

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

**RE: BOWEN, BRENT
LICENSE DENIAL**

AAD NO. 15-001/MSA

DECISION AND ORDER

This matter came on before Hearing Officer David Kerins on Motion for Summary Judgment filed by Appellant, Brent Bowen (“Appellant” or “Bowen”) and the Rhode Island Department of Environmental Management, the Division of Fish and Wildlife’s (the “Division” or “DEM”) Objection thereto. The Appellant filed a Notice of Appeal on March 11, 2015 from a letter of denial from the Division dated February 25, 2015. Appellant filed its Motion for Summary Judgment together with supporting Memorandum of Law on May 28, 2015. The Division filed its Objection to Motion for Summary Judgment with supporting Memorandum of Law on June 24, 2015. Appellant filed a Response Memorandum on July 7, 2015.

Jurisdiction

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R. I. General Laws §42-17.7-1 et. seq.); the *Administrative Procedures Act* (R. I. General Laws §42-35-1 et. seq.); and the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matter* (“AAD Rules”) and the *Commercial and Recreational Saltwater Fishing Licensing Regulations* (“Regulations”).

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Standard of Review

Rule 8.00(a)(1) of the *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters* permits a party to file a motion that would otherwise be permissible under the Rhode Island Rules of Civil Procedure. Under R.I. Civ. P. 56(c), a party may file a motion for Summary Judgment and Summary Judgment shall be rendered forthwith if the pleadings together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Super. Ct. R. Civ. P. 56(c); *Palmisciano v. Burrillville Racing Ass'n*, 603 A.2d 317, 320 (R.I. 1992). Summary judgment is an extreme and drastic remedy, and should be applied cautiously and judiciously and only when there is clearly no genuine issue of material fact. See *McPhillips v. Zarye Corp.*, 582 A.2d 747 (R.I. 1990) and *Golderese v. Suburban Land Co.*, 590 A.2d 395 (R.I. 1991). "The party opposing the motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." *Taylor v. Mass. Flora Realty, Inc.*, 840 A.2d 1126, 1129 (R.I. 2004) (quoting *United Lending Corp. v. Providence*, 827 A.2d 626, 631 (R.I. 2003)). A party opposing summary judgment must affirmatively assert facts that raise a genuine issue to be resolved at trial. *Volino v. General Dynamics*, 539 A.2d 531, 533 (R.I. 1988). When the non-moving party fails to carry its affirmative burden to set forth specific facts to demonstrate there is a genuine material issue of fact to be resolved at trial, Summary Judgment is properly entered. *Grande v. Almac's, Inc.*, 623 A.2d 971, 972 (R.I. 1993).

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Statement of Facts

The facts in this matter are not in dispute.

Brent Bowen of Portsmouth, Rhode Island is the holder of multipurpose fishing license MPUR001264 (License). He presently owns and has a registered vessel RI3983S which is an 18' Eastern boat bearing hull #EBVHRMBBMB4C. This boat was registered for the first time on December 17, 2014. Just prior to this Mr. Bowen had owned, registered and used vessel RI6905L, 36' Novi bearing hull #RIZ00020C189 which he sold in or about August of 2014. Mr. Bowen sold this former boat and obtained the new boat in order to downsize for economic reasons.

It is undisputed that during the required period of time called for by the *Commercial and Recreational Saltwater Fishing Licensing Regulations* (the "Regulations"), Mr. Bowen had been actively fishing his license prior to the filing of the application to transfer his License pursuant to Rule 6.7-8, the denial of which is the basis for this appeal. *See Rule 6.7-8 and Rule 6.7-11.*

In or about February of 2015, Mr. Bowen and applicant/ intervener Neil S. Hayes reached an agreement whereby Mr. Hayes would purchase Mr. Bowen's License, vessel and gear used in his fishing business, subject to the issuance of a new License to Mr. Hayes by the Division pursuant to the provisions of Rule 6.7-8. Both parties submitted to DEM's Boat Registration and Licensing Division an application to transfer the License to Mr. Hayes. Mr. Hayes is also a resident of Portsmouth, Rhode Island. *See application Applicant's Exhibit A- Full hereto which was submitted on February 13, 2015.* By way of correspondence dated February 25, 2015, the

