

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Notice of Intent to Deny Special Exempt Fishing License for the Federal Research Set-Aside Program Based Upon Alleged Violations of the New York State Environmental Conservation Law (ECL) Article 11 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 40 and 175

ORDER

OHMS Case No.
2009-64695

- by -

DONALD BALL,

Respondent.

The National Marine Fisheries Service of the National Oceanic and Atmospheric Administration ("NOAA") develops and implements federal research set-aside ("RSA") programs to, in part, obtain information for management of fisheries. A fisherman that seeks to participate in RSA programs must obtain a federal Exempted Fishing Permit ("EFP") from the NOAA Fisheries Service. In New York State, a fisherman who obtains a federal EFP must also obtain a license to collect or possess fish pursuant to ECL 11-0515 and title 6 of the Official Compilation of Codes, Rule and Regulations of the State of New York ("6 NYCRR") part 175 (Special Licenses and Permits) from the New York State Department of Environmental Conservation ("Department").

One advantage associated with the RSA program for summer flounder is that participating fishermen are allowed to catch more fish than those who do not participate in the program. In addition, pursuant to the program, fishing for summer flounder has been authorized for a longer period of time than the regular commercial fishing season.

In 2005, respondent Donald Ball obtained a federal EFP and the required State license to collect or possess fish (which, in this proceeding, Department staff referred to as a "special exempt fishing license"). Respondent Ball's license, designated as No. 237, was effective from March 21, 2005 through December

31, 2005 ("2005 State License"). The federal EFP and 2005 State License authorized Mr. Ball to catch a maximum of 7,078 pounds of summer flounder.

In 2009, Mr. Ball obtained a federal EFP for summer flounder. In March 2009, Mr. Ball filed an application with the Department, pursuant to ECL 11-0515 and 6 NYCRR 175.3, for a license to collect or possess fish. In May 2009, Department Region 1 staff served a notice of intent to deny respondent Ball's 2009 application ("Notice"). Department staff based its denial on Mr. Ball's alleged violations of the following provisions of 6 NYCRR Part 175 and the 2005 State License:

1. 6 NYCRR 175.5(a)(2) and 2005 State License condition no. 3.G, by not filing a vessel trip report with the Department's Bureau of Marine Resources concerning a catch of 630 pounds of summer flounder during a fishing trip on or about December 21, 2005 ("December fishing trip");
2. 6 NYCRR 175.5(a)(3) and 2005 State License condition no. 3.A, by exceeding his 2005 quota of 7,078 pounds of summer flounder by 536 pounds; and
3. 6 NYCRR 175.5(a)(4) and 2005 State License condition no. 3.E, by not using the interactive voice response system to report the December fishing trip, and by not filing a vessel trip record for the catch obtained during that trip.

Pursuant to 6 NYCRR 175.5(c), Mr. Ball filed a request for a hearing dated May 19, 2009. Under cover of an e-mail message dated September 15, 2009, the Office of Hearings and Mediation Services received copies of staff's Notice and Mr. Ball's hearing request. In a letter dated September 16, 2009, Chief Administrative Law Judge ("ALJ") James T. McClymonds advised the parties that the matter was assigned to ALJ Daniel P. O'Connell, and that the Commissioner would be issuing the final decision.

ALJ O'Connell prepared the attached hearing report. In the report the ALJ concludes that respondent Ball violated the above-referenced provisions of 6 NYCRR part 175 and the 2005 State License, and recommends that respondent's 2009 application for a license to collect or possess fish be denied. I adopt the hearing report as my decision in this matter.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Respondent Donald Ball is adjudged to have violated:

- A. 6 NYCRR 175.5(a)(2) and 2005 State License condition no. 3.G, by not filing a vessel trip report with the Department's Bureau of Marine Resources concerning a catch of 630 pounds of summer flounder on a fishing trip on or about December 21, 2005;
- B. 6 NYCRR 175.5(a)(3) and 2005 State License condition no. 3.A, when he exceeded the 2005 quota of 7,078 pounds of summer flounder by 536 pounds; and
- C. 6 NYCRR 175.5(a)(4) and 2005 State License condition no. 3.E, by not using the interactive voice response system to report the December 2005 fishing trip and by not filing a vessel trip record for his catch on the December 2005 fishing trip.

