlton was looking through the logs and Officer Stach was in the corner "trying to help out." Mr. Thayer began searching for the document but complained that Mr. Sumbaraskas had cleaned up the wheelhouse so the document was not where he had left it. At this point Mr. Thayer stated to Mr. Sumbaraskas that if he (Sumbaraskas) had called him when he was supposed to, then he (Thayer) would not have to be going through this. He testified that it appeared that Officer Jackman was in charge; he observed Officer Jackman make at least two telephone calls, but that he stepped outside the wheelhouse to do so.

Mr. Thayer stated that he also has a federal scup permit that allows him to land up to 30,000 pounds during an aggregate period. According to the witness, no other permits require that an operator be added to a permit or license. When he originally applied for the aggregate permit (Resp 2; Div 10) he was the only operator of the vessel, no one else was going to operate it. He testified that Mr. Sumbaraskas had a landing license. After the seizure of the catch, Mr. Thayer sent in an application to add Audrius Sumbaraskas to the permit (Div 11); he had been instructed to do so by one of the DEM Officers and thought if he did so, there would not be a penalty. He explained that Mr. Sumbaraskas filled out the new application.

Under final questioning by Division's counsel, Mr. Thayer conceded that the Application for the Rhode Island Aggregate Landing Program contains the following language: "The owner and any individuals who will be operating the permitted vessel must sign below." Resp 2 at 2.

#### Analysis and Conclusion

The Officers uniformly considered Mr. Thayer's statement that if the captain had called him when he was supposed to, then he would have been on board the vessel upon reaching the dock and "none of this" would have happened, to be incriminating. The language was repeated in the reports of Officers Jackman (Div 5), Knowlton (Div 8) and Stach (Div 7). Officer Schipritt arrived after the events so the language is not contained in that report (Div 6). Yet the language, accompanied by Mr. Thayer's assertion that Officer Jackman was "being picky", can also be construed as pointing out that Officer Jackman's conclusion there was a violation was ludicrous. Due to Mr. Thayer's testimony of his mental state at the time and his belief that he was in compliance with the program, I am inclined to believe the latter interpretation. In any case, I do not accept the statement as incriminating.

The Division's witnesses consistently pointed to Officer Jackman as the individual who determined that Wood Hollow was in violation of the scup aggregate program by having a non-listed operator captain the F/V *Luke and Sarah*. Officer Jackman testified that he consulted with Lt. Lees in determining the violation and seizing the catch, yet nowhere is that fact documented in any of the Officers' reports or in any other testimony. The Division neither identified nor called Lt. Lees as a



witness. Although the Notice of Suspension was issued by Deputy Chief Thomas Greene almost two months following the seizure of the catch, the Division did not offer Mr. Greene as a witness, possibly because the individual was no longer in state service. Based upon the only testimony presented, the decision to find Wood Hollow in violation and to seize the catch appears to rest solely on Officer Jackman's understanding of the regulations. Whether his interpretation of the regulatory requirements is appropriate, however, is considered below.

The Notice of Suspension issued to Wood Hollow states that the April 20, 2006 inspection revealed that the vessel was in violation of R.I. Gen. Laws § 20-1-4 and Part 7.11.2-1 of the *Marine Fisheries Regulations*. The determination of non-compliance with the terms of the permit to participate in the scup aggregate program was based upon the fact that the person identified on the permit application as the person who would be operating the vessel was not on the vessel at the time of the inspection. The Notice of Suspension states that this is a violation of the requirement set forth in Part 7.11.2-1 (c). As a result of the purported violation, the corporation's participation in the commercial fisheries was to be suspended during the Winter I period 2007. In addition, the corporation's commercial fishing privileges were to be suspended for thirty days (the maximum period for a first offense). Div 1.

I have carefully reviewed the statutes and regulations cited as authority for charging this violation against Wood Hollow. R.I. Gen. Laws § 20-1-4 allows the Director to adopt rules and regulations to carry out the duties and responsibilities set forth in Title 20. Part 7.11.2-1 of the *Marine Fisheries Regulations* provides that, unless the vessel is participating in the scup aggregate program, the vessel is limited to 2,000 pounds of scup per trip. Subsection (a) contains the following language: "The name of any applicant vessel deemed to satisfy the requirements for enrollment in the program shall be maintained on a list to be kept by DEM Division of Fish and Wildlife and DEM Division of Law Enforcement and is thereby authorized to land scup in any amount between 0 and 30,000 pounds in any two calendar week period..." Subsection (b) establishes the 2,000 pounds limit for those not participating in the program. Subsection (c) sets forth the qualifying criteria to participate in the scup aggregate program, including that the vessel be operated by a person who possesses a valid multipurpose, principal effort or landing license and who has not been assessed a criminal or administrative penalty in the past

three years. Significantly, the section does not contain language that the vessel may only be operated by a person identified on the permit application.