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Office of Boat Registration and Licensing denied the application for transfer ("Denial") (*see Division's Exhibit E - Full attached hereto*). The application was reviewed by Margaret McGrath, Programing Services Officer. Both parties to this transaction are residents of the State of Rhode Island as required by Section 6-7-8(a) of the Regulations. It was also confirmed by Ms. McGrath and the Division that Mr. Bowen, as stated above, had been actively fishing his License as required by Section 6.7-8(b). Finally, Mr. Hayes is seeking to purchase not only the License but also the vessel and gear associated with Mr. Bowen's fishing business.

A review of the denial letter from the Office of Boat Registration and Licensing shows that the application was denied despite the fact that Mr. Bowen had been actively fishing his license. The reasons provided were that Mr. Bowen did not have a vessel declared or registered from August of 2014 until December 17, 2014 which breaks the business ownership between the vessel and License. DEM has confirmed that such transfers are controlled by the provisions of Rule 6.7-8 and did not set forth any other regulation which required that there be a continuous and unbroken relationship between a vessel and the License for the transfer.

Analysis

The pending appeal was taken from a letter of denial ("Denial") of Appellant's request to sell his registered vessel RI3983S, 18' Eastern boat bearing hull # EBVHRMBBMB4C registered for the first time, December 17, 2014 together with gear and Multipurpose License MPURP001264 to Mr. Neil Hayes (*see Division's Exhibit E - Full attached hereto*). The

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Division cites the *Commercial and Recreational Saltwater Fishing Licensing Regulations* Section (6.7-8).

The pertinent sections of the Regulations which govern the transfer or sale of license with the sale of vessel and gear is found in Section 6.7-8 Issuance of New License Upon Sale of Vessel and Gear:

- (a) This section applies only to purchasers, of vessels and gear, who are residents.
- (b) Transfer or sale of licenses and endorsements between the purchaser and seller of a vessel and gear is prohibited; provided, however, that if the seller of a vessel and who is actively fishing his or her license shall have first surrendered it to the Division, the Division will, upon application, issue one new license to the purchaser of the vessel and gear, pursuant to the terms and conditions of this section. (emphasis added.)

The Regulations further clarify the term “actively fishing” in Section 6.7-11 as follows:

- (a) To meet the standard of actively fishing, an applicant must be able to demonstrate by dated transaction records, and for multiple-day trips, Vessel Trip Reports, that he or she has fished at least seventy-five (75) days in the preceding two (2) calendar years, pursuant to a valid RI license. Such fishing activity must have spanned the preceding two (2) calendar years, meaning that some activity occurred in each of the two (2) years. Such fishing activity may need to be in the same fishery sector(s) or endorsement category(s) for which a new license/ endorsement is being sought, as specified in sections 6.7-4, 6.7-6, 6.7-7, 6.7-8, and 6.7-9 herein. (emphasis added).

Section 5.1 of the Definition of terms defines “Actively Fishing” as follows:

- (5.1) “Actively Fishing” – A license holder will be considered to have been actively fishing that license/ endorsement if he or she demonstrated by dated transaction records, as verified by dealer reports to the Division, that he or she has fished a least seventy-five (75) days in the preceding two calendar years, with some of the fishing activity occurring in each of the two years. Evidence as to days fished may be supplemented by one or more

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Vessel Trip Reports, which specifically reference the license holder's name and license number, and correspond to dated transaction records, where in the determination of the Division such dates are verified by dealer reports to the Division.

The Division acknowledges that the Appellant had "actively fished" his license and therefore satisfied the requirements of Section 6.7-8 of the Regulations. The denial (Division's Exhibit E – Full) contains the following language:

In review of your file, please be aware that RI6905L, 36' Novi bearing hull #RIZ00020C189 was the vessel commercially declared and registered to you during the years of actively fishing and then sold in August of 2014. A new vessel was not declared until December 17, 2014, RI3983S as described above which breaks business ownership between the vessel and license. The Division is unable to authorize the sale/ transfer of the license in that review of our records indicated that you did not have a commercially declared vessel in your file from August 2014 until December 17, 2014.

