

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

RE: F/V ALLIANCE

AAD NO. 97-003/F&WA

DECISION AND ORDER

This matter came before the Administrative Adjudication Division ("AAD") of the Department of Environmental Management ("Department" or "DEM") pursuant to a request for a hearing filed at the AAD by Edward O. Todd on behalf of F/V Alliance ("Applicant") on the denial by the Division of Fish and Wildlife ("Division") of Applicant's application for a Rhode Island Summer Flounder Certificate of Exemption (which authorizes the landing of summer flounder by commercial fishing vessels in excess of the daily limit authorized by applicable regulations).

The within proceeding was conducted in accordance with the statutes governing the AAD (R.I.G.L. Section 42-17.7-1 et seq), the Administrative Procedures Act (Chapter 42-35 of the General Laws of Rhode Island as amended) and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules"). Thomas H. O'Brien, Esq. represented the Applicant and Gary Powers, Esq. represented Division.

The following facts are undisputed. On December 11, 1996, pursuant to duly promulgated Regulations, Division established a deadline for the issuance of "Rhode Island Summer Flounder Exemption Certificates" which authorize the landing of summer flounder by commercial fishing vessels

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in excess of the daily limit authorized by applicable regulations (currently 200 pounds). These regulations specify the procedure and substantive requirements under which an exemption certificate can be obtained. The qualifications include a demonstration that the vessel was operated by a person who landed and sold in excess of one (1 lb) pound of summer flounder to a fish dealer licensed in the State of Rhode Island during the period of January 1, 1987 to December 31, 1992. The regulations provide that an application for an exemption certificate shall be mailed or submitted prior to January 1, 1997 to the Office of Fish and Wildlife in Wakefield Rhode Island. Applicant submitted an application for a Certificate of Exemption on February 3, 1997. Division, by letter dated February 6, 1997, informed Applicant that Division could not accept the application because it was not submitted before January 1, 1997 and that Applicant is not now eligible to apply for the exemption. Applicant filed a request for a formal hearing at the AAD on February 7, 1997. Pursuant to oral stipulation of the parties (during a hearing on a Motion to Dismiss), Applicant filed an Amended Request for Hearing at the AAD on May 28, 1997.

Division initially filed a Motion to Dismiss Applicant's request for a formal hearing pursuant to Rule 12 (b) 6 of the Rhode Island Superior Court Rules of Civil Procedure (failure to state a claim upon which relief can be granted). In support of its motion, Division argued that the AAD lacked subject matter jurisdiction because the governing regulations

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establishing the moratorium deadline are devoid of any provisions granting exceptions or exemptions which permit the untimely filing of an application for a Certificate of Exemption. After review of the pertinent statutes, regulations and court decisions, it was determined by the Hearing Officer that the AAD possesses the requisite jurisdiction pursuant to R. I. G. L. Section 42-17.7-2, AAD Rule 8.00(a)(1), and Rules 54 and 60(b) of the Superior Court Rules of Civil Procedure. The Hearing Officer concluded that the Applicant should be afforded an opportunity to explain his failure to file timely and not be subjected to an automatic disqualification. Consequently, the Hearing Officer denied the Motion to Dismiss and remanded the matter to Division to determine whether Applicant met the substantive conditions of eligibility to obtain the Certificate of Exemption. On July 3, 1997, Division acknowledged that the applicant met all substantive conditions of eligibility to obtain a Certificate of Exemption (other than for a timely filing of the application).

The Prehearing Conference was held on July 7, 1997, and the Prehearing Conference Record was prepared by the Hearing Officer. The following stipulations were entered by agreement of the parties:

1. That the Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Appellant; and
2. That the Appellant submitted its initial request for the issuance of a certificate of summer flounder landing exemption on February 3, 1997.
3. If the Appellant's application for issuance of a summer flounder landing exemption certificate were deemed timely, the application

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would qualify for issuance of such a certificate.