II. As a result of the violations set forth in paragraph I of this order, the 2009 application of respondent Donald Ball for a license to collect or possess fish is denied.

III. All communications from respondent to the Department concerning this order shall be made to Jennifer M. Ukeritis, Esq., Assistant Regional Attorney, Stony Brook University, 50 Circle Road, Stony Brook, NY 11790-3409.

IV. The provisions, terms and conditions of this order shall bind respondent Donald Ball, and his agents, successors, and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: Albany, New York
November 3, 2009

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of a Notice of Intent to Deny Special Exempt Fishing License for the Federal Research Set-Aside Program based on alleged Violations of the New York State Environmental Conservation Law (ECL) Articles 11 and 13, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 40 and 175

Hearing Report

OHMS Case No.:
2009-64695

- by -

Donald Ball,

Respondent.

Proceedings

In May 2009, Staff from the Department's Region 1 Office (Department staff) commenced the captioned proceeding by serving a notice of intent to revoke and deny a special exempt fishing license (the Notice) upon Donald Ball.¹ The Notice alleged three violations of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 175 (Special Licenses and Permits), and conditions of his License to Collect or Possess (License No. 237), effective March 21, 2005 through December 31, 2005 (the License). According to the Notice, the alleged violations of 6 NYCRR part 175 and the conditions of the 2005 License are the bases for Staff's determination to deny Mr. Ball's application for a license filed in March 2009.

The Notice advised Mr. Ball that he may request a hearing. Mr. Ball, by his attorney, filed a request for a hearing dated May 19, 2009 (see 6 NYCRR 175.5[c]).

Under cover of an e-mail message dated September 15, 2009, the Office of Hearings and Mediation Services received copies of

¹ Department staff did not date the Notice but issued at the end of May 2009 (Tr. at 55).

Staff's Notice and Mr. Ball's hearing request. In a letter dated September 16, 2009, the parties were advised that the matter was assigned to me to schedule the requested hearing.

The hearing commenced at 11:30 a.m. on October 6, 2009 at the Department's Bureau of Marine Resources, 205 North Belle Mead Road in East Setauket, New York. Jennifer M. Ukeritis, Esq., Assistant Regional Attorney, represented Department staff. Staff's witnesses were Maureen C. Davidson, Biologist II, Marine, Bureau of Marine Resources, and Gerald Carpenter, Investigator, Division of Law Enforcement. Anthony H. Palumbo, Esq. (Goggins and Palumbo, Mattituck, New York) represented Mr. Ball. Mr. Ball did not call any witnesses.

The record of the hearing closed on October 19, 2009 upon receipt of the stenographic transcript of the October 6, 2009 hearing.

Findings of Fact

1. In 2005, Mr. Ball duly held a commercial fishing license issued pursuant to New York State Environmental Conservation Law (ECL) § 13-0335 (Food Fish).
2. In March 2005, Department staff issued a License to Collect or Possess (No. 237) to Mr. Ball and his vessel, the Jen-Lisa, pursuant to ECL 11-0515. The effective dates of the License were from March 21, 2005 to December 31, 2005. The License authorized Mr. Ball to collect, possess, and land a maximum of 7,078 pounds of summer flounder.² These 7,078 pounds are in addition to the limit of summer flounder that was prescribed by regulation (see 6 NYCRR 40.1[1]), and set forth in Mr. Ball's commercial fishing license. (Tr. at 13-15; Exhibit 5, Condition 3.A; Exhibit 8.)
3. A condition precedent to receiving a license to collect or possess (ECL 11-0515) from the Bureau of Marine Resources is to obtain a federal Exempted Fishing Permit (EFP) for the federal research set-aside program from the National Marine Fisheries Service (United States Department of Commerce, National Oceanic and Atmospheric Administration [NOAA]) (Tr. at 11). In 2005, Mr. Ball obtained a valid federal EFP (No. 310447), which authorized him to

² Summer flounder (*Paralichthys dentatus*) are also referred to as fluke (see ECL 13-0340-b).

participate in the federal research set-aside program.
(Exhibit 8.)

