

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

IN RE: F/V QUITSA STRIDER II

AAD NO. 97-001/F&WA

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 Application for Exemption ("Denial Letter") issued by the Division of Fish and Wildlife ("Division") on January 27, 1997. The hearing was conducted on April 21 and 22, 1997. On May 2, 1997 Applicant filed a motion to re-open the hearing. Following oral argument, Applicant's motion was denied. Post-hearing memoranda were subsequently filed by the Applicant and the Division.

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").

PREHEARING CONFERENCE

A prehearing conference was conducted on March 7, 1997 at which the parties agreed to the following stipulations of fact:

1. That the regulations effect (sic) the sale of summer flounder in

Rhode Island caught both in federal waters and in the state waters of other states;

2. That the Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant;
3. That the Applicant withdrew the initial request for the issuance of a certificate of summer flounder exemption to the F/V Quitsa Strider II on February 2, 1995;
4. That the Applicant filed a form for the Authorization to Obtain Materials in support of an anticipated application for the issuance of a certificate of summer flounder exemption for the F/V Quitsa Strider at an informal conference conducted on February 7, 1996;
5. That the Applicant failed to file the anticipated application for the issuance of a certificate of summer flounder exemption for the F/V Quitsa Strider.

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

HEARING SUMMARY

At the hearing, Applicant called two (2) witnesses: **Jonathan Mayhew**, the owner and operator of the Quitsa Strider II ("QS II"), and **April Valliere**, a principal marine biologist for the Division of Fish and Wildlife. The Division called two (2) witnesses: **Richard Sisson**, the deputy chief of marine fisheries, who was qualified by agreement as an expert in the collection, tabulation and dissemination of commercial fishery harvest statistics that are employed by the State and Federal governments; and **April Valliere** who was qualified by agreement as an expert in the collection, tabulation and dissemination of commercial fishery harvest

statistics that are employed by the State and Federal governments.

The hearing was for the purpose of considering Applicant's appeal of the denial of his application for a Summer Flounder Exemption. The denial had been issued in a letter dated January 27, 1997. (Div 1 Full; also Appl 1 Full). The letter recounted the following events: the denial of an earlier application for exemption for which there was a request for hearing before the AAD and a later withdrawal of the hearing request; an informal conference at which Applicant submitted and then withdrew a second application for exemption; and the faxed submission of the application at issue in the instant matter, which is identical to the second application. Although the application was dated February 2, 1996, it was received by the Division, via the facsimile transmission, on December 12, 1996.

The Denial Letter specified the grounds for the application's rejection:

As you are aware, in order to qualify for the issuance of an exemption, an application must demonstrate that some time during the period 1987 through 1992, an applicant fishing vessel landed summer flounder in Rhode Island and sold the fish to a licensed Rhode Island finfish dealer. The Subject Application attempted to satisfy this requirement by the submission of a landings slip from a "Bergie's Seafood, Inc." The Department was unable to verify the subject landings slip through the National Marine Fisheries Service commercial vessel database, nor was there evidence that "Bergie's Seafood, Inc." was licensed by the State of Rhode Island during the qualifying period. Div 1 Full at 2.

Background of the Fisheries Regulations

Richard Sisson provided a helpful overview of the origin of the

moratorium on the landing of summer flounder and the genesis for the particular requirements of the Rhode Island Marine Fisheries Regulations ("Fisheries Regulations"). Mr. Sisson had been a participant in developing the Federal fisheries management plan for summer flounder; he was also one of the key people charged with developing a plan for the State of Rhode Island.

The Federal plan mandates a coastwide annual allowable harvest limit for summer flounder. The commercial (vs. recreational) portion of the quota is divided among the coastal states based upon their historic participation in the summer flounder fishery. The Federal plan imposed on each state a commercial quota which the state then has to manage on its own.

Rhode Island's quota was based upon its landings over a period of years. The tabulated landings which determined Rhode Island's limit included vessels with ports of origin outside Rhode Island. Conversely, when Rhode Island vessels landed summer flounder in non-Rhode Island ports, those landings were attributed to the other state's quota and did not increase Rhode Island's limit.

The Rhode Island exemption program was designed to keep the number of vessels participating in the fishery constant. The determination was made that those who should be allowed to harvest the quota should be those with a history of landing summer flounder in Rhode Island. Vessels, regardless of their port of origin, would be allowed

to apply for the summer flounder exemption certificate.

