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

RE: YERMAN, SCOTT F. **AAD NO. 19-002/ENE**
NOTICE OF VIOLATION/SUSPENSION OF LICENSE

DECISION AND ORDER

This matter came on before Administrative Hearing before Chief Hearing Officer David Kerins pursuant to Rule 1.16(A) of the *Rules and Regulations for the Administrative Adjudication Division* ("AAD Rules"). The Parties have agreed that this matter can be decided without a hearing and on the submission of written briefs. The Department of Environmental Management ("DEM" or "Department") is represented by Christina A. Hoefsmit, Esquire and Scott F. Yerman ("Applicant", "Appellant" or "Yerman") is represented by James E. O'Neil, Esquire. The parties filed their written briefs on October 1, 2019.

The within proceeding was conducted in accordance with the statutes governing the AAD (R.I.G.L. §§ 42-17.71-1 et seq.); the Administrative Procedures Act (R.I.G.L. §§ 42-35-1 et seq.); R..I.G.L. §20-2-13; the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters and the Rhode Island Marine Fishing Regulations, Commercial and Recreational Saltwater Fishing Regulations dated April 28, 2017 ("Regs").

TRAVEL OF THE CASE

This matter commenced on or about February 22, 2019, when Applicant filed a Motion for a Stay of DEM's Decision Prohibiting the Applicant from Participating in the Summer Flounder Aggregate Program ("Program") with DEM's Administrative Adjudication Division ("AAD").

The facts relate back to a prior case with Mr. Yerman, AAD No. 18-004/ENE. In that matter, Mr. Yerman appealed an April 27, 2018 Notice of Violation which cited him for being over the 2018 Summer Flounder Aggregate Landing Program possession limit for the bi-weekly period of February 18, 2018 – March 3, 2018. *See* Joint Exhibit 3. At the time of the violation Mr. Yerman possessed a 2018 Aggregate Landing Permit. Ultimately, a Consent Agreement was reached whereby Applicant agreed to pay an administrative penalty. *See* Joint Exhibit 1.

After the Consent Agreement was executed Applicant applied to participate in the 2019 Aggregate Landing Program. Applicant was denied a 2019 Aggregate Landing Permit because, pursuant to the terms of the Consent Agreement, the administrative penalty allegedly constituted a violation. Under the eligibility requirements, to participate in the Aggregate Landing Program an applicant cannot have been "assessed a criminal or administrative penalty in the past three years for a violation of the section [Summer Flounder] or have more than one marine fisheries violation". *See* Joint Exhibit 2 at Part 3.10.2(C)(2)(c). The Department denied the Applicant a 2019 Aggregate Landing Permit

based on its position that the Applicant had a violation. See Joint Exhibit 4.

Mr. Yerman appealed DEM's denial by filing a Motion to Stay arguing that the fulfillment of his obligation under the Consent Agreement, as well as the Rhode Island Supreme Court's decision in *State of Rhode Island Department of Environmental Management v. Administrative Adjudication Division* (a/k/a Barlow) bars DEM from prohibiting his participation in the Aggregate Landing Program. DEM filed a Motion to Dismiss which was denied. The Parties subsequently agreed that this matter could be decided on the submission of briefs without the need for a hearing.

UNDISPUTED FACTS

1. Applicant, Scott F. Yerman, possessed, at all relevant times, a Rhode Island Multi-Purpose Fishing License No. MPURP001398.
2. On or about April 27, 2018, DEM issued a Notice of Violation ("NOV") to the Applicant for violations of the *Rhode Island Marine Fisheries Regulation, Finfish* ("Marine Fisheries Regulations"), for being over the 2018 Summer Flounder Aggregate Landing Program possession limit for the winter subperiod for the bi-weekly period of February 18, 2018 – March 3, 2018 and for not being a Rhode Island Resident as required in R.I.G.L. §20-2.1-5(1)(iii). (Joint Exhibit 3)
3. Applicant, at the relevant time of the violation in the NOV, possessed a 2018 Aggregate Landing Permit for Summer Flounder.
4. On or about December 6, 2018, Applicant entered into a Consent Agreement with the Department to resolve the violations in the NOV. (Joint Exhibit 1)
5. Pursuant to Section C(4)(c) of the Consent Agreement the partied agreed that the payment of an administrative penalty would constitute a violation as set forth in

the *Rules and Regulations Governing the Suspension/Revocation of Commercial and Recreational Fishing Licenses.*