4. In 2005, the open season for catching summer flounder, for commercial purposes, closed on December 13, 2005. (Tr. at 15-17; Exhibit 6.)
5. In 2005, Mr. Ball reported, pursuant to the terms and conditions of his federal EFP and his License, that he had caught 6,984 pounds of summer flounder (Exhibit 8).
6. On or about December 21, 2005, Mr. Ball caught 630 pounds of summer flounder.
7. Mr. Ball did not report the 630 pounds of summer flounder, that he caught on or about December 21, 2005, to either the National Marine Fisheries Service or the Department with the interactive voice response (IVR) system as required by his federal EFP (Exhibit 8) and License Condition No. 3.E (Exhibit 5).
8. In addition, for the December 21, 2005 summer flounder catch of 630 pounds, Mr. Ball did not file a vessel trip report (VTR) with either the National Marine Fisheries Services or the Bureau of Marine Resources (Exhibit 5, Condition No. 3.G; Exhibit 8).
9. For 2009, Mr. Ball duly obtained a commercial fishing license issued pursuant to ECL 13-0335 (Tr. at 57). The limit for summer flounder prescribed in the commercial fishing license is not known. As of the October 6, 2009 hearing, the season for summer flounder was open.
10. In 2009, Mr. Ball obtained a federal EFP from the National Marine Fisheries Service. The RSA quota for summer flounder prescribed in Mr. Ball's 2009 federal EFP is not part of the hearing record. During the hearing, Mr. Ball stated that he has transferred a significant portion of the quota originally authorized by the 2009 EFP, but remains responsible for about 800 or 900 pounds of summer flounder. (Tr. at 55-56, 57.)
11. In March 2009, Mr. Ball filed an application with the Bureau of Marine Resources pursuant to ECL 11-0515, for a license to collect or possess. Department staff denied Mr.

Ball's application for this license in May 2009. (Tr. at 55.)

Discussion

Federal Research Set-Aside Programs

The National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA) develops and implements the federal Research Set-Aside (RSA) programs. The RSA programs provide a means to fund research and to compensate participants. Fishermen who participate in the RSA program concerning summer flounder are compensated through research quotas while collecting data concerning fish populations and their distribution.

Fishermen, who want to participate in the RSA program, bid on allotments of summer flounder at a price lower than the market price. To participate in the RSA program for summer flounder, fishermen must then obtain federal Exempted Fishing Permits (EFP) from the National Marine Fisheries Service. Each EFP sets a quota consistent with the accepted bid. The EFP authorizes the fisherman to fish up to the amount of the quota until the end of the calendar year regardless of any other commercial possession limits or fishery closures. (Tr. at 10-11.)

In addition to the federal EFP for the research set-aside program, the Department's Bureau of Marine Resources issues a license pursuant to ECL 11-0515, and 6 NYCRR part 40 (Marine Fish) and part 175 (Special Licenses and Permits). Obtaining the federal EFP is a prerequisite to applying for the license with the Bureau of Marine Resources (Tr. at 11).

For 2005, Mr. Ball obtained a federal EFP and the required State license to collect or possess (Exhibit 5) from the Bureau of Marine Resources. The EFP permit and the License authorized Mr. Ball to catch a maximum of 7,078 pounds of summer flounder. The limit authorized by the EFP and the License is in addition to the limit identified in Mr. Ball's New York State commercial fishing license (Tr. at 11). The limit in Mr. Ball's commercial fishing license for the 2005 fishing season is not part of the hearing record.

Notice of Intent to Revoke and Deny Permit

In 2009, Mr. Ball obtained a federal EFP, and filed an application for the required license to collect or possess (see ECL 15-0515) with the Bureau of Marine Resources (see 6 NYCRR 175.3). In May 2009, Department staff denied Mr. Ball's license application. The bases for the denial are outlined in the Notice (see 6 NYCRR 175.4[b]; Exhibit 1).

Pursuant to ECL 11-0515, the Department may issue a license "revocable at its pleasure" to collect or possess fish for propagation and scientific purposes, among other things. Such a license is effective until revoked.

