

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

**RE: HEANEY, PATRICK J.**

**AAD No. 03-001/MSA**

**DECISION AND ORDER**

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to the appeal by Patrick J. Heaney ("Applicant") of the denial of Applicant's request to upgrade his multipurpose commercial fishing license MULA #0227 to a multipurpose license with Gill Net Endorsement.

The within proceeding was conducted in accordance with the statutes governing the AAD (R.I. GEN. LAWS §§ 42-17.7-1 et seq.); the Administrative Procedures Act (R.I. GEN. LAWS §§ 42-35-1 et seq.); R.I. GEN. LAWS § 2-2.1-5; the Rules and Regulations Governing the Management of Marine Fisheries ("Regulations"); and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules"). The Applicant appeared pro se and Deborah A. George, Esquire represented the Office of Boat Registration and Licensing, of the Office of Management Services of the Department of Environmental Management.

The Prehearing Conference was held on March 20, 2003 (immediately prior to the adjudicatory hearing), at which the parties agreed that the issue to be considered at the hearing is whether the Department's decision to deny Mr. Heaney a Gill Net Endorsement was correct.

The following are the stipulations of fact agreed upon by the parties:

1. Mr. Heaney possessed a valid multipurpose commercial fishing license for the year 2003.
2. Mr. Heaney possessed a valid vessel declaration for the year 2003.
3. On January 9, 2003, he applied for a Gill Net Endorsement with the Department.
4. On January 9, 2003, he was denied a Gill Net Endorsement.

5. Pursuant to the provisions of Rule 6.7-10(f) of the Rules and Regulations Governing the Management of Marine Fisheries, effective January 1, 2003, the decision to deny Mr. Heaney a Gill Net Endorsement became final.
6. On February 6, 2003, the Department issued its final decision to deny Mr. Heaney a Gill Net Endorsement.
7. Applicant duly appealed the denial of the Gill Net Endorsement.
8. Mr. Heaney holds a valid Federal Fisheries Permit from National Marine Fisheries Service which expires on April 30, 2003.
9. Mr. Heaney holds a Commercial Vessel Operator Permit, which is a Commercial Vessel Operator Permit issued by National Marine Fisheries Service.
10. Mr. Heaney owns and operates a thirty (30) foot commercial fishing boat, which is a federally documented vessel.

The list of exhibits proffered by the parties, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

At the hearing, the Applicant called two (2) witnesses, Patrick J. Heaney, Applicant; and Margaret McGrath, Programming Service Officer with the Office of Boat Registration and Licensing. The Office of Boat Registration and Licensing did not present any witnesses; however, it was afforded liberality in the questioning of Applicant's witnesses.

It was elicited at the hearing that the Applicant, Patrick J. Heaney, is a resident of the State of Rhode Island and has been a full-time commercial fisherman for twenty-two years. He moved to Rhode Island in June of 1992 and has held Rhode Island commercial fishing licenses continuously since 1993. Mr. Heaney has been a "hook fisherman" predominantly since coming to Rhode Island. In 1998 and/or 1999, new multipurpose with gill net licenses were issued to many new entrants who had never held a license. Applicant attempted to get a Gill Net Endorsement at that time, but his request was denied. He did not feel that the inability to use a gill net was critical at that time. Recently, however, the further restrictions in the lobster fishery and the influx of gill net

gear (both Federally and Rhode Island) into areas Applicant traditionally fished with hooks are effectively negating Applicant's competitive participation in the fishing industry.

