

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

**RE: MANVILLE, SHAWN J.
LETTER OF SUSPENSION LICENSE NO. MUGA 0074**

AAD NO. 01-002/ENE

DECISION AND ORDER

This matter was reached for administrative hearing on December 1, 2003 before the Administrative Adjudication Division for Environmental Matters. Shawn J. Manville ("Respondent") appealed the letter of suspension issued on September 21, 2001 by the Division of Enforcement ("Division"), Department of Environmental Management ("DEM"), citing him with violations of the Rhode Island Marine Fisheries Council ("RIMFC") Regulations and imposing a thirty (30) day suspension of his Multi-Purpose Commercial Fishing License. Specifically, the Respondent was alleged to have violated the summer flounder landing limit on August 4, 1998 by landing three hundred forty-four (344) pounds of summer flounder, one hundred and forty-four (144) pounds over the legal limit of two hundred (200) pounds per day. He was also charged with failing to notify the Rhode Island Office of Law Enforcement prior to offloading his catch on that date.

The hearing was conducted pursuant to the Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 *et. seq.*, R.I. Gen. Laws § 42-17.7-1 *et. seq.*, and the Administrative Rules of Practice and Procedure of the Administrative Adjudication Division for Environmental Matters. In this enforcement action, the Division bears the burden of proving the allegations by a preponderance of the evidence. The Division was represented by Gary Powers, Esq. and the Respondent was represented by Cort B. Chappelle, Esq.

At the conclusion of the hearing counsel for the Division of Enforcement requested that a briefing schedule be established. Post-hearing memoranda were

timely filed and the hearing was deemed closed on January 26, 2004. A list of exhibits introduced at hearing is attached as Appendix A.

Witness Testimony

The Division called Lieutenant Francis Floor as its first witness. Lt. Floor has been employed by the Department of Environmental Management for over sixteen years. In May of 1998 he assisted in a joint investigation with the federal government and was deputized as a National Marine Fisheries agent. At that time he assisted special agent Kevin Flanagan in a joint investigation of the South Pier Fish Company ("South Pier") located in Narragansett, RI. The nature of the investigation was the monitoring of summer flounder landings in Rhode Island waters. As a result of a federal administrative search warrant, records of South Pier were seized. Those records included invoices and copies of checks and receipts for individuals with whom the company did business. Lt. Floor testified that a review of these records determined that the fishing vessel Natator, allegedly owned by Mr. Manville, had a one hundred and forty-four pound (144 lb.) overage of summer flounder landed and sold to South Pier on August 4, 1998. To support that charge, Lt. Floor referenced two invoices from South Pier as purchaser from Respondent. Invoice #5559 (Enforcement Exhibit 3, pages 17 and 34) identifies 168 lbs. of summer flounder (also referred to as "fluke") sold to South Pier on August 4, 1998 by the fishing vessel Natator. This invoice does not reflect a date on which the catch was landed. The second invoice, #5574 (Enforcement Exhibit 3, page 32), reflects a landing date of August 4, 1998 and a sale date of August 5, 1998 of summer flounder totaling 176 lbs. It is Lt. Floor's belief that the total amount of fluke indicated on these invoices was landed on one day resulting

in total summer flounder landed of 344 lbs. on August 4, 1998. Lt. Floor testified that summer flounder is a quota managed species. On the date in question, the landing limit for summer flounder was two hundred pounds (200 lbs.) per day. Based on these facts, Lt. Floor determined that on August 4, 1998, Respondent landed 144 pounds of fluke over the legal limit established by RIMFC Regulation.

On cross-examination Lt. Floor explained that the investigation began with routine dealer checks but eventually focused on South Pier because it purchased a disproportionate amount of fluke as compared to other dealers. In response to questioning, he indicated that Respondent dealt with South Pier on an almost daily basis in 1998 and 1999. Lt. Floor explained that the invoices referred to in his direct testimony were actually National Oceanic and Atmospheric Administration (NOAA) reporting slips used by South Pier as invoices (NOAA Form 88-30 –Purchase from Fishing Vessels). Lt. Floor described a general scheme used by South Pier that included purposeful errors to conceal overages as well as backdating and postdating of documents. As a result, South Pier and a number of license holders were cited by the Division for violating Regulations relating to landing limits¹. Respondent is one of those cited with an enforcement action.

