

Department of Environmental Management

Administrative Adjudication Division

State of Rhode Island

IN RE: F/V MAUREEN S.

AAD No. 97-004/F&WA

April 6, 1999

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to the Applicant's request for hearing on the denial of his application for issuance of a certificate of exemption from the moratorium on the landing of summer flounder. Applicant Christopher Roebuck subsequently was granted leave to amend his application. The hearing conducted on April 30, 1998 was for the purpose of considering whether the amended application met the requirements for an exemption certificate as set forth in the Rhode Island Marine Fisheries Regulations ("Fisheries Regulations"). Following the hearing, both the Applicant and the Division of Fish and Wildlife ("Division") filed post-hearing memoranda.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN LAWS Section 42-17.7-1 et seq.), the Administrative Procedures Act (R.I. GEN LAWS Section 42-35-1 et seq.) and the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD Rules").

APPLICANT'S AMENDED APPLICATION

In order to place the below testimony and evidence in better context, some background on the initial application and its later amendment is helpful.

Applicant had been informed in the Division's letter dated January 17, 1997 (Div 1 Full) that his original application was denied because the vessel "Maureen S" did not meet the qualifying criteria for the Summer Flounder Certificate of Exemption. Specifically, Applicant had not provided proof that the vessel had landed summer flounder and sold the fish to a licensed dealer in Rhode Island between 1987 and 1992. At the prehearing conference conducted on September 2, 1997, Applicant stipulated that the F/V Maureen S did not have proof of landings of summer flounder between the periods January 1, 1987 through December 31, 1992, a requirement of the section under which Applicant had sought the exemption. Applicant considered, however, that he would qualify for an exemption certificate under an alternative provision of the regulations. Applicant subsequently filed his Amended Motion to Amend Application with the AAD.

In the Motion's amended application, Applicant sought the exemption for the vessel "Maureen S" under the regulatory section which recognized when a "vessel replaces a vessel" (the regulatory

requirements are discussed further below). Applicant contended in his motion that although the Maureen S had not landed summer flounder during the qualifying period, another vessel he owned had done so. Applicant asserted that at the time the original application was filed, he was the owner of a wooden skiff that had a history of landings of summer flounder for the time period between January 1, 1987 and December 31, 1992. Applicant therefore contended that the Maureen S., as the replacement vessel, would qualify for an exemption based upon the landings of the skiff.

The motion was granted on January 23, 1998. The Order Granting Applicant's Amended Motion to Amend Application remanded the amended application to the Division for its determination of whether under the amended application the vessel met the requisite conditions of eligibility to receive a Rhode Island Summer Flounder Exemption Certificate.

By letter dated March 17, 1998 (Div 8 Full), the Division informed Christopher Roebuck that it had reviewed the materials he had submitted and found that the wooden skiff identified as RI4850H did not meet the qualifying criteria and the amended application was therefore denied. The letter asserted that in order to qualify for the certificate, "the Department must be provided a copy of the state issued boat registration certificate proving ownership of the vessel". According to the Division's letter, Applicant had not provided any documentation to prove his ownership of the skiff. Indeed, the letter stated that the skiff's registration identified someone other than Christopher Roebuck as owner.

PREHEARING CONFERENCE

A prehearing conference was conducted on September 2, 1997 and, following the ruling on Applicant's Amended Motion to Amend Application and the Division's determination on the remand, a supplemental prehearing conference was held on March 26, 1998. At the conferences, the parties agreed to the following stipulations of fact:

1. That the Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. That the subject application for issuance of the requested landing certificate was filed with the Division on December 31, 1996.
3. That a copy of the subject application is provided in Exhibit #3.
4. That no evidence of sale of summer flounder by the Applicant vessel was submitted to the Division in support of the issuance of a certificate of exemption in its December 31, 1996 application.
5. That the application filed on December 31, 1996 was filed in a timely manner.
6. That the F/V Maureen S. does not have proof of landings of summer flounder between the periods January 1, 1987 through December 31, 1992.
7. That Christopher Roebuck had at the time of the filing of the application a valid RI commercial fishing license to land summer flounder up to the amount permitted.
8. That the correspondence from Joseph M. Rameaka, attorney for the applicant to Gary Powers,

Deputy Chief Legal Counsel for the Department erroneously stated RI 4850-H was not registered subsequent to its sale to Mr. Roebuck. The correspondence was meant to say it was not registered by Christopher Roebuck.