Part 175 does not expressly identify the grounds for denying an application for a license (see 6 NYCRR 175.4[b]). However, the grounds for revocation during the effective dates of a license are outlined at 6 NYCRR 175.5(a) and include, among others, the following:

1. Failing to comply with any terms or conditions of the license (see 6 NYCRR 175.5[a][2]);
2. Exceeding the scope of the purpose or activities described in the application (see 6 NYCRR 175.5[a][3]); and
3. Failing to comply with any applicable provisions of the ECL, other State or federal laws, or the Department's regulations related to the licensed activity (see 6 NYCRR 175.5[a][4]).

Staff argues that the Commissioner may rely on the grounds for revocation outlined above as the bases to deny Mr. Ball's 2009 license application given Mr. Ball's alleged failure to comply with the terms and conditions of his 2005 License. According to the Notice, Mr. Ball caught 680 pounds of summer flounder on or about December 21, 2005. With respect to this catch, Mr. Ball allegedly failed to file a vessel trip report with the National Marine Fisheries Service and the Bureau of Marine Resources as required by his License (Exhibit 5, see Condition No. 3.G). With this fishing trip, Mr. Ball allegedly exceeded the limit of 7,078 pounds of summer flounder by 536 pounds. Finally, Staff contends that Mr. Ball did not use the interactive voice response system to report the flounder that he

caught on or about December 21, 2005 to the National Marine Fisheries Service and the Bureau of Marine Resources.

Department staff attempted to demonstrate the alleged violations asserted in the Notice with the testimony of Maureen C. Davidson and Gerald Carpenter and various documents offered as evidence.³ Since 2008, Ms. Davidson has been a Biologist II, Marine, in the Department's Bureau of Marine Resources. Ms. Davidson was a Biologist I, Marine, from 1987 to 2008. During her tenure with the Bureau of Marine Resources, Ms. Davidson has, among other things, conducted fish and shellfish surveys in Long Island Sound and the Atlantic Ocean, drafted regulations related to the State's marine fisheries, and administered the Department's commercial fishery programs for summer flounder, bluefish, black sea bass and scup. (Tr. at 8-10; Exhibit 4.)

Gerald Carpenter is an Environmental Conservation Investigator in the Department's Division of Law Enforcement, Bureau of Environmental Crime Investigation (BECI) with more than 20 years of experience. Investigator Carpenter investigates potential criminal violations of the Environmental Conservation Law, and other Penal Laws related to environmental crimes. (Tr. at 20-21.)

During her testimony, Ms. Davidson explained there are two notice requirements associated with the federal EFP and the License. The first notice requirement is a federal and State requirement, referred to as the interactive voice response (IVR) system. License Condition No. 3.E (Exhibit 5) required Mr. Ball to telephone or fax the National Marine Fisheries Service and the Bureau of Marine Resources with information concerning the name of the vessel, the captain's name, and the federal identification number before leaving the dock for RSA fishing trips. (Tr. at 11-12.)

The second notice requirement is a federal and State condition referred to as the vessel trip report (VTR). Within 48 hours of returning from a RSA fishing trip, the EFP and License Condition No. 3.G required Mr. Ball to file the VTR with the National Marine Fisheries Service and the Bureau of Marine Resources. The VTR must include the name of the vessel, the captain's name and the federal identification number, as well as the amount of summer flounder caught. A VTR is required

³ The Exhibits to the hearing record are listed in Appendix A to this Hearing Report.

whenever the vessel leaves the dock on an RSA fishing trip regardless of whether any fish are caught. (Tr. at 12, 19; Exhibit 5.)

With reference to Mr. Ball's license (Exhibit 5), Ms. Davidson noted that Condition No. 3.A limited the maximum amount of summer flounder to 7,078 pounds. Condition No. 3.D required Mr. Ball to comply with the applicable requirements outlined in the ECL (e.g., ECL 13-0304-b), and 6 NYCRR part 40. (Tr. at 14.)

Referring to Condition No. 3.I, Ms. Davidson also noted that the License would be revoked under three circumstances. First, the License is revoked on December 31, 2005. Second, the License would be revoked before December 31, 2005 if Mr. Ball reached the RSA quota, which was 7,078 pounds of summer flounder. Third, the License would become void if Mr. Ball violated any license conditions. (Tr. at 14-15.) Staff argued that these circumstances could also serve as the bases to deny Mr. Ball's 2009 application for a License (Tr. at 54).