The Division did not deny the issuance or transfer of Mr. Bowen's license to Mr. Hayes because he did not "actively fish" but because there was a break in the "business ownership between the vessel and license". The Division said that it is "unable to authorize the sale/ transfer of the license in that review of our records indicates that you did not have a commercially declared vessel in your file from August 2014 until December 17, 2014".

It appears that the Appellant declared his on December 17, 2014 and then applied to transfer that vessel together with gear and his commercial fishing license by application dated February 13, 2015. The Division's position is that the Appellant had not had his vessel declared for a long enough period to qualify for the benefits of Section 6.7-8 of the Regulations. The Division advised that the Appellant was ineligible for the sale/ transfer because he did not have a commercially declared vessel in his file from August 2014 until December 17, 2014.

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The disagreement in the positions of the parties is simply stated: The Division contends the “actively fishing” requirement contained in the Regulations applies to both the individual license holder and the vessel sought to be transferred; the Appellant contends that while the “actively fishing” requirement clearly applies to the individual license holder there is no regulation establishing such a requirement to apply to a vessel.

The Division states in its Memorandum of Law that the licensee must retain his vessel for two years and establish an “active fishing” history for the vessel. The Division does not cite a specific section of the Regulations which establishes a requirement of “actively fishing” a vessel prior to receiving the benefits of Section 6.7-8(b). The Division relies on case law which authorizes it to interpret the Regulations so as to be harmonious and not in contradiction to one another. *Kaya v. Partington*, 681 A.2d 256, 261 (R.I. 1996). The Division asserts that it is mandated to apply the “actively fishing” definition to the vessel in order to reach a harmonious result.

The enabling legislation R.I. General Laws §20-20-2.1-2 states that one of the purposes for the legislation is to “allow residents who have fished commercially to sell their vessels and gear in a manner that first, facilitates up-grading license levels among residents already in the fishery; that second, provides lateral movement among residents who are holders of commercial fishing licenses to other types of fishing; and that third, enables new entrants into new commercial fishing”.

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The Applicant argues in his Memorandum of Law that while there is authority that deference should be given to the Division in its interpretation of these rules and regulations, but when there is a need to interpret the rules and regulations. The Division cannot rely on the deference afforded and then incorrectly interpret the provisions of the rules and regulations contrary to their clear meaning. A regulation cannot be altered by an interpretation that is inconsistent with its plain language. *South Shore Hospital, Inc. v. Thompson*, 308 F.3d 91, 97 (1st cir. 2002). In other words, just because the Division has been interpreting the regulations in such a manner does not mean this action is lawful and correct.

The Division cites as authority the Superior Court decision in *Daniel Ferguson v. The Rhode Island Department of Environmental Management, et al.* C.A. No. PC-2013-3376 and also the underlying decision of the Division's Administrative Adjudication Division In re: *Ferguson*, AAD No. 12-002/ F&WA. These appeals involved Ferguson's transfer of a certain vessel and certain federal and state fishing permits. Ferguson executed and delivered a bill of sale which transferred the vessel to the purchaser along with all federal and state permits. Ferguson (which is a decision that this Hearing Officer wrote) does not apply to this appeal in that it did not interpret the sections of the Regulation in question, (Section 6.7-8 and 6.7-11). Section 6.7-8 talks about the seller "who is actively fishing". Section 6.7-11 clarifies "actively fishing" required for an applicant. Section 5.1 defines "Actively Fishing" in terms of the license holder. There is no mention in any of these sections of the Regulations to "actively fishing" a vessel. You "actively fish" a license not a vessel.

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The parties agree that the Division is entitled to great deference in the area of Statutory Construction. In its argument when citing cases such as *Kaya v. Partington* 681 A.2d 256, 261 (R.I. 1996) or *Riley v. Rhode Island Department of Environmental Management*, 941 A.2d 198, 212-213, the Division substitutes the word "regulation" in place of the word "statute". The cases cited stand for the proposition that if there is an inconsistency or ambiguity in the language of a statute then the agency is given great weight in the interpretation.

