

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

RE: STEVEN O. GAGNE
LOBSTER TRAP ALLOCATION
MPURP 001045

AAD NO. 07-053/F&WA

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on the appeal of Steven Gagne ("Mr. Gagne" or "Applicant") of his Initial 2007 Area 2 Lobster Trap Allocation ("Allocation") as determined by the Department of Environmental Management, Division of Fish and Wildlife ("Division"). By letter dated January 16, 2007, the Applicant was notified that his Allocation for 2007 zero (0) traps. On February 21, 2007, Applicant filed a request for hearing with the AAD contesting the Allocation. The governing regulations are the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs, dated November 22, 2006¹ ("Regulations").

A status conference was held on March 22, 2007 and the parties indicated to the hearing officer that they wished to pursue settlement discussions. A control date of April 25, 2007 came and passed without resolution and the matter was set down for administrative hearing. The prehearing conference was held on June 11, 2007 followed immediately thereafter by the administrative hearing. The Applicant appeared *pro se* and the Division was represented by Gary Powers, Esq. At the prehearing conference, the following documents were submitted and marked as indicated below:

Joint Exhibits:

JT 1 Hearing Request of Steven Gagne, filed with AAD February 21, 2007

For Applicant:

App. 1 (ID) Notes by Thomas Angell as to documentation needed for medical hardship

App. 2 (ID) Letter from Steven Gagne to Mr. Powers

¹ The Regulations applicable to the instant proceeding were filed with the Secretary of State on November 22, 2006. Subsequent to the determination of Applicant's allotment and subsequent to the filing of this appeal, the Regulations were superseded by an April 6, 2007 filing with the Secretary of State.

- App. 3 (Full) Patient Request for Health Care Information
- App. 4 (Full) Letter from Dr. KNeY
- App. 5 (Full) Report of Coastal Orthopaedics Institute dated 10/28/02
- App. 6 (Full) Report from Dr. Green dated 8/25/04
- App. 7 (ID) Receipt for Lobsters Caught in Area 2 dated 1/7/05
- App. 8 (Full) Photographs of Boat Owned by Mr. Gagne for purpose of demonstrating ownership

For the Division of Fish and Wildlife:

- Div. 1 (Full) Notice of 2007 Lobster Trap Allotment dated January 17, 2007
- Div. 2 (Full) Lobster Landing and Trap Deployment Data for Applicant for Years 1999, 2000 and 2004.
- Div. 3 (Full) Curriculum Vitae of Thomas E. Angell, 2pp.

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

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. 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 Zero (0) traps based upon his reported activity in the lobster fishery in the target years 2001 through 2003.
3. The lobster trap allocation dated January 16, 2007 was calculated on the basis of data concerning Applicant's history of participation in the lobster fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.
4. The Division's history of the Applicant's participation in the lobster fishery reveals that Applicant had no lobster landings in the year 2004.
5. The Division's history of the Applicant's participation in the lobster fishery in 1999 and 2000 would have yielded an Initial Area 2 Lobster Trap Allocation in the amount of Three Hundred (300) traps.

6. The parties stipulated that the Applicant meets the medical hardship exception set forth in Part 15.14.2-5(d) of the Regulations.

The Applicant bears the burden of proof in this proceeding. The parties stipulated that Applicant meets the medical hardship exception set forth in the Regulations and Applicant contends that he should be awarded a trap allotment based on his 1999 and 2000 data.

The Division identified the issues as

1. Whether the Applicant's January 17, 2007 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. Did Applicant land any lobsters as required by Part 15.14.2-5 (e)(3) of the Regulations during the year 2004.
3. If issue number 2 is answered in the affirmative, the degree to which the Applicant participated in the lobster fishery in 1999 or 2000 as determined by Part 15.14.2-5(e)(3) in order to permit the Applicant pursuant to Part 15.14.2-3 to permit modification of the Appelant's Initial Lobster Trap Allocation which is the subject of this appeal by the substitution of the better annual performance in the lobster industry documented in either 1999 or 2000.

Thomas E. Angell was qualified, by agreement of the parties, as an expert in the lobster fishery and as an expert in the interpretation and application of the Department's lobster regulations.

Testimony

Mr. Gagne testified on his own behalf. He stated that he has been a commercial fisherman since high school for a period totaling thirty seven (37) years. Mr. Gagne has participated in no profession other than commercial fishing. He described himself as an in-shore fisherman that jumps from one species to another in order to keep fishing and to make a living. He testified that he cannot stay in the fishing industry without the ability to fish for lobsters.

He lobsters mainly in the winter months and the lobster fishery accounts for a major part of his income. In November of 2004, when he routinely begins his lobstering, Mr. Gagne was ill with pneumonia. His illness continued for several months and his health prohibited him from lobstering until very late in December when he did put some traps out. According to Mr. Gagne's testimony, although the traps were

set out in December of 2004, they were not pulled until early January 2005, resulting in lobster landings in 2005.

Mr. Gagne voiced great frustration with the allotment process and the settlement process. He testified that he should have been made aware of the requirement for 2004 landings up front and that although a control date was established by the hearing officer, he received no response from the Division of Fish and Wildlife, its counsel or representative, until May 10, 2007. He testified that he provided all the documentation that was requested by the Division (concerning medical hardship) but that he was still denied a reallocation based on a provision in the Regulations that was not communicated to him earlier in the process. He testified that he did not feel he was treated fairly or with respect. The Regulations have had a negative impact on his livelihood and have made the last several months stressful for him and his family. There was no cross examination of Mr. Gagne. I found Mr. Gagne to be a very honest, credible and sincere witness.