On direct examination, much was made of the fact that invoice #5559 reflected only summer flounder and did not include collateral fish. The inference was made that a sale of only one species is suspect because a catch would normally include collateral species. On cross-examination, Lt. Floor conceded that it is not so unusual that a fisherman may not sell collateral fish.

¹ Settlements and/or consent agreements were reached in the other cases.

On redirect, Lt. Floor reiterated that the joint investigation revealed a number of methods used by South Pier to avoid detection for violations of landing limits. They included changing dates on invoices and laundering overages by identifying the catch as other species of fish.

Special Agent Kevin Flanagan of the National Marine Fisheries Service ("NMFS") was the Division's next witness. Special Agent Flanagan became involved in this matter after a request from DEM for federal support with ongoing fluke landing discrepancies at South Pier. According to Special Agent Flanagan, probable cause sufficient for issuance of a federal inspection warrant existed and a warrant was executed by the National Marine Fisheries Service, DEM and the Federal Bureau of Investigation for the copying of records and the downloading of computer records of South Pier. Special Agent Flanagan testified that a review of those records revealed means used by South Pier to evade detection of summer flounder landings in excess of regulatory limits. As related by Special Agent Flanagan, those means included pre-dating and post-dating of excess landings and categorizing fluke as monkfish on reporting forms. In addition to South Pier, the NMFS charged a group of vessels with violations of their federal permits resulting in fines and prohibitions on fishing dates. Because Respondent does not hold a federal permit, he was not a target of the federal investigation.

After review of the records obtained by federal warrant, Special Agent Flanagan testified that he and Lt. Floor sat down with Respondent and laid out the information they had concerning excessive landings of fluke. Mr. Manville denied the accusations and "abruptly" left the meeting according to Special Agent Flanagan.

The importance of accurate reporting was discussed by Special Agent Flanagan. He indicated that accurate reporting is crucial to fisheries management overall and has the potential to affect quotas.

The Division of Enforcement called the Respondent as its third witness. Mr. Manville testified that he has been self-employed as a fisherman for approximately twenty (20) years. He fishes for most species and was selling his catch to South Pier in 1998. He testified that he did business with South Pier because they paid more for his catch than other dealers, picked up his catch at the dock and supplied ice to him. Under questioning by Division's counsel, he stated that he did not have fluke in excess of the legal limit on the date alleged by the Division.

Respondent was then cross-examined by his own counsel. He testified that he did not land two catches on August 4, 1998 nor did he land over two hundred (200) pounds of summer flounder that day. He explained that he would sometimes hold a catch for a day or two before selling to South Pier depending upon when he returned from the fishing trip and whether South Pier was open.

Deputy Chief Thomas Greene was the Division's concluding witness. His testimony centered upon the imposition of the suspension. Deputy Chief Greene characterized the alleged violations as crimes of profit that were a direct attempt to defraud the system and circumvent the quota system. The maximum suspension of thirty days was imposed because of the significance of the violations. The Division rested at the close of Deputy Chief Greene's testimony.

Respondent did not call any witnesses.

Analysis

The letter of suspension cites Respondent with two violations – landing in excess of two hundred (200) pounds of summer flounder on August 4, 1998 in violation of RIMFC Rule 7.7.2 and the failure to notify the Division prior to such a landing pursuant to RIMFC Rule 7.7.5 –1.

The testimony of Lt. Floor established that the RIMFC Regulations Rule 7.7.2 set the legal landing limit for August 4, 1998 at two hundred (200) pounds of summer flounder per day. The alleged violation concerns the landing of summer flounder in excess of this limit. RIMFC Regulation Rule 1.3 defines this term as follows: “**Land or landing: to enter port with fish on board, to begin offloading fish, or to offload fish.**” The Division asks that the hearing officer conclude, based on the invoices entered into evidence, coupled with the evidence of “schemes” employed by South Pier and other vessels, that the Respondent landed in excess of the legal limit on the date in question².