6. Thereafter, Applicant applied to participate in the 2019 Summer Flounder Aggregate Landing Program.
7. On or about January 29, 2019, Mr. Yerman was denied participation in the 2019 Aggregate Landing Program pursuant to Part 3.10.2(C) of the *Marine Fisheries Regulations, Part 3 – Finfish.* (See Joint Exhibit 4)
8. On or about February 22, 2019, Mr. Yerman filed the Motion to Stay with AAD to prohibit DEM from barring Mr. Yerman's participation in the Aggregate Landing Program.

STIPULATED EXHIBITS

The Parties have stipulated the following exhibits as full:

Joint Exhibit 1:	Consent Agreement in the matter of Scott F. Yerman, AAD No. 18-001/ENE, dated December 6, 2018.
Joint Exhibit 2:	DEM Regulations, entitled *Marine Fisheries, Part 3 – Finfish,* 250-RICR-90-00-3.
Joint Exhibit 3:	Notice of Violation issued to Scott F. Yerman, dated April 27, 2018.
Joint Exhibit 4:	Letter of Denial from DEM dated January 29, 2019 prohibiting the Applicant from participating in the 2019 Summer Aggregate Program.

ARGUMENTS OF THE PARTIES

Applicant's Arguments

The Applicant makes three (3) arguments in support of his position that DEM improperly denied his application to participate in the 2019 Aggregate Landing Program:

1. The Applicant argues that the terms of that certain "Consent Agreement" (Joint Exhibit 1) entered into on April 17, 2018 did not constitute a "violation" which would disqualify him from participating in the 2019 Aggregate Landing Permit Program.
2. The Applicant argues that the "Consent Agreement" (Joint Exhibit 1) was not approved by the Administrative Hearing Officer and therefore it is unenforceable.
3. The Applicant argues, in the alternative, that in the event that the "Consent Agreement" established a "violation" thereby preventing the Applicant from participating in the 2019 Aggregate Landing Permit Program such consequence would be unconstitutional in violation of the Eighth Amendment's Excessive Fines clause.

Department's Arguments

1. DEM properly denied Mr. Yerman's application to participate in the 2019 Aggregate Landing Permit Program.
2. *State of Rhode Island Department of Environmental Management v. Administrative Adjudication Division* (a/k/a Barlow) is not applicable to the instant case.

3. Applicant's inability to participate in the Aggregate Landing Program does not constitute an excessive fine under the Eigth Amendment of the United States Constitution nor does it deprive Applicant of his ability to make a living.
4. AAD lacks jurisdiction to provide injunctive relief.

BURDEN OF PROOF

In the case of an appeal by an Applicant, the Applicant bears the burden of proof in this matter and must prove that his application was denied improperly by a preponderance of the evidence. "The burden of showing something by a preponderance of the evidence…simply requires that the trier to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the facts existence" **Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121.**

ANALYSIS

This matter was filed with the Administrative Adjudication Division ("AAD") as a Motion to Stay but will be treated as a Notice of Appeal from that certain denial of the opportunity to participate in the 2019 Summer Flounder Aggregate Permit Program on or about January 29, 2019. The justification for the denial of the Applicant's application is that he violated Title 250, Chapter 90, *Marine Fisheries, Part 3 – Finfish* §3.10(C)(2)(c) which states in order to participate in the Program "The vessel's operator has not been

assessed a criminal or administrative penalty in the past three years for a violation of this section or has more than one marine fisheries violation".

The Department has argued that the interpretation or enforceability of the Consent Agreement dated December 6, 2018 (Joint Exhibit 1) is not properly before the AAD but should have been brought before the Superior Court pursuant to the terms of the agreement. I have decided to issue a decision on the merits.