The exhibits, marked as they were admitted at the hearing, are attached to this Decision as Appendix A.

THE RHODE ISLAND MARINE FISHERIES REGULATIONS

At the very beginning of the hearing I attempted to establish which set of the revised regulations was to be applied in determining whether Applicant had met his burden of proof and should be granted the exemption. Using the filing date of the original application, December 31, 1996, I discussed with counsel, both on and off the record, which regulations were in effect at that time. Division's counsel provided a copy of regulations he stated were effective on December 12, 1996. (Tr. 4).

Subsequently, in testimony from Division's witness Richard Sisson (who had the dates of public hearing, public notice, and date of filing), it became evident that the regulations offered by Division's counsel did not become effective until January 1, 1997¹, the day following the application's filing. (Tr. 88-89). The previous regulations were those which went into full effect on June 1, 1996. (Tr. 90-91). Later, I stated that I was assuming the regulations that had been in effect when the original application was filed were the ones to be used in considering the amended application but that the parties could make argument on the issue. (Tr. 108-111).

Indeed, the Division's post-hearing memorandum rejects the date of the initial application as the controlling date to determine the applicable regulations. It states that the amended application "was to be considered by the Division applying the regulations in effect at the time of the substitution [of the vessel] and submission of the application (citation omitted)". **Division's Posthearing Memorandum ("Division's Memorandum")**, p. 4. Since the order which allowed the application's amendment was dated January 23, 1998, the Division considered the regulations then in effect were applicable and controlling in its review and in AAD's consideration of the amended application.

These later regulations require that if the Applicant is applying for the exemption on the grounds of a vessel replacing a qualifying vessel, then proof of ownership of both boats is required. Fisheries Regulations Section 7.7.8-5, effective 1/1/97. The 1996 regulations do not contain such a provision. According to the testimony of Division's witness Richard Sisson, it was Applicant's failure to comply with the 1997 provision that caused rejection of the exemption certificate:

... all we needed was proof that the applicant and the vessel owner were the same person, and had they been, we wouldn't have had a problem. (Tr. 104-105).

In direct opposition to the Division's position, Applicant's memorandum contends that the 1996 regulations should properly be applied and when applied, the application should be approved. According to Applicant, his amended application was denied because they followed the wrong regulations: "the letter of denial, signed by Mr. Stolgitis, was based solely on a regulation that was not in effect at the time the application was made." **Memorandum of Law in Support of Applicants Appeal of the Denial of a Certificate Exemption from the Moratorium on the Landing of Summer Flounder ("Applicant's Memorandum")**, p. 11.

Applicant's position is that the application was amended pursuant to Rule 15(c) of the Superior Court Rules of Civil Procedure; therefore, the only regulations that should be considered are those that were in effect on the date the original application was filed. **Applicants Reply of Memorandum of Law** (sic) ("**Applicant's Reply**"), pp. 1-2. Rule 15(c) provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Applicant provides no further legal basis for his conclusion that the original filing date controls the determination of the applicable regulations.

In my search for the meaning of the Rule 15 language, I consulted Professor Kent's 1969 tome wherein he considered this same language. He concluded that the provision's importance rested solely "when the statute of limitations has run as to the subject of the amendment between the date of the original pleading and the date the amendment is sought." 1 Kent, *R.I.Civ.Prac.* § 15.6 at 154 (1969). The "relation back" language seems to have no other function than to shield the amendment from a statute of limitations' dismissal.

Having thus considered the arguments of the parties and using the guidance of the Rhode Island Supreme Court that the date of a filing does not "lock" in the law (see *Dunbar v. Tammelleo*, 673 A.2d 1063, 1066-1067 (R.I.1996)), and with the expertise of Professor Kent, I conclude that the amended application was properly reviewed under the regulations in effect when the amended application was submitted to the Division pursuant to the order granting the amendment.