Subsection (d) states that the operator of the applicant vessel shall "strictly adhere" to a list of requirements, including that "the subject vessel shall be permitted from the date the participant enters the program"; that "a vessel may commence the application process for obtaining a permit to participate"; and that no vessel shall possess simultaneously more than one scup aggregate permit. The operator of a permitted vessel may only sell scup to a certified dealer. Subsection (e) provides that "[n]on-compliance with the provisions of these regulations or the permit agreement shall subject both the owner and the operator to revocation of enrollment and participation in the commercial fisheries for the subsequent Winter I fishery."

Respondent Wood Hollow applied for the scup aggregate permit for the vessel *F/V Luke and Sarah* and the vessel was admitted into the program. Respondent does not dispute that the vessel held a catch weighing 22,555 pounds. For the Notice of Suspension to be upheld, the Division must prove either a violation of the requirements of the provisions of the *Marine Fisheries Regulations* concerning the scup aggregate program and/or the provisions of the permit itself. While the Division may (or may not) have intended the regulatory language to impose a requirement that the vessel only be operated by a person identified on the permit application, such a requirement cannot be found in Part 7.11.2-1 (c) of the *Marine Fisheries Regulations*. It is the vessel that is enrolled in the program; it is the vessel's name that is required to be on DEM's permit list. Operators must fulfill certain requirements, but the regulations do not require that all operators of a vessel be identified on the scup aggregate permit application. According to Mr. Thayer's uncontradicted testimony, no other vessel permits require that each operator be added to the permit or license. The Division has not proved by a preponderance of the evidence that Respondent violated Part 7.11.2-1 (c) of the *Marine Fisheries Regulations*.

The Division suggests that the language of the application, which serves as the permit, also imposes the requirement that all operators be identified on the permit application. The application states that it is for the "above named vessel" to participate in the program. Under the agreement, "the operator of any vessel permitted for the aggregate landing program" shall only sell, trade or barter with specified

dealers. Non-compliance with the provisions of the regulations or of the enrollment agreement shall subject both the owner and operator to revocation of enrollment and participation in the commercial fisheries for the subsequent Winter I fishery and imposition of a license suspension. The application contains the following language: "By signing below the individual(s) agree(s) to follow the aggregate landing program agreement and the program regulations as set forth in RIMF Regulations 7.7.1-1 and 7.11.2-1. The owner and any individuals who will be operating the permitted vessel must sign below."

Mr. Thayer testified that at the time he signed the application as President of Wood Hollow (corporate owner of the vessel) and as an operator, he was the only operator and the only operator in the foreseeable future. He clearly intended to be bound by the agreement. He did not understand there was any obligation to add future operators or one-time only operators. There was no clear requirement that the application be continuously updated. All other permits he was familiar with did not contain such a requirement. He had no understanding that failure to update the application meant he was in violation of the agreement. If the traditional rules of contract law were applied here, it could be said that there was no "meeting of the minds" as to Wood Hollow's responsibilities in this regard. I conclude that the Division has not proved by a preponderance of the evidence that Respondent violated the terms of the Application for the Rhode Island Aggregate Landing Program

## II. The Seizure of the Catch and License Suspension

At Officer Jackman's direction, approximately 22,500 pounds of scup was seized and sold to the fish house at the end of the dock, The Town Dock. The Incident Report prepared by Officer Jackman identified the value of the seized catch as \$11,250.00. Div 3. Officer Jackman explained that he obtained this number from the floor manager at The Town Dock as an estimated value of the catch. He stated that he has seized catches "well over 50 times" and he followed the normal procedure with this one. He had been involved in approximately 12 transactions of selling the seized product. The purchaser is selected by who is available, who will take the product and the logistics of moving the product. He stated that Lt. Lees had told him that this was the process to be used in the sale of seized catch.

Several days later he returned to The Town Dock to pick up the receipt (Div 9 B) and a check

in the amount of \$9,702.75 (Div 9 C). He stated that it was not an unusual occurrence for the final value to disagree with the estimated value.

Under cross-examination he admitted that he did not "keep track" of the fair market value for scup; that there was no DEM policy to obtain the true market price; and that it was not his responsibility if The Town Dock paid less than fair market value. He stated that the scup was sold to the dealer that the owner was going to sell the catch to.

In the determination of the penalties imposed in this matter, Officer Jackman stated that his role was limited to requesting that the vessel be suspended from the scup aggregate program. The decision to issue the suspension of the corporation's commercial fishing privileges was made at a level above him.

James Thayer also testified about the value of the seized catch. He stated that he had checked the prices paid for scup on April 20, 2006 and found it to be between \$ .60 to \$.70 per pound.