The issue to be considered at the Hearing (pursuant to stipulation of the parties in the Prehearing Conference Record) is the following:

1. Whether the Appellant can demonstrate to the satisfaction of the Hearing Officer that a factual basis has been presented by the Appellant to warrant a finding of excusable neglect.

The adjudicatory hearing was held on July 17, 1997, at which both sides presented evidence as to whether Applicant should be granted an exception for untimely filing on the grounds of excusable neglect.

Edward Todd testified on behalf of Applicant, and Richard Sisson and April Valliere testified on behalf of Division.

The exhibits proffered by the parties, marked as they were admitted into evidence, are indicated on Appendix A.

Edward O. Todd testified that he has been a commercial fisherman since 1982, and that he became the captain/owner of F/V Alliance in 1990. He stated that the Alliance was a member of the Point Judith fishing fleet, and that it made regular fishing trips from the early Nineties until he encountered certain unusual problems during 1995. Commencing around the beginning of July 1995, the ship had a breakdown and a refitting, which caused it to be at the dock for about a month. He then resumed making regular trips until the beginning of October, when his mother-in-law died and his co-captain was severely burned in a home accident.

Applicant resumed fishing from around the middle of October until the beginning of November, when the US Marshall "ticketed" the Alliance,

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commencing foreclosure proceedings. After several months of unsuccessful negotiations in an attempt to avert foreclosure, the auction WAS held on February 6, 1996 and the boat was purchased by a corporation owned by Mr. Todd's father and father-in-law. About seven to ten days later, the Federal Court approved the sale and a title to the boat was given to said corporation. During the remainder of February and April of 1996, the boat required extensive restoration, and the documentation and licenses had to be changed to the new corporation before the boat resumed fishing.

The Alliance started fishing again in mid-April, 1996 and made regular trips until the middle of May 1996, when they were once again required to undergo repairs. They did not resume fishing until July, 1996. Shortly thereafter, the Alliance experienced further and more extensive difficulties (the bolts holding the two shafts were sheered) and they were towed back to port for more extensive repairs. The Alliance was docked exclusively for repairs essentially from the beginning of August, 1996 until mid-December, 1996, when it resumed regular fishing trips. During a December 1996 fishing trip, the Alliance virtually totally destroyed its net, which required fourteen to sixteen days to repair.

Mr. Todd further testified that between April and July of 1996, he reported his landings of summer flounder (all of which were at Point Judith) to the DEM. On February 6, 1997, when the Alliance was landing summer flounder, DEM Officers came to the dock and inspected the catch

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and the paperwork. They informed Mr. Todd that he was in violation of the summer flounder regulations because he did not have the requisite exemption certificate. He went to the Division of Fish and Wildlife on the following business day to fill out an application for an exemption, but he was told that he could not do so because of the moratorium.

Mr. Todd explained at the hearing that he is in charge of paperwork and keeping the regulations, and that he does not have anyone working for him who helps with the paperwork or things to that effect. He is also the captain when he fishes on the vessel; and he alone keeps the requisite licenses up-to-date. It was the further testimony of this witness that he did not recall ever receiving in the mail an application for a state certificate of exemption from the landing of summer flounder; that he was never aware in 1996 of the need for such a state certificate, nor of the cutoff date of December 31, 1996; and that in April of 1996 when he visited the offices of Fish and Wildlife in South Kingstown twice in order to make sure that his licenses were all in order before he returned to fishing, he was not asked if he had a valid state exemption certificate for summer flounder at either visit.

Richard T. Sisson, Deputy Chief of Marine Fisheries in the Division, testified that he has been employed by the State of Rhode Island for over twenty-nine years; and that he receives the staff recommendations for either approval or denial of applications for issuance of summer flounder landing exemption certificates and passes those on with his

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recommendation to the Division Chief for signature. He explained that the Federal Government, pursuant to the Magnuson Fisheries Conservation Act, has declared that the summer flounder fishery on the Atlantic coast is over-fished and has mandated that certain measures be taken to restore the stocks of fish to a healthy state. As part of that program, which is administered by the Mid-Atlantic Fisheries Management Council (created by the Magnuson Act) and the Atlantic States Marine Fisheries Commission (created pursuant to the Atlantic States Marine Fisheries Compact Act R.I.G.L. Chapter 8 of Title 20) were charged with managing the fisheries; and based on historical landings in each state between 1980 and 1989, each state on the Atlantic coast will be given a share of a coastwide quota of summer flounder. Each of said states was charged with managing that share to its best advantage.