Invoice # 5559 proves only that 168 pounds of fluke was sold by Respondent and purchased by South Pier on August 4, 1998 and invoice # 5574 reflects only that 176 pounds of summer flounder was landed on that date (and sold to South Pier on 8/5). Taken together, they, at best, leave one questioning when the catch reflected in invoice #5559 was actually landed. Witnesses for the Division contend, based on the documentary evidence, that it was in fact landed the same day in violation of RIMFC

² In the post hearing memorandum, the Division makes much of the fact that the exhibits reveal that respondent “did indeed sell in excess of the authorized two hundred pounds to the dealer on August 4, 1998” Division’s Post Hearing Memorandum at 3. This emphasis, however, is misplaced as the prohibition is on *landing* in excess of the authorized limit.

Regulation Rule 7.7-2. While it is clear that one may prove a violation of landing limits by evidence less direct than observation of a vessel landing an excess catch at the dock, the evidence must rise to the level of proof required. It is the Division's burden to prove, by a preponderance of the evidence that Respondent landed in excess of two hundred pounds of summer flounder on August 4, 1998. Black's Law Dictionary, (5th ed., 1979) defines the term "preponderance of the evidence" in part as ". . . With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. . . . But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side." *Id.*, at 1064. The Division asks that I consider the documentary evidence and testimony concerning "schemes" to circumvent the quota system employed by Respondent's fish dealer and others in his fishing circle, and draw reasonable inferences therefrom to prove that Respondent committed the violations alleged.

In his testimony, however, Mr. Manville not only denied that he landed over the legal limit on August 4, 1998, but offered an explanation for the incomplete invoices that I find equally as plausible as the explanation offered by the Division. The evidence presented by the Division was not of greater weight or more persuasive than the evidence offered by Respondent. In order to prevail, the scales must tip in favor of the Division. They do not. I therefore conclude that the Division has failed to prove the allegation by a preponderance of the evidence.

The Division's second contention is that the Respondent failed to call in his catch prior to landing on August 4, 1998 as required by RIMFC Regulations, Rule

7.7.5-1(c). Specifically, the Rule requires:

7.7.5 Summer flounder Dealer/Shipping/Transfer/Reporting

Regulations/Penalty –

7.7.5-1 Prohibition on the transfer of Summer flounder -- No Summer flounder (*Paralichthys dentatus*), may be purchased, bartered, or sold within the State of Rhode Island unless marked, processed, shipped, labeled, and handled in accordance with the following rules:

a. . .

b. . .

c. The licensed person in charge of the vessel pursuant to RIGL Title 20-2 must notify the Rhode Island Office of Law Enforcement (401) 222-2284 or 222-3070 at least one hour prior, but not more than six hours prior, to offloading any commercial vessel which possesses more than 200 pounds of summer flounder or the maximum allowable possession limit or the lesser thereof. Said notice shall be provided by the vessel who will be involved in the transfer and must include the name of the dealer, the name of the vessel, the landing time, and the precise landing location.

d. . .

e. . .

f. . .

Respondent was required, under Rule 7.7.5, to notify the Rhode Island Office of Law Enforcement prior to offloading if Respondent possessed in excess of two hundred pounds of summer flounder on August 4, 1998. Respondent's failure to notify the Rhode Island Office of Law Enforcement prior to offloading on August 4, 1998, is of no consequence because the Division has failed to prove that Respondent landed more than two hundred pounds of summer flounder on that date.

Having concluded that the Division failed to prove the allegations set forth in the letter of suspension by a preponderance of the evidence, I need not address the issues concerning the appropriateness of the suspension.

Before moving on, however, I feel compelled to address the Division's concerns

regarding the importance of compliance with fishing limits and the importance of such restrictions to the fishing industry. I acknowledge that such violations, when proven, constitute serious infractions of fisheries management rules imposed to protect what is characterized by the Division as "the most economically important finfish in Rhode Island". There is an obligation on the part of the Division to ensure that such significant violations, when alleged against commercial fisherman, are proven in accordance with established evidentiary burdens. The Division failed to carry it's evidentiary burden in this case.

