

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Robert Cruso
AAD No. 07-044/F&WA
Lobster Trap Allocation MPURP 000977
June, 2007

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD) pursuant to Applicant's request for hearing on the Initial 2007 RI/Area 2 Lobster Trap Allocation as determined by the Department of Environmental Management, Division of Fish and Wildlife (Division). Applicant Robert Cruso appeared on his own behalf. Gary Powers, Esq. appeared on behalf of the Division. The hearing was conducted on June 19, 2007.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 et seq.); the *Administrative Procedures Act* (R.I. GEN. LAWS § 42-35-1 et seq.); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD Rules)*; and the *Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans, and Horseshoe Crabs (Marine Fisheries Regulations)*.

PREHEARING CONFERENCE

A prehearing conference was conducted on June 19, 2007. The parties agreed to the following stipulation of fact:

1. The Applicant reported no landings in the lobster fishery to the Department during the year 2004.

Applicant identified the following as issues to be considered by the Hearing Officer at the hearing:

1. Applicant never received information whether he qualified for the Medical Hardship determination.

2. Whether the 1999-2000 fishing history should be used for an alternative calculation.

The Division identified the following as issues to be considered by the Hearing Officer at the hearing:

1. Whether the Applicant's initial lobster trap allocation was calculated consistent with the requirements of Part 15.14.2 - Area 2 Lobster Trap Effort Control that was duly promulgated pursuant to R.I. Gen. Laws § 42-35-1 et seq.

2. Whether the Applicant suffered a medical hardship during the target years of 2001-2003 as that term is set out in Part 15.14.2-5(d).

3. If the finding to the issue set out above in Issue 2 is in the affirmative, whether the Applicant landed any lobsters as required by Part 15.14.2-5(e) (3) during 2004.

4. If the findings to the issues set out above in Issues 2 and 3 are both answered in the affirmative, Part 15.14.2-5(e) (3) will dictate that the degree to which the Applicant's Initial Lobster Trap Allocation may be modified will be the higher of the Applicant's participation in the lobster fishery in 1999 or 2000.

A list of the exhibits that were presented by the parties is attached to this Decision as Appendix A.

HEARING SUMMARY

The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued by the Division assigns an allocation of six (6) lobster traps to Robert Cruso. Mr. Cruso filed an appeal at the AAD on February 16, 2007, citing medical hardship during the 2001 to 2003 qualifying period. The hearing was conducted immediately following the prehearing conference on June 19, 2007. Applicant bears the burden of proving by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation pursuant to section 15.14.2-5 of the *Marine Fisheries Regulations*.

The Applicant's only witness was himself. The Division called one (1) witness: Thomas Angell, a Principal Marine Biologist in the Division of Fish and Wildlife who, by agreement, was qualified as an expert concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations.

The Applicant testified that he is seeking the medical hardship exception and requested that his lobster trap allocation be based upon his 1999-2000 landings. He explained that he harvested some lobster by traps in 2001 but then his medical condition worsened and he was unable to continue to fish lobster. He stated that the medical problem existed from 2001 through 2005 and as a result he had no fishing history for the year 2004.

Applicant presented medical records from Westerly Hospital in support of his claim of medical hardship. The documents show that on June 3, 2003 Dr. Gross diagnosed Mr. Cruso's injury as "calcific tendinitis right shoulder," and referred his patient to physical therapy. Appl 2 at 3. The records indicate that Mr. Cruso was treated "for a total of five physical therapy visits" and that on August 19, 2003 further treatment was discontinued due to the "lack of the patient's follow-through for attendance." *Id* at 10.

The Division waived cross examination of the witness.

The Division's only witness was Thomas Angell. Mr. Angell stated that he is employed as a Principal Marine Fisheries Biologist in the DEM Division of Fish and Wildlife Marine Fisheries section. His responsibilities include collecting biological and fishing data on the lobster fishery; analyzing the data; and drafting regulations. As a member of the Lobster Technical Committee of the Atlantic States Marine Fisheries Commission, he produces a compilation of data for stock assessment purposes and reviews management plans.

The witness explained that Lobster Management Area 2 stock assessments were conducted in 1996, 2000 and 2006. All three studies showed that Area 2 had been overfished. In order to replenish the lobster fishery, the Atlantic States Marine Fisheries Commission (ASMFC) adopted *Addendum VII* as an effort control plan. The plan imposes a limit on the number of lobster traps for Area 2 and utilizes the individual's historic participation in the fishery to determine the trap allocation. Mr. Angell stated that each state in Area 2 is required to adopt regulations implementing the *Addendum VII* management plan. If a state does not comply, then the ASMFC will find the state out of compliance and forward that finding to the United States Secretary of Commerce and the Secretary of the Interior who may proceed to implement a moratorium on the fishery.

According to the witness, Massachusetts adopted regulations in June 2006. Mr. Angell testified that he was responsible for taking the language from *Addendum VII* and drafting regulations for Rhode Island. After the regulations were adopted, it was his responsibility, and that of John Lake, to carry out the provisions of the regulations. A database was created that contained fishermen's historic participation in the lobster fishery for the years 1999-2003. He and Mr. Lake notified the fishermen of the lobster trap determinations; conducted data dispute reviews; and corrected faulty data in the database.