Mr. Sisson described the function and purposes of a Federal Exemption Certificate regarding summer flounder. The Federal Exemption waived the mesh regulation for a certain specified area of the Atlantic coast, allowing fishermen to use small mesh nets so they could catch species other than summer flounder with that net and still not do any damage to the summer flounder population. Fisherman were allowed to keep summer flounder in amounts that are greater than the normal allowed limit. This Federal exemption allows certain gear to be used to take summer flounder in a certain area of the Atlantic Ocean during a certain season; whereas the Rhode Island landing exemption allows

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vessels with a historical participation in the Rhode Island fisheries to land in excess of two hundred pounds of summer flounder.¹

Mr. Sisson testified that he monitors the quota given to Rhode Island to make sure that it lasts for the entire year; that he consults with several industry representatives as to how adjustments can best be made to assure that the quota is not used; that since January 1, 1995 there have been a number of changes or modifications in the permissible landings that are authorized by otherwise licensed commercial vessels in this state. As required, he files said changes at the Secretary of State's office. He also publishes a legal notice in the newspaper, and prepares a press release for each change. Each seafood dealer in Rhode Island is informed of any prospective changes in possession limits; and they are requested to pass on this information to the people who sell to them.

April Valliere, a Principal Marine Biologist with the Division, testified that she has been employed by the State of Rhode Island for over fifteen years. In her present position, she is involved in the review of summer flounder landing exemption applications and the recommendations to the Division Chief for issuance or denial of a certificate. Her participation in the formulation of the summer flounder regulations consisted of researching the mechanisms used in formulating a permitting system

¹During the course of the proceedings, however, the possession limit (which had been put into place during the first week of June, 1997) was reduced to two hundred pounds. Therefore, at the time of the hearing, the two hundred pound limit applied to both exempt and non-exempt vessels.

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(utilizing a Federal database) to prevent the State's quota from being unfairly harvested.

It was the testimony of this witness that on November 5, 1995, the Division mailed an informational package concerning the emergency regulations to all current commercial fishing license holders, (including Edward Todd); that the regulations providing for the landing exemption certificate for summer flounder have been in place since December 1995; and that the application period was open from that time until regulations were again promulgated in 1996 to put a cap on the number of permits.

Ms. Valliere expressed concern for the consequences that might flow from the issuance of additional summer flounder landing exemption certificates. She felt that Division would be inundated with applications; that this would jeopardize the program; and that it would not comply with the Federal management plan.

At the conclusion of the applicant's presentation, Division made a motion for dismissal/denial of Applicant's request pursuant to Rule 41 (b) (2) of the Superior Court Rules of Civil Procedure.² Applicant then responded to said motion. The Hearing Officer deferred determination of this motion, and this decision shall operate as a determination of same.

The parties waived final argument at conclusion of the hearing, and the Hearing Officer directed that Post-hearing memoranda be filed by

²The 1995 Amendment incorporated the equivalent of Rule 41(b)(2) into Rule 52(c).

August 12, 1997. Applicant filed a Post-hearing memorandum on August 12, 1997. Division filed a Post-hearing Memorandum on August 15, 1997, and a Response To Applicant's Post-hearing Memorandum on August 19, 1997. On August 21, 1997, Applicant filed a Motion to Strike Division's Post-hearing Memorandum and Division's Response (said motion also requested that Applicant be awarded his attorney's fees for prosecution of said motion). On August 28, 1997, Division filed a Motion to Enlarge Time for the Filing of Post-hearing Memorandum as well as an Objection to Applicant's Motion to Strike. On September 4, 1997, Applicant filed an Objection and Motion to strike Division's Motion to Enlarge Time.