Findings of Fact

After review of all the documentary and testimonial evidence of record I make the following findings of fact:

1. Shawn W. Manville holds a Rhode Island Multi-Purpose Commercial Fishing License #MUGA 0074.
2. In the summer of 1998 Mr. Manville sold his catch to South Pier Fish on a regular basis.
3. On August 4, 1998 fishing vessel Natator sold 111 pounds of fluke to South Pier as reflected on invoice # 55549. This catch was landed on August 3, 1998.
4. On August 4, 1998 fishing vessel Natator sold 168 lbs. of fluke (summer flounder) to South Pier as reflected on invoice #5559.
5. The landing date for the catch reflected on invoice #5559 was not established.
6. On August 4, 1998, fishing vessel Natator landed 176 lbs. of summer flounder which was sold to South Pier on August 5, 1998.
7. On August 4, 1998 fishing vessel Natator sold in excess of two hundred pounds of summer flounder to South Pier.
8. Mr. Manville did not notify the Rhode Island Office of Law Enforcement prior

to offloading on August 4, 1998.

Conclusions of Law

After review of all the evidence, applicable statutes and regulations 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 Respondent.
2. The Division failed to prove by a preponderance of the evidence that on August 4, 1998, Respondent landed in excess of two hundred pounds of summer flounder in violation of RIMFC Regulations Part 7.7.2-2
3. Because the Division failed to prove by a preponderance of the evidence that on August 4, 1998, Respondent landed in excess of two hundred pounds of summer flounder, he was not required to notify the Rhode Island Office of Law Enforcement prior to offloading on August 4, 1998.

Based on the foregoing Findings of Fact and Conclusions of Law it is hereby

ORDERED

1. The violations set forth in the Letter of Suspension are **DISMISSED**.

Entered as a Recommended Decision and Order this 31st day of March, 2004.

Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, Rhode Island 02908
(401) 222-1357

Entered as a Final Agency Order this 9th day of April, 2004.

Frederick J. Vincent
Acting Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Final Agency Order to be forwarded, via regular mail, postage prepaid to: Cort B. Chappell, Esquire, Chappell & Dolbashian, 171 Chase Road, P.O. Box 8, Portsmouth, RI 02871-0008 and Gary Powers, Esquire, DEM-Division of Fish & Wildlife, Oliver Stedman Government Center, 4808 Tower Hill Road, Wakefield, RI 02879; via interoffice mail to: Gerald McAvoy, Esquire, Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 9th day of April, 2004.

Appeal Procedure

If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.

APPENDIX A

EXHIBIT LIST

The following exhibits were offered by the Office of Enforcement and marked as indicated below:

- Enforcement 1**
(Full) Copy of the September 21, 2001 notice that the Respondent's Multipurpose License would be suspended for a period of thirty (30) days as a result of Respondent's August 4, 1998 violations. 1 Page
- Enforcement 2**
(Full) Copy of the request dated October 24, 2001 on behalf of the Respondent for a formal hearing before the AAD concerning the Division's letter of September 21, 2001. 1 Page
- Enforcement 3**
Copy of R.I. Department of Environmental Management Case Report of the Respondent concerning the May 26, 1998 violation. 70 Pages
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|-------------|------|
| Page 1 | ID |
| Pages 2-7 | Full |
| Page 8 | ID |
| Pages 9-10 | Full |
| Pages 11-14 | ID |
| Pages 15-20 | Full |
| Pages 21-23 | ID |
| Page 24 | ID |
| Pages 25-30 | Full |
| Page 31 | ID |
| Page 32 | Full |
| Page 33 | ID |
| Page 34 | Full |
| Pages 35-38 | ID |
| Pages 39-70 | Full |

The following exhibits was offered by the Respondent and marked as indicated below:

- Respondent's 1**
(Full) NOAA Form 88-30 – Purchases from Fishing Vessels, Invoice #5520