Mr. Heaney is married and has two children, ages fourteen and eight. He purchased his boat in May 2001 and has five years remaining to pay on the mortgage. He operates his commercial fishing boat as a one-man boat approximately ninety percent of the time. This is his sole source of income and although Applicant's wife works, she could not support the family by herself. It was Applicant's uncontradicted testimony that as a full-time commercial fisherman, his ability to harvest seafood depends on his ability to compete on an equal footing with other boats in his area. His traditional method of harvest, i.e. traps and hooks, is only viable in an area where they are the only gear types in use. Applicant's uncontroverted testimony was that most multipurpose license holders have the Gill Net Endorsement and granting Applicant the endorsement would place him at equity with other license holders. Denial of a Gill Net Endorsement would place him at a tremendous disadvantage and cause a serious hardship to him and his family; that regarding any quota species subject to harvest, the quota is the management tool, not the method of harvest. It would not entitle Applicant to catch more fish, but only make it easier to catch fish; and granting the endorsement would have no impact on the fisheries management program overall. It will not be inconsistent with other prior agency decisions (since Applicant is the first person to appeal a denial under the newly enacted statutory scheme). It will be consistent with management plans and the provisions and purposes of R.I. GEN. LAWS 20-2.1 and the Rules and Regulations Governing the Management of Marine Fisheries.

The instant matter is one of first impression. The pertinent statutes and regulations involved in this matter became effective January 1, 2003. Both contained provisions that any person whose application for a commercial fishing license was denied by OBR&L may file a request for reconsideration to the Commercial Fishing License

Review Board ("Board") within ten days; that the Board issue a written recommendation to OBR&L in thirty days; that within ten days, the OBR&L issue a written decision affirming, denying or modifying the recommendation of the Board and stating the rationale for the decision. Applicant may appeal the decision of the OBR&L to the Administrative Adjudication Division for Environmental Matters ("AAD"). The written decisions of the Board and of the OBR&L are required to be provided and made part of the administrative record upon appeal to the AAD, and the burden of proof is on the Applicant to demonstrate that he meets the criteria for issuance of a license.

Applicant filed a request for reconsideration by the Board; however, no written decision on Mr. Heaney's request for reconsideration was issued by the Commercial Fishing License Review Board within thirty (30) days of the date of the preliminary denial (since the Board's members had not yet been appointed as of that date). Consequently, pursuant to Rule 6.7-10(f) of the Rules and Regulations Governing the Management of Marine Fisheries, the decision by the Office of Boat Registration and Licensing to deny Mr. Heaney a Gill Net Endorsement became final at the expiration of the thirty (30) day period. On February 6, 2003, the Applicant duly filed a timely appeal at the AAD. The written decisions of the OBR&L were provided to the AAD, and by agreement of the parties, the hearing proceeded without any consideration or recommendation by the Board.

R.I. GEN. LAWS § 20-2.1-12(b) and Regulation 6.7-10(g) both provide that the review board shall consider the impact that issuance of the license will have on the fisheries management program overall; equity with other license holders; consistency with prior agency decisions; consistency with management plans; unreasonable hardship to the applicant; and consistency with the purposes of R.I. GEN. LAWS 20-2.1 and the Regulations.

Regulation 5.54 defines unreasonable hardship as "Severe economic loss

resulting from the denial of a license which is unique to an individual and which has not been caused or exacerbated by prior actions or inaction on the part of that individual”.

The threshold issue is whether the Statute/Regulations prohibit the issuance of any “new” licenses/endorsements to anyone who did not have same on December 31, 2002. A review of the statutes and regulations in their entirety demonstrates that they do not prohibit such issuances without recourse to reconsideration or appeal. Although the obvious intent of the Legislature was to restrict the issuance of new licenses/endorsements, neither the statute nor regulations contain language specifically prohibiting the issuance of new licenses on appeal. They both contain provisions which warrant an initial denial; but this initial denial must be reconsidered by OBR&L after consideration by the Board. Thereafter, the final decision by the OBR&L is subject to appeal before the AAD.

The procedures established for reconsideration, review and appeal of such initial determinations demonstrates that such prohibition is not absolute and/or mandatory. The Legislature created a detailed statutory scheme affording individuals the opportunity to have denials considered by a review board and ultimately AAD. The statute sets forth the criteria to be considered by the Board and provides opportunity for further review by AAD should the OBR&L issue a final denial. To hold absolutely that no new licenses or endorsements may be issued after December 31, 2002 would render nugatory the subsequent review process established by the Legislature in § 20-2.1-12.