Neither party requested oral argument on any of the aforesaid Motions. After reviewing the submissions, I have determined that oral argument would not advance my understanding of the issues and therefore is not warranted in these instances. The Applicant's Motion to Strike is hereby denied. It was not accompanied by the requisite memorandum pursuant to the AAD Rules and no valid grounds were advanced by Applicant. The Applicant's request for attorney's fees for prosecution of said Motion is also denied. There is no authority for this tribunal to impose sanctions, even if the facts herein would support such sanction. The Division's Motion to Enlarge Time is hereby granted. The delay in filing was relatively short, and Applicant has not been prejudiced by Division's failure to file said documents timely or pursuant to the manner specified by the Hearing Officer.

It is Division's contention that the Applicant did not present an adequate factual basis for a finding of such excusable neglect as warrants that Applicant be exempted from timely filing an application for a RI Summer Flounder Landing Exemption Certificate. It is asserted by Division that the potential of prejudice to Division is exceedingly great if the Applicant were allowed to untimely file his Application, because the granting of such an exception would "open the floodgates for numerous other applicants, especially those from the states...whose summer flounder fisheries are currently closed". Division argues that the Applicant's testimony during the course of the hearing was contradictory and "leaves plenty of room to believe good faith is not being practiced on the part of the Appellant, thus accentuating the question of whether the Appellant was indeed aware of the regulatory changes establishing the requirement for a summer flounder landing exemption certificate and the moratorium on the application for said certificate". Division, therefore, requests that its motion to dismiss be granted, or in the alternative, that a decision be rendered in favor of the Division.

It is the Applicant's contention that he has demonstrated by a preponderance of the evidence that his failure to timely file his application for a certificate of exemption was caused by excusable neglect sufficient to justify granting the relief requested. Applicant asserts that he has presented a detailed and substantial basis to explain his failure to timely file the subject application; that these grounds were virtually

uncontradicted; and that the evidence clearly establishes the existence of extenuating circumstances of sufficient significance as constitutes excusable neglect. Applicant, therefore, requests that his application be deemed timely and that a decision be rendered in his favor ordering Division to issue to Applicant a Certificate of Exemption for the landing of summer flounder.

The following statutes and regulations provide the requisite background for a determination of this matter:

R.I.G.L. 20-1-2. Authority over fish and wildlife--The general assembly hereby vests in the director of the department of environmental management authority and responsibility over the fish and wildlife of the state and, together with the marine fisheries council as hereinafter set forth, over the fish, lobsters, shellfish, and other biological resources of marine waters of the state.

R.I.G.L. 20-1-4. Rules and Regulations--The director is authorized to promulgate, adopt, and enforce any and all rules and regulations deemed necessary to carry out duties and responsibilities under this title.

R.I.G.L. 20-3-1. Council created-Membership-Compensation--There is hereby created a marine fisheries council. The council shall be composed of the director of the department of environmental management or his or her designee who shall serve as chairperson and eight (8) private citizen members. The private citizen members shall be chosen from among those with skill, knowledge and experience in the conservation and management of fisheries resources and shall be appointed by the governor with the advice and consent of the senate. Three (3) of the private citizen members shall be representatives of the commercial fishing industry; and the remaining two (2) shall have skill, knowledge, and experience in the conservation and management of fisheries resources and/or marine biology. The chairperson of the coastal resources management council and the chiefs of the divisions of enforcement and fish and wildlife in the department of environmental management shall serve in an advisory capacity to the council.

R.I.G.L. 20-3-2. Powers and duties--The marine fisheries council shall have regulatory jurisdiction over all marine animal species within the jurisdictional territory of the state. The council is authorized, after the

holding of a public hearing to promulgate and adopt the rules and regulations governing the following activities only, within the areas of its jurisdiction...