It is important to note that pursuant to R.I. General Laws §20-1-4 the Director of the Rhode Island Department of Environmental Management is "authorized to promulgate, adopt, and enforce any and all Rules and Regulations deemed necessary to carry out duties and responsibilities under this chapter". If there is ambiguity in the Regulations the Division has the authority to rewrite or edit the Regulations to make them clearer.

In this instance, I find that the Regulations are clear and unambiguous. It appears in this matter that the Division is attempting to insert additional criteria not expressly stated in the Regulations. The cited language from the *Riley v. Rhode Island Department of Environmental Management* in the Division's memorandum does not provide authority for the Division to interpret language which is clear on its face. It merely states that the General Assembly has broad authority and jurisdiction to legislate on the whole the subjects of fisheries and that it may delegate the administration of its regulations to the Division. This does not mean that once the legislature has adopted a regulatory framework and delegated authority to the Division to establish rules and regulations, that the Division has free and unbridled discretion to interpret the regulations that have been promulgated. If the Division is unhappy about the plain language of

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the Regulations or feels they should be broadly interpreted to reach the desired meaning, it should consider rewriting them so that everyone will understand them.

Conclusion

In a careful review of the Regulations in this matter I find that there is no express requirement that a commercial fishing license holder must retain and “actively fish” his declared fishing vessel for two (2) years before being eligible to sell and transfer his license pursuant to Section 6.7-8 or 6.7-11. The Regulations are clear and unambiguous. The Appellant has sustained his burden under a Motion for Summary Judgement and is entitled to a judgement as a matter of law.

FINDINGS OF FACT

1. The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. General Laws §43-17.7-1 et. seq.); the *Administrative Procedures Act* (R.I. General Laws §42-35-1 et. seq.); the *Administrative Rules of Practice and Procedure for the Division of Environmental Management, Administrative Adjudication Division for Environmental Matter* (AAD Rules); and R.I. General Laws §4-19-1 et. seq.
2. Brent Bowen of Portsmouth, Rhode Island is the holder of multipurpose fishing license MPUR001264 (License). He presently owns and has a registered vessel RI3983S which is an 18' Eastern boat bearing hull #EBVHRMBBMB4C.

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3. This boat was registered for the first time on December 17, 2014.
4. Just prior to this Mr. Bowen had owned, registered and used vessel RI6905L, 36' Novi bearing hull #RIZ00020C189 which he sold in or about August of 2014.
5. Mr. Bowen sold this former boat and obtained the new boat in order to downsize for economic reasons.
6. During the required period of time called for by the *Commercial and Recreational Saltwater Fishing Licensing Regulations* (the "Regulations"), Mr. Bowen had been actively fishing his license prior to the filing of the application to transfer his License pursuant to Rule 6.7-8, the denial of which is the basis for this appeal. *See Rule 6.7-8 and Rule 6.7-11.*
7. On or about February of 2015, Mr. Bowen and applicant/ intervener Neil S. Hayes reached an agreement whereby Mr. Hayes would purchase Mr. Bowen's License, vessel and gear used in his fishing business, subject to the issuance of a new License to Mr. Hayes by the Division pursuant to the provisions of Rule 6.7-8.
8. Both parties submitted to DEM's Boat Registration and Licensing Division an application to transfer the License to Mr. Hayes.
9. Mr. Hayes is also a resident of Portsmouth, Rhode Island. *See application Applicant's Exhibit A - Full hereto which was submitted on February 13, 2015.*