Richard Sisson assisted in drafting the Fisheries Regulations to manage the state's plan. The regulations' provision that an applicant must demonstrate landing one pound of summer flounder in Rhode Island during the period 1987 through 1992 (to show the applicant's historic involvement in the summer flounder fishery in Rhode Island) was selected because computerized data was available for that period and it was the most accurate data available for any time period on record. Additionally, the period overlapped that used for people who had applied for Federal summer flounder permits.

The pertinent provisions of the Rhode Island Fisheries Regulations, effective June 1, 1996, are as follows:

7.07-6 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 the Division and a valid Rhode Island commercial fishing license.

7.07-7 Exemption Certificates--The Division will issue an exemption certificate for a vessel if the owner of the vessel or his/her representative applies to the Division for the issuance of such a certificate and demonstrates to the satisfaction of the Director that:

- A. the operator of the vessel possesses a current Rhode Island commercial fishing license to land summer flounder up to the amount permitted by the Rhode Island Marine Fisheries Council Regulations; and
- B. the subject vessel meets any of the following criteria:
 1. the vessel was operated by a person who possessed a valid Rhode Island Commercial fishing license and landed and sold in excess of one pound of summer flounder to a licensed fish dealer in the State of Rhode Island during the period from January 1, 1987, through December 31, 1992; or
 2. the vessel fished exclusively in the Exclusive Economic Zone

- (EEZ) and landed and sold in excess of one pound of summer flounder to a licensed Rhode Island fish dealer sometime during the period January 1, 1987, through December 31, 1992. The Department may require additional supporting documents including but not limited to the ship's logs, ice and fuel slips; or
3. 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 licensed Rhode Island dealer during the period from January 1, 1987, through December 31, 1992; or
 4. the vessel replaces a vessel which fished exclusively in the EEZ (sic) and landed and sold in excess of one pound of summer flounder to a licensed fish dealer in Rhode Island during the period January 1, 1987, through December 31, 1992.

7.07-8 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 wishing to apply for an exemption certificate shall:

- A. provide the Division with a copy of the operator's valid current Rhode Island commercial fishing license or non-resident landing license, and Federal Fluke Permit if the summer flounder is to be taken in the Exclusive Economic Zone (EEZ);
- B. submit a completed notarized application for said certificate.
- C. Submit proof that the vessel meets the requirements set out in 7.07-7; and
- D. provide a completed notarized waiver authorizing the Department to access records verifying that this vessel and operator meet the criteria set forth in 7.07-7.

Did the QSII Land Summer Flounder in Rhode Island?

The Fisheries Regulations require that for a vessel to be eligible for the Rhode Island summer flounder exemption, the vessel¹ must submit

¹At the hearing, Applicant questioned whether the regulations required the **vessel** or the **vessel's owner/operator** to demonstrate the history of landing summer flounder in Rhode Island. I allowed Jonathan Mayhew, owner/operator of the QSII, to present testimony regarding his personal history of landing summer flounder on a previous vessel and reserved ruling on the testimony's relevancy until I could more fully review the regulatory language. It is clear from the language and from

proof that it has landed and sold in excess of one pound of summer flounder "to a licensed fish dealer in the State of Rhode Island"². In the application, the vessel attempted to meet this requirement through the submission of landing slips from "Bergie's Seafood, Inc.". The slips, dated April 17, 1992 and November 23, 1992, document that Bergie's Seafood purchased considerably more than one pound of summer flounder from the QSII. Also submitted with the application was a statement from Bergie's Seafood acknowledging that the company purchased fish from the QSII on November 24, 1992 (sic) as indicated on the latter landing slip.

According to the Denial Letter issued by the Division, the

the Director's statement adopting the Emergency Regulations that it is the **vessel's history** which is to be considered. It was the intent of the Emergency Regulations that commercial fishing vessels which have traditionally landed summer flounder in Rhode Island ports be permitted to continue to land summer flounder in Rhode Island ports. That goal did not change with the adoption of the permanent regulations.