(d) The numbers or quantities of fish, lobsters, and shellfish which may be taken or possessed.

Pursuant to the foregoing authority, the following pertinent rules and regulations were adopted by the Rhode Island Marine Fisheries Council:

7.7 Fluke (Summer Flounder)--No person commercially licensed under RIGL 20-2-27 or RIMFC Part II shall possess or harvest any fluke which is less than fourteen (14) inches total length. A total annual statewide quota for fluke will be established. It shall be the most recent allocation established for the State by the Secretary of the U.S. Dept. of Commerce and published in the Federal Register. The quota may be harvested by licensed gear fisherman in accordance with the provisions of Title 20 of the General Laws and in accordance with all rules and regulations promulgated by the R.I. Marine Fisheries Council. In order to provide for the orderly harvest of the quota the R.I. Marine Fisheries Council has established the following sub-period allocations:

7.7.1 Summer flounder Sub-periods

7.7.1-1 Winter Sub-Period: January 1 - April 30 annually. Quota - 45% of the annual quota established in Section 7.7.

7.7.1-2 Summer Sub-Period: May 1 - October 31 annually. Quota - 40% of the annual quota established in Section 7.7.

7.7.1-3 Fall Sub-Period: November 1 - December 31 annually. Quota - 15% of the annual quota established in Section 7.7.

Any unused portion of the quota from a "sub-period" would be carried into the next following sub-period, and any over-harvest is deducted from the next following sub-period. Any landings in excess of the annual quota will be deducted from the next year's allocation to be adjusted at the discretion of the Rhode Island Marine Fisheries Council.

7.7.2 Summer flounder Trip Limits (possession limit)

7.7.2-1 Initial limit 3,000 lbs. in possession at the start of each period for R.I. licensed commercial fisherman.

7.7.2-2 The possession limit may vary from 200 - 10,000 pounds. Fish and Wildlife, after discussions with fishing industry representatives, will determine based upon the period of time remaining in the quota period and the current catch rate, whether the quota will be reached prior to the end of the sub-period. Having determined the catch rate and time remaining in the sub-period Fish and Wildlife will decide whether the possession limit should be decreased or increased. Fish and Wildlife will file a notice with the Secretary of State's Office if the rate is changed, and publish a news release announcing the change. The rate may be modified by Fish and Wildlife upon providing such notification with the possession limit altered between a range of 200 pounds to 10,000 pounds in possession. Effective 12.01 A.M., June 5, 1997, the possession limit will be 200 pounds.³

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.

7.7.9 Submission of Application--Application for an exemption certificate shall be mailed or submitted prior to January 1, 1997 to the office of Fish and Wildlife at: Oliver Stedman Government Center, 4808 Tower Hill Rd., Wakefield, RI 02879, Attention: Fluke Exemption.

The Rhode Island Marine Fisheries Council Regulations state that an application for an exemption certificate shall be mailed or submitted prior to January 1, 1997, but they do not mandate that untimely filing shall automatically result in a disqualification. The time for filing such applications (unlike appeal periods) should be considered directory in light of the apparent harm that results from a strict mandatory deadline. It would be unduly harsh and manifestly unjust to automatically

³Occasionally, said certificates authorize fishing vessels to land in excess of 200 pounds, up to 1000 pounds. As of April 24, 1997, the possession limit was 500 pounds; however, as per the current regulations above, the limit was reduced to 200 pounds.

permanently ban a historical participant (who qualifies in every other regard other than a timely filing) from obtaining a Certificate of Exemption. The applicant should therefore be afforded the opportunity to prove by a preponderance of the evidence that the factual basis presented by him is sufficient to warrant the finding of excusable neglect sufficient to justify the granting of the requested relief.

Section 8:00(a)1 of the AAD Rules provides that a party may request any order or action not inconsistent with law or these regulations which is permissible under the AAD Rules and the R.I. Superior Court Civil Rules of Practice. Super.R. Civ.P. Rule 60(b) provides that a party may be granted relief from a final judgment, order, or proceeding for the following reasons: mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief.