The language contained in the Consent Agreement (Joint Exhibit 1) § (C)(4)(c) states as follows:

"The Parties agree that the payment of a penalty in lieu of a suspension of Respondent's Rhode Island Multi-Purpose License #MPURP001398, as a result of the violations alleged in the Notice of Violation dated April 27, 2018 shall constitute a Violation as set forth in the *Rules and Regulations Governing the Suspension/Revocation of Commercial and Recreational Fishing Licenses* (250-RICR-80-00-8)". (emphasis added)

The Applicant argues that this case and the Consent Agreement (Joint Exhibit 1) "bears a striking resemblance to the case of Daniel P. Barlow AAD No. 07-010/ENE". In the Barlow matter, however, the Consent Agreement is distinctly different. This Hearing Officer issued a decision in Barlow that the Applicant was not precluded from participation in a subsequent program because of the specific language of that Consent Agreement. In the Barlow agreement the following language was used: "shall operate to absolve [Barlow] from any liability for all violations alleged by [DEM] relative to the

inspection of Barlow's boat on May 22, 2007". The decision in Barlow's favor in the AAD was appealed by DEM and eventually decided by the Supreme Court of Rhode Island in the matter of *State of Rhode Island Department of Environmental Management v. Administrative Adjudication Division* (a/k/a Barlow) 60 A.3rd 921 (RI 2012). The Supreme Court upheld the initial AAD decision and specifically ruled that the use of the words "absolve from any liability" in the consent agreement prevented DEM from using that incident as a prior violation. 60 A.3rd 926.

The consent agreement is the instant case does not contain the "magic words" "absolve from liability" but on the contrary states that "the violation alleged in the Notice of Violation dated April 27, 2018 shall constitute a violation as set forth in the Rules and Regulations". The argument of Applicant that the decision in Barlow applies is without merit.

The Applicant argues that the Consent Agreement (Joint Exhibit 1) is unenforceable due to the fact that it was never approved by the Hearing Officer as required by AAD Rules. AAD Rule 1.18 entitled "Consent Order or Withdrawal" provides for methods of resolving appeals. Rule 1.18 C and D contains the following language:

> C. Disposition of proposed agreement. Upon receiving such agreement, the AHO may:
>
> 1. Accept it and issue the order agreed upon; except that no agreement shall be accepted unless consistent with the provisions of R.I. Gen. Laws §42-17.1-2(s)(1),
>
> 2. Reject it and reschedule a hearing; or

3. Take such other action as he or she deems appropriate.

D. The provision of this Rule shall not preclude settlement of the proceedings in any other manner."

This Hearing Officer has never approved a Consent Agreement. To the best of my knowledge no Hearing Officer in the history of the AAD has approved a Consent Agreement. It has been the reasoning of this Hearing Officer to allow the parties to negotiate a disposition of the appeal in a manner that does not prejudice the process. If the Department and the Appellant have reached an acceptable settlement no Hearing Officer has objected to the disposition in the agreed terms. The lack of Hearing Officer approval is not necessary and does not invalidate the Consent Agreement which was voluntarily entered into by the parties.

CONSTITUTIONALITY

The final argument to be addressed is whether the terms of the Consent Agreement (Joint Exhibit 1) is unconstitutional in violation of the Eighth Amendment of the United States Constitution. Counsel for Applicant asserts that the punishment for the violation acknowledged in the Consent Agreement is excessive and therefore unconstitutional citing Timbs v. Indiana 586 U.S. _____ (2019). In the Timbs matter the petitioner had received a fine for possession of heroin. The police seized a Land Rover SUV which Timbs had purchased for $42,000.000 with money received from an insurance policy when his father died. The Supreme Court opinion in Timbs stands for the proposition that the Eight

Amendment applied to state cases, as well as federal cases, where "excessive fines" may have been imposed. The United States Supreme Court remanded the judgement to the Indiana Supreme Court for further proceedings not inconsistent with their opinion.

The Applicant has made allegations relating to his loss of revenue as a result of the denial of his application but these allegations are speculative and not supported by any specific evidence. I find that the Applicant has not proven by a preponderance of the evidence that the DEM Regulations are unconstitutional under the Eighth Amendment of the United States Constitution.