HEARING SUMMARY

At the hearing, Applicant called two (2) witnesses: **Donald Roebuck**, father of Christopher Roebuck, and **Christopher Roebuck**, as Applicant. The Division called two (2) witnesses: **April Valliere**, a principal marine biologist in the Division of Fish and Wildlife, who was qualified as an expert in the collection, tabulation and dissemination of commercial fishery harvest statistics that are employed by the State and Federal governments; and **Richard Sisson**, the deputy chief of marine fisheries, who was qualified as an expert in the collection, tabulation and dissemination of commercial fishery harvest statistics that are employed by the State and Federal governments. For purposes of presenting rebuttal testimony, the Division also called **Margaret McGrath** as a witness.

The pertinent provisions of the Rhode Island Marine Fisheries Regulations, effective January 1, 1997, are as follows:

7.7.6 Moratorium on the Landing of Summer Flounder—No person shall possess, land, sell, or offer for sale in excess of two hundred (200) pounds of summer flounder *Paralichthys dentatus*, in any calendar day, in the State of Rhode Island or the jurisdictional waters of the state without a summer flounder exemption certificate issued by Fish and Wildlife and a valid Rhode Island commercial fishing license. Application for a summer flounder exemption permit must be received by Fish and Wildlife prior to January 1, 1997.

7.7.7 Exemption Certificates—Fish and Wildlife will issue an exemption certificate for a vessel if the owner of the vessel or his/her representative applies to Fish and Wildlife prior to January 1,

1997, for the issuance of such a certificate and demonstrates to the satisfaction of the Commissioner that:

7.7.7-1—the operator of the vessel possesses a valid Rhode Island commercial fishing license to land summer flounder up to the amount permitted by the Rhode Island Marine Fisheries Council regulations; and

7.7.7-2—the subject vessel meets any of the following criteria:

a. ***

b. ***

c. the vessel replaces a vessel which was operated by a person who possessed a valid Rhode Island commercial fishing license, and the vessel being replaced landed and sold in excess of one pound of summer flounder to a Rhode Island licensed dealer during the period from January 1, 1987, through December 31, 1992, and if the vessel being replaced was lost by sinking or was otherwise destroyed, the replaced vessel is required to have been owned by the applicant at the time of the loss; ...

d. ***

e. ***

7.7.8 Application for Certificate of Exemption—A vessel is eligible to receive a Rhode Island Summer Flounder Exemption Certificate if it meets the following conditions. The applicant applying for an exemption certificate shall:

7.7.8-1 ***

7.7.8-2 ***

7.7.8-3 submit proof that the vessel meets the requirements set out in **7.7.7** and

7.7.8-4 ***

7.7-8-5 provide Fish and Wildlife with a copy of the vessel's U.S. Coast Guard documentation papers or state issued boat registration certificate proving ownership of the vessel. If replacing a vessel, proof of ownership for both boats is required...

According to the denial letter for the amended application, Applicant had failed to comply with regulation 7.7.8-5; he had not provided a copy of the state issued boat registration certificate proving his ownership of the wooden skiff. (Div 8 Full).

Applicant's first witness, Donald Roebuck, testified that he had owned the wooden skiff identified as 4850-H during the period January 1, 1987 through December 31, 1992 and in the operation of the boat had landed in excess of one pound of summer flounder during this same period. He stated that he sold the vessel to his son Christopher Roebuck on June 1, 1996 and had received \$200.00. The sale was documented by a bill of sale that Donald Roebuck had prepared. (Tr. 6-8).

Donald Roebuck also testified that notwithstanding the sale in 1996, in 1997 he continued to register the vessel identifying himself as the owner. He stated that they had a community mailbox

which received Christopher's mail as well as others'; when the registrations had arrived for the five boats, Donald Roebuck had automatically mailed them in and paid the \$20.00 registration fee for the wooden skiff. He had forgotten about the sale to his son. (Tr. 10-11).

In cross-examination, Division elicited that Donald Roebuck continued to register the boat 4850-H in 1998. (Tr. 16). Also, contrary to Mr. Roebuck's representation that he had registered five boats in 1997, he had registered only two vessels in 1997, the wooden skiff and a pleasure craft he said belonged to another son. (Tr. 17-20).