The question of what constitutes excusable neglect has been addressed by various courts in matters involving deadlines imposed by court rules and court orders, as well as by regulations or orders of various agencies or authorities. Although there are no cases dealing specifically with moratoriums on applications such as here, the standards established by the courts in similar matters provides guidelines which are applicable to the issue under consideration. The same standards that have been applied by the courts to their own or subordinate court rules and orders have been applied to the rules or orders of various agencies or boards. Also, "what constitutes mistake, inadvertence, or excusable neglect

sufficient to justify relief under the rule depends on all the circumstances, including the posture of the case," (Kent, Commentaries, Section 60.3).

It has been held by the Rhode Island Supreme Court that the existence of excusable neglect is a question of fact and must be established by evidence. Graham Architectural Products Corp. v. M & J Constr. Co., 492 A.2d 150 (R.I. 1985). The party seeking relief must show "extenuating circumstances of sufficient significance to render" his neglect excusable. Ludwig & Kowal, 419 A.2d 297 (R.I. 1980).

Unexplained neglect standing alone and without more will not automatically excuse noncompliance with orderly procedures. The party seeking relief must present evidence sufficient to establish that the neglect present in this case was occasioned by some extenuating circumstances of sufficient significance to render it excusable. Fields v. S & M Foods, Inc., 105 R.I. 161, 249 A.2d 892 (1969).

The liberal application which the inadvertence and excusable neglect standard has received in the federal courts suggests that a trial justice may now have a wider latitude for the exercise of his discretion. The new standard is not available, however, to circumvent other procedural requirements nor is it so latitudinous as to permit relief where neglect is without excuse, King v. Brown, 103 R.I. 154, 235 A.2d 874 (1967).

Excusable neglect required under the Rules of Procedure for Domestic Relations to set aside a Family Court judgment may be a less stringent standard than that which is needed to set aside other types of

default judgment. However, in both the Family Court and the Superior Court, unexplained neglect alone will not justify granting of a motion to vacate.⁴ The excusable neglect that would qualify for relief from judgment is generally that course of conduct which a reasonably prudent person would take under similar circumstances. Pari v. Pari, 558 A.2d 632 (R.I. 1989).

The Rhode Island Supreme Court has held that the rules of arbitration establishing a deadline for filing written rejection of an arbitration award do not restrict a trial justice's discretionary power under rules of Civil Procedure to enlarge time for notice of rejection when the moving party demonstrates the existence of conditions such as excusable neglect. Relief will not be granted, however, unless it is first factually established that the neglect was occasioned by neglect occasioned by extenuating circumstances of sufficient significance to render it excusable. Astors Beechwood v. People Coal Co., 659 A.2d 1109 (R.I. 1995).

Excusable neglect was found to exist when there was overwhelming medical evidence demonstrating that counsel was suffering from chronic depression and stress for which counsel was under medical treatment,

⁴The Court stated that the wording of Rule 60(b) of the Rules of Procedure for Domestic Relations and the wording of Rule 60(b) of the Superior Court Rules of Civil Procedure are identical. As both Rules have identical wording and purpose, Superior Court precedents regarding its Rule 60(b) may be drawn upon to interpret Rule 60(b) under the Rules of Procedure for Domestic Relations.

and that medical condition was of such a serious nature that it later caused counsel to be transferred to inactive status by the court. Iddings v. McBurney, 657 A.2d 550 (R.I. 1995).

The Division argues that Applicant should have been aware of the need for a certificate because of the mailing of applications, the postings, and newspaper notices. However, the Division's testimony concerning the mailings was sketchy and failed to supply important details such as Applicant's address at the time of mailing. The mailing, postings and notices all occurred during the time of the foreclosure and other unfortunate circumstances that kept Applicant from performing his usual fishing endeavors. The Applicant's testimony that he did not receive the application and that he was not aware of the need for a certificate was credible and essentially uncontradicted. The evidence presented by Applicant was most persuasive, and establishes an adequate factual basis for a finding of such excusable neglect as warrants relief.