The regulations specify that it is the **vessel** which is eligible to receive the exemption if it meets the listed conditions. Additionally, according to section 7.7.8-6, the fishing and permit history are presumed to follow the vessel, not the former owner, when a vessel is transferred and may only be retained by the previous owner if there is credible written evidence to that effect. No such evidence was presented in this case. The testimony of Jonathan Mayhew regarding the landing of summer flounder from the vessel *Quitsa Strider* (not "II") is therefore not relevant to the fishing history of the QSII.

²The subsections of 7.07-7 B variously require the fish to have been landed and sold "to a licensed fish dealer in the State of Rhode Island"/"to a licensed Rhode Island fish dealer"/"to a licensed Rhode Island dealer"/"to a licensed fish dealer in Rhode Island". Amendments to this section were filed with the Secretary of State on December 11, 1996 and made the language uniform that the sale of summer flounder be to a "Rhode Island licensed dealer." The amendments became effective January 1, 1997. See R.I. GEN LAWS §42-35-4.

Department was unable to verify the landing slips through the National Marine Fisheries Service ("NMFS") commercial vessel database.

At the hearing, Jonathan Mayhew, a commercial fisherman from Chilmark, Massachusetts, testified that he has owned the QSII since late 1989 or January 1990. Mr. Mayhew stated that during the period 1990 through December 31, 1992, the QSII caught summer flounder in Federal waters and landed the fish in Rhode Island. He was present at the April 17, 1992 landing at a dock in Melville, Rhode Island, located near the Navy yard on Aquidneck Island, and unloaded 235 pounds of summer flounder which was delivered into a truck for Bergie's Seafood.

Although Mr. Mayhew had submitted with the QSII application the landing slip for the November 23, 1992 sale to Bergie's Seafood, he testified that he was not present on that occasion. The Division's objection that further questioning regarding the location of the sale called for hearsay was sustained.

Mr. Mayhew also testified that the QSII, under the captainship of Sean Waite, may have landed summer flounder at Point Judith, Rhode Island. No further evidence was provided regarding the possible landing of summer flounder in Point Judith during the years 1987 through 1992.

April Valliere was called as a witness for Applicant and later also testified for the Division. Ms. Valliere, a principal marine biologist at the DEM Division of Fish and Wildlife, had been the Fisheries Reporting Specialist and Senior Fisheries Reporting Specialist at the Department for

11 years, through 1992. She served as a Port Agent/Fisheries Reporting Specialist responsible for the collection of all commercial fisheries harbor statistics for the State and Federal management plans. This included, among other things, collecting the landings of all commercial fish and shellfish species landed in Rhode Island, their count and value. Her primary responsibility was to collect the data on the west side of Narragansett Bay but her office also served as the central facility for all landings in the state.

Ms. Valliere was also one of the individuals responsible for reviewing the applications for the summer flounder exemption certificate. Her role was to check that the application was complete, that it had been notarized, that the waiver had been signed to allow access to the necessary databases to confirm the licensing and landing information, and that copies of the state license, the Federal permit and the landing receipt were affixed. She would review the application and make a recommendation to her supervisor. Ultimately the application went to the Chief of the Division for his approval or disapproval.

Ms. Valliere testified that for the QSII application, as with all applications, the Division sought to verify the landings suggested by the Applicant as qualifying the vessel for the exemption and did so by reviewing the NMFS commercial vessel database. Ms. Valliere testified that the NMFS database listed all permitted vessels landing summer flounder in Rhode Island for the period 1987 through 1992. The information showed

no QSII landings attributed to the State of Rhode Island in 1992.

Subsequent to the issuance of the Denial Letter on January 27, 1997, the Division made an additional query to the NMFS for data specific to the QSII for the period 1991 through 1993. That database showed that all of the QSII landings for all species in the year 1992 were in Massachusetts.

A third inquiry was made to the NMFS seeking information regarding QSII landings on the two dates identified in the application. According to the NMFS information, both landings were attributed to New Bedford, Massachusetts.

Ms. Valliere also addressed the status of Melville, Rhode Island as a port of landing. She stated that, to her knowledge, Melville was not a port of landing at all until 1993. According to Ms. Valliere, trucks began to unload fishing vessels in Melville sometime in 1993. This was due to fishing vessels having reached the summer flounder quota in their home state(s).