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10. By way of correspondence dated February 25, 2015, the Office of Boat Registration and Licensing denied the application for transfer (*see Division's Exhibit E- Full attached hereto*).
11. The application was reviewed by Margaret McGrath, Programing Services Officer.
12. Both parties to this transaction are residents of the State of Rhode Island as required by Section 6-7-8(a) of the Regulations.
13. It was also confirmed by Ms. McGrath and the Division that Mr. Bowen, as stated above, had been actively fishing his License as required by Section 6.7-8(b).
14. Mr. Hayes is seeking to purchase not only the License but also the vessel and gear associated with Mr. Bowen's fishing business.
15. On February 13, 2015, the Division received a request from Appellant to transfer his Multipurpose License Number, MPURP001264, pursuant to Section 6.7-8 of the *Commercial and Recreational Saltwater Fishing Licensing Regulations* (the Licensing Regulations").
16. The Division reviewed the application to transfer and on February 25, 2015 the Division sent a letter to the Appellant notifying him that the subject request was denied.
17. Upon receipt of the denial letter, the Appellant timely exercised his right to appeal to the AAD pursuant to a letter dated March 11, 2015.
18. The language of the Regulations is clear and unambiguous.
19. The language of the Regulations is not unclear and ambiguous so as to require

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interpretation by the Division.

20. The Applicant has "actively fished" his license so as to qualify to transfer his license together with vessel and gear pursuant to Section 8.7-8 of the Regulations.

CONCLUSIONS OF LAW

After due consideration of the documentary evidence and based upon the Findings of Fact as set forth herein, I conclude the following as a matter of law:

1. The Administrative Adjudication Division for Environmental Matters ("AAD") has jurisdiction over the matter pursuant to R.I. General Laws §42-17.7-2; the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matter* ("AAD") and the *Commercial and Recreational Saltwater Fishing Licensing Regulations* ("Regulation");
2. Section 6.7-8 of the Regulations provides for a method for a license holder who has "actively fished" his license to transfer or sell his license, vessel and gear;
3. The term "actively fished" is defined in Section 5.1 of the Regulations as: "A license holder will be considered to have been actively fishing that license/ endorsement if he or she demonstrated by dated transaction records, as verified by dealer reports to the Department, that he or she has fished at least seventy-five (75) days in the preceding two calendar years, with some of the fishing activity occurring in each of the two years";
4. There is no express requirement in the Regulations that a person seeking the benefits of Section 6.7-8 has "actively fished" his declared vessel for two (2) years prior to the sale or transfer;
5. There is no specific time designated in the Regulations that a license holder must "actively fish" his declared vessel prior to sale or transfer pursuant to Section 6.7-8 thereof;
6. The language of the regulations are clear and unambiguous on the issue of the requirements of Section 6-7-8 of the Regulations;

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7. The Division is not entitled to interpret the Regulations where the terms are clear and unambiguous;
8. The Respondent has met his burden of proof on his Motion for Summary Judgement;
9. There are no issues of material fact in dispute and the Appellant is entitled to the entry of Judgement.

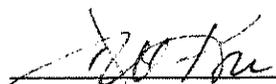
Wherefore, based on the foregoing Findings of Facts and Conclusions of Law, it is hereby

ORDERED

Wherefore it is hereby **ORDERED** that:

1. The Applicant's Motion for Summary Judgement is **GRANTED**.
2. The Division's Objection to Appellant's Motion for Summary Judgement is **DENIED**.
3. Judgement is entered on behalf of the Applicant.
4. The matter is remanded to the Division for approval of the Appellant's request for transfer of his commercial fishing license together with vessel and gear.

Entered as an Administrative Order this 20th day of July, 2015.



David Kerins
Chief Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

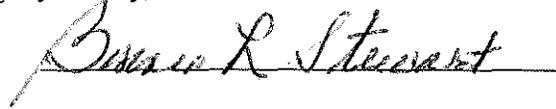
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CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Christopher J. Behan, Esquire, 294 Valley Road, Middletown, RI 02842, and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 30th day of July, 2015.



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NOTICE OF APPELLATE RIGHTS

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

Rhode Island Department of Environmental Management
Boat Registration and Licensing
Attn: Margaret McGrath
235 Promenade Street
Providence, RI 02908

**Re: Brent Bowen to Neil S. Hayes
License #001264**

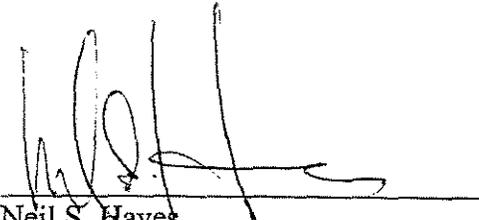
Dear Margaret:

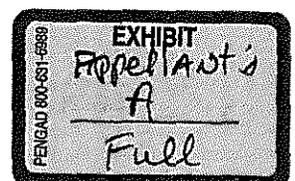
Please accept this as an application to transfer my multi-purpose license #001264 to Neil S. Hayes of Portsmouth, Rhode Island.