#### Analysis and Conclusion

At the conclusion of the hearing the parties were requested to specifically address the issue of the catch's seizure in their post-hearing memoranda. The Division's *Post Hearing Memorandum* cites R.I. Gen. Laws § 20-1-8 (a)(5) for its authority to seize the catch:

(a) The director, and each conservation officer, shall have the power:

- (1) \*\*\*
- (2) \*\*\*
- (3) \*\*\*
- (4) \*\*\*

(5) To seize and take possession of all fish, shellfish, crustaceans, marine mammals, amphibians, reptiles, birds, and mammals in possession or under control of any person or which have been shipped or are about to be shipped, at any time, in any manner, or for any purpose contrary to the laws of this state, and dispose of them at the discretion of the director...

The Division states that that even Mr. Thayer acknowledged in testimony that the price quoted by the dealers often varied from what was ultimately received. The Division also noted that some of the scup were undersized (for which a warning was issued to Mr. Sumbaraskas) and could not be legally purchased by the dealer. *Division's Post Hearing Memorandum* at 7.

In the Respondent's *Post Hearing Memorandum*, Respondent argues that the scup was sold for less than market value. The Division sold the catch at between \$.40 to \$.45 per pound, depending on the size of the scup, for the total sales price of \$9702.75. Based upon Mr. Thayer's research, however,

Respondent contends that the scup should have been priced at between \$.60 and \$.70 per pound, for a total value of \$14,660.75. *Respondent's Post Hearing Memorandum* at 11. Even if the DEM sold the scup for less than the fair market value, however, Respondent has not provided any citations of statute, regulation or case law to substantiate the Division's purported responsibility to seek fair market value for a seized catch.

Since I have concluded that the Division has not proved the violation as alleged in the Notice of Suspension, Respondent is entitled to the return of the sum obtained by the sale of the scup: \$9,702.75.

The Division has also sought the suspension of the corporation's commercial fishing privileges for a period of thirty days. In its *Post Hearing Memorandum*, the Division asserts that it has proven the violation and that the burden of proof shifts to the Respondent to demonstrate that the penalty – the suspension – is excessive. The Division states that the Respondent failed to present any evidence to support a finding that such a penalty might be excessive. *Division's Post Hearing Memorandum* at 8.

Rule 6.1 (1) of the Department's *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"* allow the Director, or his/her designee, to impose a suspension for a first violation of "up to thirty (30) days". There is no provision that imposes on a Respondent the burden of proof to demonstrate that the suspension sought is excessive. In all likelihood, Division's counsel has borrowed the presumption that the penalty stands unless the Respondent demonstrates otherwise from section 12 (c) of the Department's *Rules and Regulations for Assessment of Administrative Penalties (Penalty Regulations)*. Those regulations are inapplicable to this matter since "administrative penalty" is defined in the *Penalty Regulations* to mean "a monetary sum assessed by the Director". In this matter the so-called penalty is a suspension, not a monetary fine. In addition, if the Division is intent on borrowing the benefit of imposing the burden shift upon a Respondent, then it should also have to comply with the *Penalty Regulations'* requirements to determine the penalty according to Type and Deviation from the Standard, as well as provide a range to determine the severity of the suspension.

Even if the Division had proved the violation, it did not present sufficient evidence to impose the maximum suspension on this Respondent for a first violation.

Finally, I note that Officers Knowlton, Stach and Schipritt clearly respect their colleague Officer Charles Jackman and that all officers on the scene were professional and courteous to Mr. Sumbaraskas and to Mr. Thayer. After hearing the evidence presented and having reviewed the pertinent regulations, the application and the cover letter sent with the application (Resp 1), however, I conclude that a violation has not been proven and that the Notice of Suspension cannot be upheld.

Wherefore, after considering the testimonial and documentary evidence of record, I make the following:

**FINDINGS OF FACT**

1. The Application for Rhode Island Aggregate Landing Program (Application), which also served as the Permit, contains language requiring the owner and any individuals who will be operating the permitted vessel to sign the Application.
2. The Application was signed by James S. Thayer, Jr., President of Wood Hollow Trawlers, Inc., the owner of the applicant vessel *Luke and Sarah*, and submitted to the DEM on or about January 1, 2006.
3. At the time the Application was submitted, James S. Thayer, Jr. was the only operator of the F/V *Luke and Sarah*.
4. The Application was signed by James S. Thayer, Jr. as the operator of the F/V *Luke and Sarah*.
5. As a result of the Application being submitted, the F/V *Luke and Sarah* was enrolled in DEM's biweekly trip limit program for scup, also referred to as the "scup aggregate program".
6. During an inspection conducted on April 20, 2006 DEM Environmental Police Officers determined that the F/V *Luke and Sarah* had landed 22,555 pounds of scup.
7. Adrius Sumbaraskas was the operator of the F/V *Luke and Sarah* at the time of the inspection conducted on April 20, 2006.
8. James S. Thayer, Jr. was not the operator of the F/V *Luke and Sarah* at the time of the inspection conducted on April 20, 2006.
9. The scup was seized by the DEM and the product sold to The Town Dock at \$.40 to \$.45 per pound for a total sales price of \$9,702.75.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:


1. The F/V *Luke and Sarah* was enrolled in the scup aggregate program in accordance with Part 7.11.2-1 of the *Marine Fisheries Regulations*.
2. Pursuant to Part 7.11.2-1 (a) of the *Marine Fisheries Regulations* the name of the applicant vessel is to be maintained on a list to be kept by DEM Fish and Wildlife and DEM Division of Law Enforcement and is authorized to land scup in any amount between 0 and 30,000 pounds in any two calendar week period.
3. When the Application was submitted to DEM on or about January 1, 2006 the owner of the F/V *Luke and Sarah* signed the Application as required by the terms of the Application.
4. When the Application was submitted to DEM on or about January 1, 2006 the only operator of the F/V *Luke and Sarah* signed the Application as required by the terms of the Application.
5. The Division has failed to prove by a preponderance of the evidence that Respondent violated the terms of the permit agreement.
6. The Division has failed to prove by a preponderance of the evidence that Respondent violated R.I. Gen. Laws § 20-1-4 and *Marine Fisheries Regulations* Part 7.11.2-1 as alleged in the Notice of Suspension of Commercial Fishing License issued on June 16, 2006.

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

ORDERED

1. The Notice of Suspension of Commercial Fishing License issued to Wood Hollow Trawlers, Inc. on June 16, 2006 is DISMISSED.
2. The Division of Law Enforcement shall refund to Wood Hollow Trawlers, Inc. the sum of \$9,702.75 within thirty (30) days from the date of the Final Agency Order in this matter.

Entered as an Administrative Order this 12<sup>th</sup> day of September, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.

  
\_\_\_\_\_  
Mary F. McMahon  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
235 Promenade Street, Third Floor  
Providence, RI 02908  
(401) 222-1357

Entered as a Final Agency Decision and Order this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
W. Michael Sullivan Ph.D.  
Director  
Department of Environmental Management  
235 Promenade Street, Fourth Floor  
Providence, Rhode Island 02908

**CERTIFICATION**

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: Roberta J. Mulholland, Esquire and Alan P. Gelfuso, Esquire, Gelfuso & Lachut, 1193 Reservoir Avenue, Cranston, RI 02920 and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this \_\_\_\_\_ day of September, 2008.

\_\_\_\_\_



RE: WOOD HOLLOW TRAWLERS, INC.  
NOTICE OF SUSPENSION F/V LUKE AND SARAH

AAD No. 06-002/ENE

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NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI Gen. 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.

APPENDIX A  
LIST OF EXHIBITS

DIVISION OF LAW ENFORCEMENT'S EXHIBITS

- DIVISION 1 Copy of the Notice of Suspension dated June 16, 2006 (2 pages)  
for Id
- DIVISION 2 Copy of the hearing request dated July 13, 2006 (1 page)  
for Id
- DIVISION 3 Copy of the cover sheet of the DEM Incident Report (1 page)  
Full
- DIVISION 4 Copy of the request for a License Suspension or Revocation (1 page)  
Full
- DIVISION 5 Copy of the Narrative Incident Report of Officer Charles M. Jackman (1 page)  
Full
- DIVISION 6 Copy of the Narrative Incident Report of Officer Michael R. Schipritt (1 page)  
Full
- DIVISION 7 Copy of the Narrative Incident Report of Officer Michael Stach (1 page)  
Full
- DIVISION 8 Copy of the Narrative Incident Report of Officer Wendy L. Knowlton (1 page)  
Full
- DIVISION 9 Copy of the Seizure Report (3 pages)  
A for Id (p. 1)  
B Full (p. 2)  
C Full (p. 3)
- DIVISION 10 Copy of the Application for the Aggregate Landing Program for the *F/V Luke and Sarah*  
pp. 1-2 Full (3 pages)  
p. 3 Id only
- DIVISION 11 Copy of the Amended Application for the Aggregate Landing Program for the *F/V Luke and Sarah* (3 pages)  
Full

RESPONDENT'S EXHIBITS

- Resp 1 Correspondence and DEM Application for Rhode Island Aggregate Landing Program  
Full
- Resp 2 Application for Rhode Island Aggregate Landing Program for Fishing Vessel *Luke & Sarah*  
Full