Although ignorance of the regulations may not excuse the violations of the regulations, (which is not at issue here), it would be unduly harsh to apply this rule to permanently bar the Applicant from obtaining a certificate of exemption. The issue presented in this matter is not whether Applicant was or should have been aware of the regulations, but whether a factual basis has been presented to warrant a finding of excusable neglect for not meeting the deadline. The Rhode Island Supreme Court has granted similar relief to a corporation where failure to

timely respond to summons and complaint was occasioned in part by the lack of familiarity of the officers of a corporation with the English language and by their lack of understanding of the need for a prompt response. Security Pacific Credit v. Law King Jon, 517 A.2d 1035 (R.I. 1986).

Clearly, the evidence demonstrates that (1) the application was filed within a short time after Applicant learned of and had an opportunity to address the untimeliness; (2) the elapsed time is of very short duration; and (3) that the Division is not prejudiced by the delay. See Safronski v. Commission, 695 A.2d 291 (Pa. Comweth. 1997).

Division's assertion that the granting of an exception to the Applicant would open the floodgates for numerous other applicants and do irreparable damage to the summer flounder fishery is unpersuasive. Admittedly, Applicant met all of the requisite conditions of eligibility to receive a certificate of exemption (other than for a timely filing) of his application. He was a historical participant in Rhode Island fisheries, and he acted as a reasonably prudent person would act under similar circumstances. His application was submitted only thirty-four (34) days late, and he filed on the same day he became aware of the need for an exemption.

The granting of relief under the unique circumstances in the subject matter should not pose a problem to the Division or the fishing industry as suggested by Division. The granting of relief in the instant matter should not "open the floodgates" for others to file, since it would

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be most unusual that other historical participants could have experienced such unusual and extraordinary problems as Applicant. The Applicant attempted to file his application without undue delay, and the reasons for the delay suffice to extend the time for filing for an additional 34 days.

After a careful review of the evidence, I am satisfied that a factual basis has been presented by the Applicant which justifies a finding of such excusable neglect as warrants relief from meeting the subject filing deadline. Applicant presented a detailed and substantial factual basis to explain his failure to timely file the subject application. In addition to the unusually extensive repairs causing the vessel to be docked for prolonged periods of time and the protracted financial problems resulting in the foreclosure and auctioning of the vessel, the applicant suffered the unfortunate loss of his mother-in-law and the severe burning of his co-captain. Consequently, Applicant was not conducting his customary commercial fishing endeavors during most of the time that the summer flounder exemption certificate regulations were promulgated and noticed, and he neglected to file his application for a certificate of exemption prior to the date specified in the regulations. However, the evidence introduced by Applicant is sufficient to explain the reasons for such neglect and clearly demonstrates that such neglect was occasioned by such extenuating circumstances of sufficient significance to warrant a finding of excusable neglect.

FINDINGS OF FACT

After considering the stipulations of the parties and the testimonial and documentary evidence of record, I find as a fact the following:

1. Edward O. Todd was the Captain and owner of the F/V Alliance at all times material hereto.
2. Edward O. Todd met all the substantive conditions of eligibility to qualify for a State certificate of exemption for the landing of summer flounder.
3. Edward O. Todd possessed all valid Federal and State licenses for 1996, except for the State certificate of exemption for the landing of summer flounder.
4. After the Alliance was seized by U.S. Marshalls, the Alliance was inoperable as a fishing vessel from November 1995 until mid-April 1996 due to foreclosure action and docking for repairs.
5. On eight occasions in 1996, the Alliance reported landings in excess of 200 pounds to DEM Enforcement personnel.
6. The Alliance was in no way operational as a fishing vessel from mid-July 1996 until mid-December 1996 due to major mechanical problems with the vessel.
7. Due to unique and extraordinary problems encountered by the Applicant from November 1995 until December 31, 1996, Edward Todd did not file an application for a state certificate of exemption to land summer flounder by the January 1, 1997 deadline.
8. Edward O. Todd applied for a certificate of exemption on February 3, 1997 the day after he was informed of the necessity to obtain a certificate of exemption.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based on the findings of fact as set forth herein, I conclude the following as a matter of law:

1. The Administrative Adjudication Division has valid jurisdiction over this matter pursuant to R.I. Gen. Law §42-17.7-2 and Rule 3.00 of the

Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters. ("AAD Rules").