This transfer is requested pursuant to section 6.7-8 of the Commercial and Recreational Saltwater Fishing Licensing Regulations. At this time I am selling to Mr. Hayes my currently registered vessel and all gear along with the license. Mr. Hayes is a resident of the state of Rhode Island. I have also demonstrated to you pursuant to section 6.7-11 that I have been actively fishing my license.

I am prepared to surrender my license at this time in order to effectuate this transfer if and when it is approved.


Brent Bowen
71 Ferreira Terrace
Portsmouth, RI 02871


Neil S. Hayes
380 Windstone Drive
Portsmouth, RI 02871





RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

235 Promenade Street, Providence, RI 02908-5767

TDD 401-222-4462

Office of Boat Registration & Licensing
3rd Floor – Room 360
401-222-6647

Brent Bowen
71 Ferreira Terrace
Portsmouth, RI 02871

February 25, 2015
CERTIFIED MAIL

Dear Mr. Bowen,

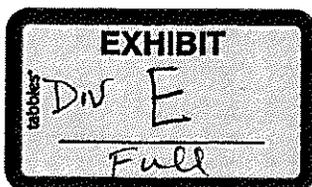
I am in receipt of your fax correspondence received February 13, 2015 requesting the sale of your currently registered vessel, RI 3983S 18' Eastern boat bearing hull #EBVHRMBBM84C, registered for the first time, December 17, 2014, gear and Multipurpose License MPURP001264 to Mr. Neil Hayes. Unfortunately, at this time, your request must be denied. Please be advised transfers are governed by the Commercial and Recreational Saltwater Fishing Licensing Regulations Section (6.7-8) which provides as follows: Issuance of New Licenses Upon Sale of Vessel and Gear

(a) This section applies only to purchasers, of vessels and gear, who are residents.

(b) Transfer or sale of licenses and endorsements between the purchaser and seller of a vessel and gear is prohibited; provided, however, that if the seller of a vessel and gear who is actively fishing his or her license shall have first surrendered it to the Department, the Department will, upon application, issue one new license to the purchaser of the vessel and gear, pursuant to the terms and conditions of this section.

(Emphasis added.)

In review of your file, please be aware that RI 6905L, 36' Novi bearing hull #RIZ00020C189 was the vessel commercially declared and registered to you during the years of actively fishing and then sold in August of 2014. A new vessel was not declared until December 17, 2014, RI 3983S as described above which breaks business ownership between the vessel and license. The Department is unable to authorize the sale/transfer of the license in that review of our records indicates that you did not have a commercially declared vessel in your file from August 2014 until December 17, 2014.



You have the right to appeal this preliminary denial to the Administrative Adjudication Division for Environmental Matters. That appeal must be filed within thirty (30) days of the receipt of this preliminary denial. You must file an appeal with the:

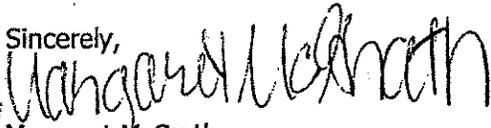
Clerk
Office of Administrative Adjudication
One Capitol Hill, Second Floor
Providence, RI 02903

You should also send a copy of the notice of your appeal to:

Gary Powers
Deputy Chief Legal Counsel
Department of Environmental Management
235 Promenade Street
Providence, RI 02908

If you have any questions, please contact my office at (401) 222-6647, extension 2102. However, please be advised that any communications with this office cannot be deemed to extend the time period during which a timely appeal may be filed with the Administrative Adjudication Division for Environmental Matters.

Sincerely,



Margaret McGrath,
Programming Services Officer

Cc: Gary Powers, Esq.
Bonnie Stewart, Clerk AAD