Christopher Roebuck also testified. He stated that he was the owner of the Maureen S, now named the "Karen Elizabeth". (Tr. 22). He agreed that if the exemption were granted, he would remove the vessel 4850-H from the fishery and would use the exemption for the Karen Elizabeth. (Tr. 23-24). Under my questioning, Christopher Roebuck admitted that he had not owned the Maureen S in December 1996 but that he was agent for the owner of the vessel at that time. (Tr. 30-32).

April Valliere testified on behalf of the Division. She stated that the original application had been referred to her at the Office of Review. (Tr. 42). According to Ms. Valliere, after the initial application had been denied, "there were numerous attempts after that to submit other vessels for qualification.... [A]pproximately six months later this skiff came into the picture...". (Tr. 46-47).

In her review of the amended application, Ms. Valliere considered the registration form that showed that Donald Roebuck was the owner of the skiff. (Tr. 55-56). She prepared a proposed determination which stated that Applicant had not provided documentation showing he was the owner of both vessels and therefore the amended application did not comply with regulation 7.7.8-5. (Tr. 50-52; 56-57).

Ms. Valliere also testified that the bill of sale (Appl 1 Full) was not submitted with the amended application and that the first time she saw it was the day of the hearing. (Tr. 61). Even if this documentation had been provided earlier, however, the witness concluded that the application would not have met the criteria set forth in the regulations. (Tr. 64). She stated that the registration contradicted the bill of sale and she was required under the regulations to review the registration. (Tr. 70-71).

The Division also called Richard Sisson as a witness. He had become involved in this matter following the initial denial and during the arguments on the motion to amend. (Tr. 77-81). Mr. Sisson testified that he reviewed Ms. Valliere's recommendation, approved the draft denial letter and passed the document on to John Stolgitis, Chief of the Division, for his final review and signature. (Tr. 76, 83-84, 96).

Mr. Sisson testified that in determining whether Applicant had complied with the requirements for issuance of the exemption certificate, he had considered the boat registration application (Div 6 Full) filed in 1997 by Donald Roebuck. (Tr. 84-85). He concluded that there was an inconsistency between the name on the application for exemption (Christopher Roebuck) and the name on the vessel being considered for qualification (Donald Roebuck's). He stated that he could not recommend issuing the certificate to Christopher Roebuck because the regulations require ownership of both vessels by the same person. (Tr. 86-87).

Under cross examination, Mr. Sisson stated that when he was confronted with the conflicting documents of the bill of sale (Appl 1 Full) and the 1997 boat registration (Div 6 Full), he sought

further documents from the licensing section to see if, subsequent to the registration by Donald Roebuck, the vessel had been reregistered in another name. (Tr. 99–100). Nothing was provided to satisfy the discrepancy. (Tr. 104).

The Division also called Margaret McGrath, chief of the Boat Registration and Licensing section, as a rebuttal witness. Ms. McGrath is the Administrative Officer in charge of records who, on the morning of the hearing, conducted a record search of vessels registered in Donald Roebuck's name. She discovered two vessels registered for 1997, the RI 4850–H skiff and one identified as 2377–L. No others were registered in 1997. (Tr. 113–114). She also searched the records for 1998 registrations in Donald Roebuck's name and found the same two vessels. (Tr. 115).

I have considered the testimonial and documentary evidence presented by the parties and conclude that the discrepancy as to the real ownership of the skiff still exists. Donald Roebuck's testimony is not persuasive. He stated he continued to register Applicant's skiff for convenience and paid two years of registration fees for a boat he presumably no longer owned. The obvious question—which was not answered persuasively—is why sell a boat for \$200.00 in 1996 and pay a total of \$40.00 over the next two years in registration fees?

The circumstances surrounding the bill of sale, including the other efforts to qualify a vessel as referenced by Ms. Valliere (Tr. 46–47), also make that document's timing and reliability suspect. I therefore conclude that Christopher Roebuck, as Applicant, has not met his burden to prove that he was owner of the skiff prior to the deadline for filing an application for exemption—December 31, 1996.