The Department's Investigation

In December 2006 Investigator Carpenter and other members of Department staff served a search warrant upon Gosman's Fish Market (Gosman's), which is located in Montauk, New York (Tr. at 22). With the search warrant, Staff obtained the following documents, among others. Exhibit 7A is a copy of Invoice No. 33705, dated December 21, 2005, and attached copy of Purchase Order No. 60619 dated December 22, 2005. Exhibit 7B is a copy of Invoice No. 33532, dated December 22, 2005, and attached copy of Purchase Order No. 60635 also dated December 22, 2005. Exhibit 7C is a copy of a cancelled check (No. 27476), dated January 9, 2006 made payable to Don Ball for the amount of \$1,677.00.

Investigator Carpenter testified about the chain of custody, and the significance of these documents (Tr. at 24, 33-35). Invoice No. 33705 (Exhibit 7A) shows that Gosman's accepted 630 pounds of fluke from Mr. Ball at a unit price of \$1.00 per pound (\$630.00). In addition, Invoice No. 33705 provides lines to record the hull/permit #, and the vessel trip report (VTR). On Invoice No. 33705, the hull/permit # is 1063208 with a line through it. For the VTR, the notation is "N/R." The invoice also has the note, "not reported PO #60619."

Like Invoice No. 33705, Purchase Order No. 60619 notes that Gosman's purchased 630 pounds of fluke from Mr. Ball. (Tr. at 22-23, 25; Exhibit 7A.)

Invoice No. 33532 (Exhibit 7B) shows that Gosman's accepted 698 pounds of sushi fluke from Mr. Ball at a unit price of \$1.50 per pound (\$1,047.00). As with Exhibit 7A, Invoice No. 33532 provides lines to record the hull/permit #, and the VTR. On Invoice No. 33532, the hull/permit # is 993, and the VTR is 10636028. The attached Purchase Order No. 60635 records the same amount of fish as reported on Invoice No. 33532. (Tr. at 23-24, 25; Exhibit 7B.)

As noted above, Exhibit 7C is a copy of a cancelled check (No. 27476) dated January 9, 2006 made payable to Mr. Ball for the amount of \$1,677.00. The check was endorsed and deposited. The top third of Exhibit 7C shows that the total amount of the check was apportioned between Invoice No. 33705 (Exhibit 7A) and Invoice No. 33532 (Exhibit 7B). Invoice No. 33705 and Purchase Order No. 60619 concern 630 pounds of fluke at \$1.00 per pound for a total of \$630.00. Invoice No. 33532 and Purchase Order No. 60635 concern 698 pounds of fluke at \$1.50 per pound for a total of \$1,047.00. The sum of \$630.00 and \$1,047.00 is \$1,677.00. (Tr. at 46-47.)

Investigator Carpenter testified that, based on Exhibits 7A, 7B and 7C, Mr. Ball caught a total of 1,328 pounds of summer flounder on December 21, 2005 (630 pounds) and December 22, 2005 (698 pounds), and received payment from Gosman's for these two catches in the amount of \$1,677.00. After reviewing Invoice No. 33705, Investigator Carpenter interpreted the notations of "N/R" and "not reported" to mean that Mr. Ball did not report the December 21, 2005 catch to the National Marine Fisheries Service and the Bureau of Marine Resources (Tr. at 25-26; Exhibit 7A). Investigator Carpenter explained that he contacted the National Marine Fisheries Service to confirm whether Mr. Ball reported the December 21, 2005 vessel trip during which he caught 630 pounds of summer flounder. (Tr. at 26.)

After contacting the Northeast Regional Office of the National Marine Fisheries Service in Gloucester, Massachusetts, Investigator Carpenter received a supporting deposition from Alison Verry, sworn on December 20, 2007. Ms. Verry's December 20, 2007 supporting deposition is Exhibit 8 in the hearing record. (Tr. at 26-28.)