CONCLUSION

I find that the Applicant has failed to meet his burden of proof by a preponderance of the evidence that his Application for a Permit to participate in the Aggregate Landing Program was improperly denied. The Application was denied based the admission of violation contained in the Consent Agreement (Joint Exhibit 1). Said Consent Agreement was properly entered and enforceable. I do not find that the DEM Regulations in this matter are unconstitutional. The Applicant's appeal, therefore, should be denied.

FINDINGS OF FACT

1. The Administrative Adjudication Division has personal jurisdiction over the parties and substance in this matter.
2. Applicant, Scott F. Yerman, possessed, at all relevant times, a Rhode Island Multi-

Purpose Fishing License No. MPURP001398.

3. On or about April 27, 2018, DEM issued a Notice of Violation ("NOV") to the Applicant for violations of the *Rhode Island Marine Fisheries Regulations, Finfish* ("Marine Fisheries Regulations"), for being over the 2018 Summer Flounder Aggregate Program possession limit for the winter subperiod for the bi-weekly period of February 18, 2018 – March 3, 2018 and for not being a Rhode Island Resident as required in R.I. Gen. Laws § 20-2.1-5(1)(iii). Joint Exhibit 3.
4. Applicant, at the relevant time of the violation in the NOV, possessed a 2018 Aggregate Landing Permit for Summer Flounder.
5. On or about December 6, 2018, Applicant entered into a Consent Agreement with the Department regarding the violations in the NOV.
6. Pursuant to Section C(4)(c) of the Consent Agreement the parties agreed that the payment of an administrative penalty would constitute a violation as set forth in the *Rules and Regulations Governing the Suspension/Revocation of Commercial and Recreational Fishing Licenses.*
7. Applicant applied to participate in the 2019 Summer Flounder Aggregate Landing Program.
8. On or about January 29, 2019, Applicant was denied participation in the 2019 Aggregate Landing Program pursuant to Part 3.10.2(C) of the *Marine Fisheries Regulations, Part 3 – Finfish.* (See Joint Exhibit 4)
9. On or about February 22, 2019, Applicant filed a Motion to Stay AAD to enjoin DEM from barring Applicant's participation in the Aggregate Landing Program.
10. Consent agreements do not require the approval of the Hearing Officer in order to be enforceable.
11. The Applicant has failed to prove, by a preponderance of the evidence, that his application for permit to participate in the 2019 Aggregate Landing Program was improperly denied.
12. The Applicant's application was properly denied.

CONCLUSIONS OF LAW

1. The Administrative Adjudication Division has personal jurisdiction over the parties and substance in this matter.
2. The Applicant has the burden to prove by a preponderance of the evidence that DEM's denial was not in accordance with the applicable regulations.
3. The Applicant has failed to prove by a preponderance of the evidence that DEM's denial was not in accordance with the applicable regulations.
4. Under the terms of the Consent Agreement Applicant's payment of an administrative penalty constitutes a violation.
5. Under Part 3.10.2(C)(2)(c) of the Finfish Regulations Applicant's payment under the Consent Agreement constitutes an administrative penalty.
6. As the underlying NOV was for violations for Summer Flounder possession limits, the Applicant has been assessed an administrative penalty for the violation of Summer Flounder.
7. The Applicant did not meet the eligibility requirements for the Aggregate Landing Program contained in Part 3.10.2(C)(2)(c) of the Finfish Regulations.
8. DEM properly denied Applicant's application for the 2019 Aggregate Landing Program.
9. The Applicant's appeal should be denied and dismissed.

ORDERED

1. The Letter of Denial issued by DEM on January 29, 2019 barring the applicant from participating in the 2019 Summer Founder Aggregate Landing Program is hereby **SUSTAINED.**

2. The Appeal filed by the Applicant, Scott F. Yerman, is hereby **DENIED** and **DISMISSED**.

Entered as an Administrative Order this 12th day of November 2019 as a Final Agency Order.

David Kerins
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-4700 x4600

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded by first-class mail, postage paid to James O'Neil, Esquire, The Meadows, Suite A-103, 1130 Ten Rod Road, North Kingstown, RI 02852 and Christina A. Hoefsmit, Esq., DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 12 day of November 2019.

Mary Dalton

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.