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

FINDINGS OF FACT

1. The original application for the Summer Flounder Certificate of Exemption for the F/V Maureen S was filed with the Division of Fish and Wildlife on December 31, 1996.
2. In the original application, Christopher Roebuck was identified as the Applicant and Dan McQuillan Jr. was identified as the owner of the Maureen S.
3. At the time of the filing of the application, Christopher Roebuck had a valid RI commercial fishing license to land summer flounder up to the amount permitted.
4. The Maureen S did not have proof of landings of summer flounder for the period January 1, 1987 through December 31, 1992.
5. The Division of Fish and Wildlife denied an exemption for the Maureen S (on the original application) by letter dated January 17, 1997.
6. Applicant's motion to amend the application was granted on January 23, 1998 and the amended application was remanded to the Division for its determination of whether the Maureen S should be granted an exemption based upon a wooden skiff identified as RI 4850–H.
7. Applicant did not provide the Division with a copy of the vessel 4850 H's state issued boat registration certificate proving his ownership of the vessel.

8. The Division of Fish and Wildlife denied the amended application by letter dated March 17, 1998.

9. A bill of sale dated June 1, 1996 represents the sale of a wooden skiff identified as RI 4850 H from Donald Roebuck to Christopher Roebuck.

10. Donald Roebuck continued to register the vessel 4850 H, identifying himself as the owner, in 1997 and 1998.

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 Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The amended application was properly reviewed pursuant to the Rhode Island Marine Fisheries Regulations, effective January 1, 1997.
3. Applicant has failed to prove by a preponderance of the evidence that he was the owner of vessel 4850 H prior to the deadline for filing an application for exemption.
4. Applicant has not met the criteria set forth in section 7.7.8-5 of the Rhode Island Marine Fisheries Regulations, effective January 1, 1997, to obtain a Rhode Island Summer Flounder Exemption Certificate.

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

ORDERED

Applicant's request for a Rhode Island Summer Flounder Exemption Certificate is **DENIED**. Entered as an Administrative Order this 15th day of February, 1999 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon
Hearing Officer

Entered as a Final Agency Order this 6th day of April 1999.

George Welly
Interim Director

APPENDIX A

The below—listed documents are marked as they were admitted into evidence:

Applicant's Exhibits:

Appl. 1 Full	Proof of ownership of RI 4850H
Appl. 2 Full	Old Salt Seafood Company, Inc. landing slip
Appl. 3 for Id	Application
Appl. 4 Full	Amended Application

Division's Exhibits:

Div. 1 Full	A copy of the January 17, 1997 denial by the Division of a request for the issuance of a Summer Flounder Landing Exemption Certificate to the Applicant F/V Maureen S. 1 pg.
Div. 2 Full	A copy of the request filed on behalf of the Applicant F/V Maureen S. by Chris Roebuck for a formal hearing before the AAD concerning the January 17, 1997 denial of the subject application. 1 pg.
Div. 3 Full	A copy of the subject application for issuance of a Summer Flounder Landing Exemption Certificate to the Applicant F/V Maureen S. submitted to the Division on December 31, 1996. 4 pgs.
Div. 4 Full	A copy of the curriculum vitae of April K. Valliere Principal Marine Biologist with the Division. 2 pgs.
Div. 5 Full	A copy of curriculum vitae of Richard Sisson, Deputy Chief Division. 3 pgs.
Div. 6 Full	A copy of the Boat Registration Application for the wooden skiff bearing Rhode Island Registration No. 4850H dated January 26, 1997. 1 pg.
Div. 7 Full	Withdrawn by Division.
Div. 8 Full	A copy of the denial of the subject application on remand dated March 17, 1998. 1 pg.
Div. 9 Full	Copy of 1997 Boat Registration Application for RI 4850H.

Div. 10 Full	Copy of 1997 Boat Registration Application for RI 2377L.
Div. 11 Full	Copy of 1998 Boat Registration Application for RI 4850H.
Div. 12 Full	Copy of 1998 Boat Registration Application for RI 2377L.

Footnotes

- 1 December 12, 1996 appears to be the date the regulations were filed with the Secretary of State's Office. According to Section 42-35-4 of the Rhode Island General Laws—the Administrative Procedures Act—the regulations would have been effective twenty (20) days after their filing date, that is, on January 1, 1997.