Ms. Verry is a Fishery Information Specialist at the Northeast Regional Office of the National Marine Fisheries Service, and works in the Fishery Statistics Office. According to Ms. Verry's deposition, Mr. Ball and his vessel, the Jen-Lisa, had a valid federal EFP for 2005, which authorized him to participate in the RSA summer flounder program (Tr. at 28-29). For 2005, Mr. Ball's RSA quota was limited to 7,078 pounds of summer flounder (Tr. at 29). Based on the records maintained by the National Marine Fisheries Service, Ms. Verry stated that, for 2005, Mr. Ball reported 6,984 pounds of summer flounder (Tr. at 29-30).⁴ (Exhibit 8.)

In her December 20, 2007 deposition, Ms. Verry stated that, on December 26, 2005, Mr. Ball reported a 700 pound catch of summer flounder for an RSA trip that started on December 21, 2005. Mr. Ball reported this trip on December 26, 2005 using the federal interactive voice response (IVR) call-in system. Subsequently, the December 21, 2005 RSA trip was assigned VTR No. 10636028. (Exhibit 8.) The information concerning VTR No. 10636028 is consistent with the information presented in Invoice No. 33532 (Exhibit 7B). (Tr. at 37-38.)

In addition, Ms. Verry listed the VTRs for Mr. Ball's RSA trips in December 2005 (Tr. at 29-30). The information from Ms. Verry's December 20, 2007 deposition is summarized in Table 1 (Donald Ball's VTRs for December 2005), which is attached to this Hearing Report as Appendix B.

After reviewing the records concerning Mr. Ball's IVRs and VTRs, maintained by the National Marine Fisheries Service for December 2005, Ms. Verry stated there is no report (oral or written) for 630 pounds of summer flounder caught during an RSA trip on either December 21, 2005, or December 22, 2005 (Tr. at 30, 32). Ms. Verry stated further that if the 630 pounds caught on December 21, 2005 were added to Mr. Ball's reported catches (6,984 pounds of summer flounder), the total amount of summer flounder that Mr. Ball caught would have been 7,614 pounds,

⁴ This amount (6,984 pounds of summer flounder) includes the 698 pounds of summer flounder (rounded to 700 pounds) reported to the National Marine Fisheries Service on December 22, 2005 (see Table 1 - VTR No. 10636028).

which exceeded his 2005 quota of 7,078 pounds by 536 pounds.⁵ (Exhibit 8.)

Based on his review of Ms. Verry's December 20, 2007 deposition, Investigator Carpenter concluded the following. First, Mr. Ball properly reported the 698 pounds of summer flounder identified on Invoice No. 33532 (Exhibit 7B), which is reflected in VTR 10636028 (Tr. at 40-41; Exhibit 8). Second, Mr. Ball, however, did not report that he caught 630 pounds of summer flounder on or about December 21, 2005 in violation of his License. Third, Mr. Ball exceeded the 2005 quota of 7,078 pounds of summer flounder specified in his License. (Tr. at 32-33.)

As noted above, the notation "10636208" appears on Invoice No. 33705 with a line through it (Exhibit 7A). This notation is similar in form to the identification numbers for the vessel trip reports provided in Ms. Verry's December 20, 2007 deposition (Exhibit 8; Table 1 [Appendix B]). Given the similarity of the 10636208 notation to the other identification numbers, Investigator Carpenter inquired whether any of Mr. Ball's RSA trips for summer flounder were assigned 10636208 as a vessel trip report number, and asked Staff at the National Marine Fisheries Service to check the data base. The result of the search was that no vessel trip report was assigned the number 10636208. (Tr. at 46; Exhibit 8.)

In his closing statement, Mr. Ball contended that the alleged violations are based on a catch of 630 pounds of summer flounder, and whether the catch was accounted for properly. According to Mr. Ball, Department staff did not offer substantial evidence to demonstrate the violations alleged in the Notice. He requested that the Commissioner dismiss the charges alleged in the Notice, and direct Staff to grant his 2009 application for a License, pursuant to ECL 11-0515.