He explained that Mr. Cruso had only reported landings and traps fished for the year 2001: that 46 pounds of lobster were landed and only six (6) traps fished. See Div. 1 at 1. He stated that in order to use Applicant's 1999-2000 landings for an alternative calculation of the lobster trap

allocation, Applicant is required to have lobster trap landings in 2004. According to Mr. Angell, Robert Cruso had no reported landings of lobster for 2004; if there had been landings in 2004, then sixteen (16) traps would have been allocated based upon Applicant's 1999-2000 landings. Under cross examination by Applicant, Mr. Angell stated that the trap "cap" established by the ASMFC Lobster Management Board was based on the number of traps employed in 2003; the result is a total trap allocation of approximately 220,000 lobster traps for all of Lobster Management Area 2.

In re-direct examination by Division's counsel, the witness explained that Lobster Management Area 2 is composed of the waters extending from the Rhode Island/Connecticut border, out forty (40) miles, and running to the east, including all of Rhode Island state waters and the southeastern shore of Massachusetts.

Both parties waived closing arguments.

Conclusion

Section 15.14.2-3 of the *Marine Fisheries Regulations* provides in pertinent part:

(a) Initial Area 2 lobster trap allocations shall be based on reported lobster landings and reported traps fished in the RIDEM lobster catch/effort logbooks (logbooks) and/or the federal Vessel Trip Reports (VTR) during the qualifying years 2001 -- 2003...

Mr. Cruso has not argued that the Initial 2007 RI/Area 2 Lobster Trap Allocation of six (6) was incorrectly calculated; rather, Applicant claims a medical hardship during the years 2001 -- 2003. Section 15.14.2-5 of the *Marine Fisheries Regulations* provides for an alternative calculation if a medical hardship or military service hardship existed during the target years:

(d) Medical / Military Service Hardships -- Any applicant who holds a current commercial lobster license and who held such authorization during the period 2001 -- 2003 but had no documented, or had reduced, fishing performance during 2001 -- 2003 due to the applicant's military service or the documented disabling physical or medical illness, injury, impairment, or condition that constitutes a material incapacitation involving inpatient care in a hospital, a nursing home, or a hospice, or outpatient care requiring continuing treatment or supervision by a health care provider of the applicant or the applicant's family member, i. e. a parent, spouse, child, mother-in-law, or father-in-law may appeal in order to request that his/her Initial Lobster Trap Allocation be based on his/her 1999 -- 2000 fishing performance in Area 2, and that his/her fishing performance (lobster landings and maximum number of traps reported fished) for the years 1999 -- 2000 be employed to calculate the applicant's Initial Area 2 lobster trap allocation. (emphasis added)

Although subsection (e) proceeds to delineate further what shall be considered in determining whether the medical hardship exception may be employed, it is unnecessary to reach that issue since the Applicant cannot demonstrate compliance with Section 15.14.2-5 (e) of the *Marine Fisheries Regulations*, which includes the following requirement:

3. If an applicant is found to have presented persuasive evidence to qualify pursuant to part 15.14.2-5 (d), the applicant may use landings from any year or years (highest or the average) during the years 1999 and 2000 as the basis for their allocation, provided that the individual must also have landed lobsters with traps during 2004, and must have possessed a state or federal commercial fishing vessel registration and/or a state commercial fishing license or federal lobster permit to land lobster continuously during the period 1999 -- 2004. (emphasis added)

Mr. Cruso did not land lobster in 2004. He is therefore not entitled to a re-calculation of his lobster trap allotment.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined to be six (6) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
2. Applicant filed a request for hearing at the Administrative Adjudication Division on February 16, 2007.
3. Applicant presented evidence of his medical condition during the years 2001 -- 2005.
4. Applicant landed lobster in 1999 and 2000.
5. Applicant did not land any lobsters during 2004.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, 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 Applicant.
2. Applicant has failed to prove by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation pursuant to section 15.14.2-5 (e)3 of the *Marine Fisheries Regulations*.

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

ORDERED

1. Applicant's request for a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation is DENIED.
2. The Initial 2007 RI/Area 2 Lobster Trap Allocation for RI Commercial License # MPURP000977 shall remain at six (6) traps.

Entered as an Administrative Order this _____ day of June, 2007 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon

Hearing Officer

Entered as a Final Agency Decision and Order this _____ day of June, 2007.

W. Michael Sullivan, Ph. D.

Director

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.

APPENDIX A

LIST OF EXHIBITS

APPLICANT'S EXHIBITS

APPL 1 Letter from Robert Cruso to Gary Powers dated 3/19/07

For Id

APPL 2 Medical Records, The Westerly Hospital

Full

DIVISION OF FISH AND WILDLIFE'S EXHIBITS

DIV 1 The Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined by the Division to be six (6). 3 Pages (Copy).

Full

DIV 2 The Applicant's letter requesting a hearing concerning the Division's Trap Allocation Letter. 1 Page (Copy).

Full

DIV 3 A computer printout summarizing the history of Applicant's participation in the lobster fishery during the period 1999, 2000, and 2004. 1 Page (Copy)

Full

DIV 4 Curriculum vita of Thomas E. Angell. 2 Pages (Copy).

Full