I conclude that the fact that the Applicant did not hold a valid multipurpose commercial fishing license with Gill Net Endorsement as of December 31, 2002 is not dispositive of this appeal and AAD may consider the criteria set forth by the Legislature in § 20-2.1-12(b). In this case, because no Board was in existence at the time of Applicant’s request for reconsideration, evidence concerning these criteria was presented for the first time on appeal to AAD. In the normal course, and consistent with the

statutory scheme, evidence concerning these criteria would be presented to the Board in the first instance, and the decisions of the Board and the OBR&L would be provided to AAD as part of the administrative record on appeal. To conclude that AAD could not consider those criteria would ascribe a legislative intent that is devoid of any purpose, is inefficacious, or is nugatory. Pullen v. State, 707 A.2d 686 (R.I. 1998).

After careful consideration of the facts and circumstances involved in this matter, and the lack of countering evidence, I find that Applicant has met his burden of proving by a preponderance of the evidence that he satisfies all of the criteria for the upgrade of his multipurpose commercial fishing license to a multipurpose license with Gill Net Endorsement. Consequently, Applicant's request for an upgrade to a multipurpose license with Gill Net Endorsement should be granted.

#### FINDINGS OF FACT

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

1. The Applicant, Patrick J. Heaney, possesses a valid Rhode Island commercial fishing license for the year 2003.
2. Mr. Heaney possesses a valid Vessel Declaration (i.e. registration of a vessel as a commercial fishing vessel with the Department) for the year 2003.
3. The Applicant, Patrick J. Heaney, holds a valid Federal Fisheries Permit from the National Marine Fisheries, which expires on April 30, 2003.
4. Mr. Heaney holds a Commercial Vessel Operator Permit issued by the National Marine Fisheries Service.
5. On January 9, 2003, Mr. Heaney applied for an upgrade of his current multipurpose license MULA #0227 to a multipurpose license with a Gill Net Endorsement.
6. On January 9, 2003, the Department denied Mr. Heaney's request for an upgrade of his multipurpose license to a multipurpose license with a Gill Net Endorsement.
7. On January 9, 2003, Mr. Heaney filed a timely request with the Office of Boat Registration and Licensing for reconsideration of the denial by the Commercial

Fishing License Review Board ("Board").

8. By letter dated February 6, 2003, the Office of Boat Registration and Licensing informed Mr. Heaney that his January 9, 2003 request for reconsideration by the Board could not be considered by the Board (since the Board had not yet been appointed); and, "therefore the January 9, 2003 decision of the Office of Boat Registration is now final".
9. The Applicant duly appealed the final decision of the Office of Boat Registration and Licensing to the Administrative Adjudication Division for Environmental Matters.
10. Mr. Heaney now owns, and generally operates solely, a thirty (30) foot commercial fishing boat, which is a federally documented vessel.
11. The Applicant is a resident of the State of Rhode Island and has been a commercial fisherman for twenty-two (22) years.
12. The Applicant has held Rhode Island commercial fishing licenses continuously since 1993.
13. Mr. Heaney purchased his present boat in May 2001 and has five (5) years remaining to pay on the mortgage to purchase said boat.
14. Mr. Heaney is a married man with two children and his sole income is derived from the operation of his commercial fishing boat.
15. Applicant's wife is employed, but her income is insufficient to support the family.
16. Mr. Heaney has been a "hook fisherman" predominantly during his Rhode Island commercial fishing career.
17. Applicant's traditional method of harvest, i.e. traps and hooks, are only viable in an area where they are the only gear types in use.
18. Most multipurpose license holders have the Gill Net Endorsement.
19. The decline of the lobster fishery and the influx of gill net gear (both Federally and Rhode Island) into areas traditionally fished with hooks will effectively negate Applicant's competitive participation in the fishing industry.
20. Granting the Gill Net Endorsement will not adversely affect the preservation and/or restoration of the state's fish stocks since Applicant already possesses a multipurpose license, and it will not permit Applicant to exceed established quotas.
21. The denial of a Gill Net Endorsement would place Applicant at a tremendous disadvantage and cause a serious financial hardship on him and his family.