Mr. Ball argued that the bases for alleged violations are unreliable because they rely on paperwork (Exhibits 7A, 7B, and 7C) maintained by an uninvolved third party (Tr. at 39-40, 51). He noted that Department staff did not seize or recover any fish, and did not obtain any admissions from Gosman's owners or employees (Tr. at 37-38). Although Investigator Carpenter

⁵ 6,984 lbs. + 630lbs. = 7,614 lbs.; and 7,614 lbs. - 7,078 lbs. = 536 lbs.

testified that an accounting error did not occur (Tr. at 44), Mr. Ball asserted that the Gosman Fish Market is a very large operation, and that personnel changes occur regularly. Under such circumstances, Mr. Ball contended that accounting and clerical errors are very likely. (Tr. at 50, 53.)

Because the catches reported on Invoices 33705 and 33532 (Exhibits 7A and 7B, respectively) are close in weight (*i.e.*, 630 pounds v. 698 pounds), Mr. Ball contended that the right hand at Gosman's did not know what its left hand was doing. Consequently, Mr. Ball argued that Invoice No. 33705 (Exhibit 7A) was declared void, and that any payment made to Mr. Ball for the catch recorded on Invoice No. 33705 was in error (Tr. at 51). Mr. Ball noted that a check issued from any fish market would provide a record of a catch, reported or not, and argued that the better way to conceal any unreported catch would be to pay the fisherman with cash (Tr. at 53).

With reference to Exhibit 8, Mr. Ball argued that the vessel trip reports show that he was close, but did not exceed, his quota for 2005. Consequently, in order to fill his quota before December 31, 2005, he took an RSA trip (*see* VTR 10636029 in Table 1 [Appendix B]) near the end of the month, and caught 900 pounds of summer flounder. These catches were sold to Gosman (200 pounds) on December 31, 2005 and to Wilkisson (700 pounds) on January 1, 2006. Mr. Ball asserted that he would not jeopardize the extra income associated with participating in the RSA program for summer flounder by exceeding his quota near the end of the permit term (*i.e.*, December 31, 2005). (Tr. at 52-53.)

Mr. Ball's arguments are not persuasive. Mr. Ball offered nothing to demonstrate the clerical error that he asserted. Rather, Mr. Ball accepted payment in the amount of \$630 as noted on the canceled check (Exhibit 7C), which references Invoice No. 33705 for 630 pounds of summer flounder (Exhibit 7A). He offered nothing to show that he refused the payment, or that he returned the alleged excess payment to Gosman's subsequent to depositing the \$1,677.00 check.

In addition, I assign the statement in Ms. Verry's December 20, 2007 deposition (Exhibit 8) concerning the lack of both an oral and written record of Mr. Ball's 630 pound catch of summer flounder significant weight for the following reasons. As discussed above, the federal EFP and the License required Mr.

Ball to use the interactive voice response system to alert both the National Marine Fisheries Service and the Bureau of Marine Resources when he left port on any RSA trip. Upon his subsequent return to port, Mr. Ball was required, within 48 hours, to file copies of the vessel trip report with both government agencies (Tr. at 19; Exhibit 5, Condition No. 3.G).

The oral and written reporting systems to the federal and State agencies are redundant and, consequently, provide a back-up record of each and every trip. However, no record of the vessel trip associated with the 630 pounds of summer flounder was located by the National Marine Fisheries Service, or offered by Mr. Ball.

Ms. Verry's December 20, 2007 deposition demonstrates that the National Marine Fisheries Service maintains records related to the IVR system and VTR for several years subsequent to each RSA trip. Because the purpose of the RSA program is to collect valuable data about fish populations and their seasonal distribution, accurate records about each trip and a good record retention policy would be necessary to realize the goals of the RSA program.

I note further that Mr. Ball did not submit any evidence that contradicts or refutes the evidence offered by Department staff concerning the unreported 630 pounds of summer flounder. Accordingly, I conclude that Staff demonstrated by a preponderance of the record evidence that Mr. Ball committed the violations alleged in the Notice. I conclude further that these violations in 2005 provide sufficient bases to deny Mr. Ball's 2009 application for a license.

Finally, Mr. Ball argued that a denial of his 2009 application for a License pursuant to ECL 11-0515 would result in an adverse economic impact. As noted above, Mr. Ball obtained a federal EFP for 2009, which provides a quota for summer flounder. During the hearing, Mr. Ball explained that he transferred much of the quota but, as of the hearing date, remained responsible for between 800 to 900 pounds of summer flounder. According to Mr. Ball, the potential cost of the remaining quota, if he remains responsible for it, would be burdensome.