Notwithstanding the Division's determination that Applicant did not qualify for the exemption, the Division met with Mr. Mayhew and other participants to discuss the matter at an informal conference. Ms. Valliere testified that during the meeting, Mr. Mayhew requested that if he supplied additional documentation, such as ship logs, fuel or ice slips to substantiate his landings, the Division would review them. No such documentation was ever received by the Division, however, nor was any offered at the hearing.

It is certainly possible that Ms. Valliere is mistaken about the status of Melville as a port of landing as early as April 1992. Applicant, however, has not offered any evidence to substantiate his claim that it was indeed operating as a port in April 1992, nor has he explained the apparent conflict of Bergie's statement that the April landing was a New Bedford landing for the purposes of the NMFS, since Bergie's Seafood would have been the source of the NMFS reports.

Applicant has also not offered any evidence to explain the two inconsistent statements from Bergie's Seafood, one which is attached to the application stating the November 1992 landing occurred in Melville, Rhode Island, and the other to the New Bedford port agent that the November landing was a New Bedford landing for the purposes of the NMFS. Without further evidence from the Applicant, whose burden it is to show the landing occurred in Rhode Island, I cannot find that the Bergie's statement attached to the application is credible.

Based upon my review of the above discussed testimony and exhibits, I find that Applicant has not met the burden established in section 7.07-8 of the Fisheries Regulations to prove that the vessel meets the requirements set out in 7.07-7, specifically that the vessel landed and sold summer flounder in Rhode Island during the qualifying period.

Was Bergie's Seafood Properly Licensed?

To be eligible for the Rhode Island summer flounder exemption, the Applicant must also submit proof that it has sold in excess of one pound

of summer flounder "to a licensed fish dealer in the State of Rhode Island". According to the Denial Letter issued by the Division, the application was also denied because there was no evidence that "Bergie's Seafood, Inc." was licensed by the State of Rhode Island during the qualifying period. Div 1 Full at 2.

At the hearing, Ms. Valliere testified that in her role as principal marine biologist and as fisheries reporting specialist/port agent, she was familiar with those fish dealers licensed in the State of Rhode Island. She had reviewed both the Department of Health licenses and the Department of Environmental Management licenses for 1992 (since Applicant's two alleged qualifying landings were in 1992) and found that Bergie's Seafood, Inc. was not licensed by either agency in 1992.

Applicant argues in his Post Hearing Memorandum that the regulatory language requiring the sale of summer flounder "to a licensed fish dealer in the State of Rhode Island" means that the fish dealer must be licensed and the sale must occur in Rhode Island but that there is no requirement that the fish dealer be licensed in or by the State of Rhode Island. Post Hearing Memorandum In Support of Appeal of Applicant F/V Quitsa Strider, p. 7. Applicant states in the Post Hearing Memorandum that the evidence of record is that Bergie's Seafood was licensed in the Commonwealth of Massachusetts. at 8.

Even assuming, *arguendo*, that Applicant's interpretation of the regulation is correct, after a careful review of the transcript of the

hearing, I find that Applicant did not establish in evidence that Bergie's Seafood, Inc. was licensed in Massachusetts or anywhere else. It is therefore unnecessary to reach the determination of whether the regulation allowed the purchasing fish dealer to be licensed in another state or whether it must be by the State of Rhode Island.

Finally, I wish to briefly address Applicant's Motion to Reopen Hearing or Motion to Supplement Record by Affidavit, which was filed after the close of the hearing. Applicant sought to reopen the hearing to present affidavit or testimony from the Department of Health that a Rhode Island license would not have been required for Bergie's Seafood to purchase fish in Rhode Island and transport it out of state. Following oral argument on May 22, 1997, I concluded that the proposed evidence was irrelevant because the issue at the hearing was not whether Bergie's Seafood was required to have a Rhode Island license but rather was whether Applicant had sold to a licensed fish dealer in the State of Rhode Island as set forth in the regulation. The motion was therefore denied.

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

FINDINGS OF FACT

1. Jonathan Mayhew is the owner of the F/V Quitsa Strider II and has owned the vessel since late 1989 or January 1990.
2. On April 17, 1992 and in November 1992 the F/V Quitsa Strider II sold in excess of one pound of summer flounder to Bergie's Seafood, Inc..