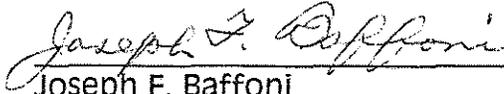
2. Rule 8.00(a)(1) of the AAD Rules allows for motion practice under the Rhode Island Superior Court Rules of Civil Procedure. ("R.C.P.")
3. R.C.P.60(b) allows relief from a judgment or order on the grounds of mistake, inadvertence, excusable neglect or other reasons justifying relief from operation of the judgment or order.
4. The Division's denial letter of February 6, 1997 constitutes "an order or proceeding from which an appeal lies" under R.C.P.54(a).
5. The applicant sustained his burden in demonstrating by a preponderance of the evidence that his failure to timely file was caused by such excusable neglect as entitle Applicant to relief from the denial of his application for the certificate of exemption.

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

ORDERED

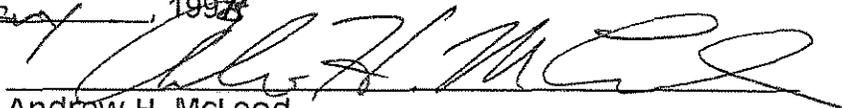
1. That the Application for a Rhode Island Summer Flounder Certificate of Exemption filed by Edward O. Todd ("Applicant") on behalf of the F/V Alliance be and is hereby deemed timely filed.
2. That the Division of Fish and Wildlife's Motion to Dismiss is hereby DENIED.
3. That the Applicant's appeal is sustained and a decision is hereby rendered in favor of the Applicant.
4. That the Division of Fish and Wildlife issue a Certificate of Exemption for the landing of summer flounder to the Applicant forthwith.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 5th day of November, 1997.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street
Providence, RI 02908

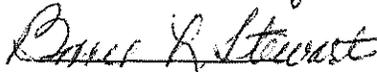
Entered as a Final Agency Decision and Order this 20th day of February, 1997



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

CERTIFICATION

I hereby certify that I caused a true copy of the within order to be forwarded, via regular mail, postage prepaid to Thomas O'Brien, Esq., 400 Reservoir Avenue, Providence, RI 02907 and via interoffice mail to Gary Powers, Esq., Office of Legal Services, 235 Promenade Street, Providence, Rhode Island 02908 on this 20th day of February, 1997: 1998



APPENDIX A

LIST OF EXHIBITS

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

APPLICANT'S EXHIBITS:

Appl. 1 Full A copy of the 1996 landings of the F/V Alliance, entitled "VESSEL LANDINGS BY SPECIES FROM THE FILES OF THE COMMERCIAL LANDINGS DATABASE", United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service. 4 pgs.

DIVISION'S EXHIBITS:

Div. 1 Full A copy of the February 6, 1997 denial by the Division of a request for the issuance to the F/V Alliance (the "Appellant") of a Certificate of Exemption to land summer flounder. 1 pg.

Div. 2 Full A copy of a request on behalf of the Appellant for a formal hearing dated February 7, 1997. 1 pg.

Div. 3 Full A copy of curriculum vitae of April K. Valliere, Marine Biologist with the Division. 2 pgs.

Div. 4 Full A copy of curriculum of Richard Sisson, Deputy Chief Division. 3 pgs.

Div. 5 for Id Affidavit of April K. Valliere with attachments.

Div. 6 for Id Affidavit of Richard Sisson with attachments.