In addition, to presenting arguments, Mr. Ball had the opportunity at the hearing to provide factual information about

the potential economic impact associated with the denial of his 2009 License application, but chose not to do so. The current per pound market value of summer flounder is not part of the hearing. In addition, it is not known whether the current per pound market value of summer flounder is comparable to the costs from 2005. I conclude, therefore, that the potential adverse economic impact cannot be reliably quantified based on the hearing record. I note further that the grounds for license revocation outlined at 6 NYCRR 175.5(a) do not provide for the consideration of any economic factors.

Conclusions

1. Mr. Ball failed to comply with the terms and conditions of his License (No. 237) in violation of 6 NYCRR 175.5(a)(2) when he did not file a vessel trip report with the National Marine Fisheries Service and the Bureau of Marine Resources for landing 630 pounds of summer flounder on or about December 21, 2005.
2. In 2005, Mr. Ball violated 6 NYCRR 175.5(a)(3) and License Condition No. 3.A when he exceeded his quota of 7,078 pounds of summer flounder by 536 pounds.
3. Mr. Ball violated 6 NYCRR 175.5(a)(4), on or about December 21, 2005, by failing to report an RSA trip for summer flounder to the National Marine Fisheries Service and the Bureau of Marine Resources by neither telephoning the interactive voice response system nor filing a vessel trip report.

Recommendations

1. The Commissioner should conclude that Mr. Ball violated the terms and conditions of his 2005 License issued pursuant to ECL 11-0515.
2. The Commissioner should conclude further that these violations provide a basis, consistent with the regulations outlined at 6 NYCRR 175.5(a), to deny Mr. Ball's 2009 application for a license.

3. The Commissioner should deny Mr. Ball's 2009 application for a License to Collect or Possess (see ECL 11-0515).

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Attachments: Appendix A - Exhibit List
Appendix B - Table 1

Appendix A

Exhibit List

Matter of Donald Ball

OHMS Case No. 2009-64695
October 6, 2009

1. Notice of Intent to Revoke and Deny Permit.
2. Notice of Appearance and Demand for Hearing.
3. Letter dated June 5, 2009 from Jennifer Ukeritis, Esq., Assistant Regional Attorney, NYS DEC, Region 1 to Anthony Palumbo, Esq., Goggins and Palumbo, Mattituck, New York regarding Matter of Donald Ball.
4. Resume of Maureen C. Davidson.
5. License No. 237 (License to Collect or Possess). Issued to Donald Ball, effective from March 21, 2005 to December 31, 2005.
6. Summer Flounder Closure Notice.
- 7.A Invoice No. 33705 dated December 21, 2005 and attached Purchase Order No. 60619.
- 7.B Invoice No. 33532 dated December 22, 2005 and attached Purchase Order No. 60635.
- 7.C Check No. 27476 dated January 9, 2006 from Gosman's Fish Market to Don Ball in the amount of \$1677.00.
8. Supporting Deposition by Alison Verry sworn on December 20, 2007.

RULING: All exhibits received into evidence.

Appendix B

Matter of Donald Ball
OHMS Case No.: 2009-64695

Table 1: Donald Ball's VTRs for December 2005.

VTR	Pounds (lbs) of Fish Reported	Sold To ¹	Date of Sale
10636026	740 lbs.	500 lbs. to Gosman	12/14/05
		240 lbs. to Wilkisson	12/15/05
10636027	760 lbs.	700 lbs. to Gosman	12/18/05
		60 lbs. to Wilkisson	12/20/05
10636028	700 lbs.	700 lbs. to Gosman	12/22/05
10636029	900 lbs.	200 lbs. to Gosman	2/31/05
		700 lbs. to Wilkisson	1/1/06

¹ Ms. Verry stated in her December 20, 2007 deposition that Gosman's is a federally permitted food fish dealer (Dealer No. 1355). Frank Wilkisson, Inc. (Wilkisson) is a similarly permitted dealer (Dealer No. 779).