3. Jonathan Mayhew's claim that the vessel landed summer flounder in Melville, Rhode Island on April 17, 1992 lacks substantiation and is contradicted by the reports from the National Marine Fisheries Service.
4. Jonathan Mayhew's claim that the vessel landed summer flounder in Melville, Rhode Island in November 1992 is supported by a statement from Bergie's Seafood, Inc. which is inconsistent and contradicted by the reports from the National Marine Fisheries Service.
5. There is no evidence in the record that Bergie's Seafood, Inc. was a licensed fish dealer.

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. Applicant has failed to prove by a preponderance of the evidence that the vessel landed and sold in excess of one pound of summer flounder to a licensed fish dealer in the State of Rhode Island.
3. Applicant has not met the criteria set forth in section 7.07-7 of the Fisheries Regulations to obtain a Rhode Island summer flounder exemption certificate.

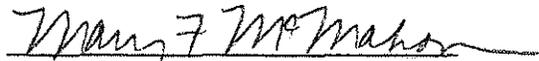
Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. Applicant's Motion to Reopen Hearing or Motion to Supplement Record by Affidavit is **DENIED**.
2. Applicant's request for a Rhode Island summer flounder exemption

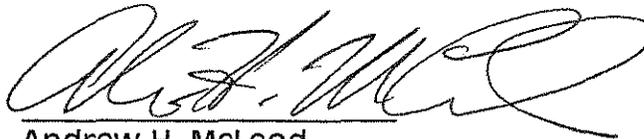
certificate is **DENIED**.

Entered as an Administrative Order this 8th day of December, 1997 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 St., Room 310
Providence, Rhode Island 02908
(401)-277-1357

Entered as a Final Agency Order on this 20th day of February, 1998



Andrew H. McLeod
Director
Department of Environmental Management
235 Promenade Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded via regular mail, postage prepaid to Everett A. Petronio, Jr., Esq., 1239 Hartford Ave., P. O. Box 19040, Johnston, RI 02919-0001 and Paul L. Foster, Esq., Suite 200 Lincoln Center, 132 Old River Road, Lincoln, RI 02865 and via interoffice mail to Gary Powers, Esq., Office of Legal Services, 235 Promenade Street, Providence, Rhode Island 02908 on this 20th day of ~~December~~, 1997.

February, 1998



APPENDIX A

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

Applicant's Exhibits:

- App. 1 Full A copy of the January 27, 1997 Denial of Application for Exemption to Applicant's application issued by the Department.
- App. 2 Full A copy of Applicant's Application for a Certificate of Exemption from the Moratorium on the landing of Summer Flounder dated February 2, 1996, including attachments and covering correspondence.
- App. 3 for Id A copy of the Emergency Regulations filed on Dec. 1, 1995.
- App. 4 for Id Copies of correspondence between counsel for the Applicant and the Department evidencing that Applicant had not withdrawn its application on February 7, 1997, as alleged in the Department's Denial of Application for Exemption dated January 27, 1997.
- App. 5 Full Invoices from Bergie's with attached vessel landings by species, re: F/V Quitsa Strider II.

Division's Exhibits:

- Div. 1 Full A copy of the January 27, 1997 denial by the Division of a request for the issuance to the F/V Quitsa Strider II (the "Applicant") of a Certificate of Exemption which would authorize the Applicant to land in excess of Two Hundred (200) pounds of Summer Flounder in the State of Rhode Island. (3 pgs.)
- Div. 2 Full A copy of a request on behalf of the Applicant for a formal hearing dated January 28, 1997. (1 pg.)
- Div. 3 Full A copy of the February 2, 1996 withdrawal of the application previously submitted to the AAD for formal hearing concerning the issuance of a Certificate of Exemption for the Applicant. (1 pg.)

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- Div. 4 Full A copy of a form Authorization to Obtain Materials dated January 7, 1996 concerning an anticipated application to be filed on behalf of the F/V Quitsa Strider. (1 pg.)
- Div. 5 Full A copy of curriculum vitae of April K. Valliere, Marine Biologist with the Division. (2 pgs.)
- Div. 6 Full A copy of curriculum vitae of John Karlsson, Marine Biologist with the Division. (1 pg.)
- Div. 7 Full A copy of curriculum vitae of Richard Sisson, Deputy Chief Division. (3 pgs.)
- Div. 8 Full Nautical map of Narragansett Bay #13221 prepared by U.S. Dept. of Commerce.