22. The issuance of the upgrade of Applicant's current multipurpose license MULA # 0227 to a multipurpose license with a Gill Net Endorsement will
- (a) have no impact on the fisheries management program overall;
  - (b) be at equity with other license holders;
  - (c) not be inconsistent with prior agency decisions (since this is the first such appeal);
  - (d) be consistent with management plans;

#### 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 for Environmental Matters ("AAD") has jurisdiction over this matter pursuant to R.I. GEN. LAWS § 42-17.7-2; Rule 3 of the Administrative Rules of Practice and Procedure for the AAD; R.I. GEN. LAWS § 2-2.1-12(c); and Rule 7.7-10(i) of the Rules and Regulations Governing Management of Marine Fisheries.
2. Applicant has proved by a preponderance of the evidence that the denial of the requested upgrade would be an unreasonable hardship in that severe economic loss will result to Applicant, which is unique to Applicant and has not been caused or exacerbated by prior actions of or inaction on the part of Applicant.
3. Applicant has proved by a preponderance of the evidence that issuance of the Gill Net Endorsement would be consistent with the purposes of R.I. GEN. LAWS 20-2.1 and the Regulations.
4. That Applicant, Patrick J. Heaney, has proved by a preponderance of the evidence that he meets the criteria for the issuance of an upgrade of his multipurpose commercial fishing license MULA # 0227 to a multipurpose license with Gill Net Endorsement.

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

#### **ORDERED**

1. That the appeal to the Administrative Adjudication Division for Environmental Matters by the Applicant, Patrick J. Heaney, is **GRANTED** and a decision is hereby rendered in favor of the Applicant.
2. That the Office of Boat Registration and Licensing shall issue an upgrade of Applicant's multipurpose commercial fishing license MULA # 0227 to a

multipurpose license with Gill Net Endorsement upon payment of the requisite fee therefore by Applicant.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 9<sup>th</sup> day of May, 2003.

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Joseph F. Baffoni  
Hearing Officer  
Department of Environmental Management  
Administration Adjudication Division  
235 Promenade Street, Third Floor  
Providence, RI 02908  
(401) 222-1357

Entered as a Final Agency Decision and Order this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

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Jan H. Reitsma  
Director  
Department of Environmental Management  
235 Promenade Street, 4<sup>th</sup> Floor  
Providence, RI 02908

**CERTIFICATION**

I hereby certify that I caused a true copy of the within Decision and Order to be delivered via regular mail, postage prepaid to: Patrick J. Heaney, 22 County Street, Newport, RI 02840; and via interoffice mail to: Deborah George, Esquire, DEM Office of Legal Services, 235 Promenade St., 4th Fl., Providence, RI 02908; on this \_\_\_\_\_ day of May, 2003.

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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**  
**LIST OF EXHIBITS**

**JOINT EXHIBITS**

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| JOINT 1 | Copies of photographs of Mr. Heaney and his fishing boat.  |
| JOINT 2 | Copies of Mr. Heaney's Federal Fisheries Permit and also including a copy of Commercial Vessel Operator Permit of National Marine Fisheries Service. |
| JOINT 3 | Copies of portions of the Rules and Regulations Governing Marine   |

Fisheries that are relevant to today's hearing.

- JOINT 4 Copy of R.I. GEN. LAWS 20-2.1-12 entitled Commercial fishing license review board.
- JOINT 5 Copy of R.I. GEN. LAWS 20-2.1-5 entitled Resident licenses.
- JOINT 6 Copy of License Summary printout showing Applicant's valid Multipurpose Commercial Fishing License and valid Vessel Declarations.
- JOINT 7 Copy of letter of denial dated January 9, 2003 from Margaret McGrath, Programming Service Officer, to Patrick Heaney.
- JOINT 8 Copy of final denial dated February 6, 2003 from Margaret McGrath to Patrick Heaney.

APPLICANT'S EXHIBITS

APPLICANT'S 1 Full

Statement by Applicant that is being submitted today  
(no objection by Department).