The Division called Thomas E. Angell as its only witness. Mr. Angell is employed by the Department in the Division of Fish and Wildlife. Mr. Angell's duties include serving as the project leader for Rhode Island's Lobster Research and Management Project. Mr. Angell participated in lobster stock assessments over several years and the result of those assessments was a finding that that lobsters in Area 2 were overfished. Mr. Angell was responsible for the drafting and implementation of the Regulations. Briefly stated, the Regulations were promulgated by DEM to comply with the lobster management plan adopted by the Atlantic States Marine Fisheries Commission ("ASMFC"), of which Rhode Island is a member state. Mr. Angell was responsible for extracting the necessary elements of the ASMFC management plan and drafting state regulations that comply with the ASMFC management plan. Mr. Angell testified that he drafted the initial regulations and forwarded them to the Rhode Island Marine Fisheries Council (RIMFC) Lobster Panel for review. Thereafter, the proposed regulations were reviewed by the entire RIMFC and were ultimately forwarded to the Director of DEM for review, approval and adoption. The Regulations were subject to three public hearings over the course of the adoption process. All public hearings were held at Corliss Auditorium on the campus of the University of Rhode Island in Kingston, Rhode Island.

Mr. Angell next explained his involvement in the implementation of the Regulations. He reviewed applications for Initial 2007 Area 2 Lobster Trap Allocations, reviewed and computed the data provided by Applicants and participated in providing the notices to Applicants regarding their 2007 allocation. Upon inquiry concerning lobster landings in 2004 and 2005, Mr. Angel indicated that a review of his records reflects no reported landings in 2004, and no reported landings until December of 2005. Mr. Angell was asked for his expert opinion regarding whether the Applicant met Part 15.14.2-5(e)(3) of the Regulations, requiring lobster landings in 2004. Mr. Angell indicated that based on Applicant's testimony and submissions, he fails to meet the specific requirement set forth in Part 15.14.2-5(e)(3).

Upon cross-examination, Mr. Angell was questioned concerning the decline in lobster populations in Area 2. He acknowledged that there are other causes for the decline such as effects of oil spills, increased water temperature, lack of dissolved oxygen in the waters, but asserted that overfishing is the primary cause. He stated that no public hearings concerning the Regulations were held in the East Bay area or anywhere other than at the URI Campus in Kingston, RI. Upon further inquiry from Mr. Gagne, Mr. Angell conceded that the state has conducted no study on the economic impact to in-shore fishermen in Rhode Island. There was no redirect examination and testimony concluded with Mr. Angell.

The parties were afforded the option of making closing arguments or filing a brief or written statement after the conclusion of the hearing. Mr. Gagne and Mr. Powers elected to make a closing statement.

Analysis

Only the portions of the Regulations applicable to the instant proceeding are addressed in this analysis. The Department of Environmental Management has the authority under Title 20 of the General Laws to enact regulations governing the commercial fishing industry in our state. As part of that broad authority, the Department is responsible for regulation of the lobster industry and associated licensing. The Regulations provide that DEM's Division of Fish and Wildlife shall be the lobster trap allocation authority for both state licensed and federally permitted Rhode Island residents. The Division is required to process Area 2 lobster trap allocation applications submitted by Rhode Island residents. Valid license or permit holders² seeking a 2007 Area 2 Lobster Trap Allocation were required by Regulation 15.14.2-2(b) to make

²Recreational (non-commercial) lobster trap license holders are exempt from this process.

written application to the Division from November 12 – December 31, 2006. To be eligible for any Area 2 lobster trap allocation, Regulation 15.14.2-2(c) requires an applicant present documentation that he/she lawfully harvested lobsters employing lobster traps in Area 2 during the years 2001-2003.

The Applicant in this matter submitted the required forms to the Division and included documentation that he lawfully harvested lobsters in Area 2 using lobster traps. Applicant did not participate in the lobster fishery for the years 2001, 2002 and 2003 either because of his medical condition or because the stock was so depleted that it was not economically viable to participate. The Division accepted the information provided by Applicant and applied the standard regression formula adopted in the Regulations to determine the Applicant's Initial 2007 Area 2 Lobster Trap Allocation. The result of that standard calculation was that Applicant's allotment was Zero (0).

The Regulations establish that the qualifying period for determining the 2007 Area 2 Lobster Trap Allocation is 2001 through 2003. Only two exceptions are enumerated in the Regulations³ which, if applicable, allow a departure from the 2001 -2003 qualifying period. It is stipulated by the parties that the Applicant meets the medical hardship standard of Part 15.14.2-5(d) of the Regulations. Medical hardship established, Part 15.14.2-5(e)(3) of Regulations then requires:

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 average) during the years 1999 and 2000 as the basis for their allocation, *provided the individual must have landed lobsters 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)

The mechanism for computing the lobster trap allotment after establishing medical hardship is three-pronged. First, an Applicant must have landings from the year or years 1999 and 2000 to use as the basis for computing the allocation; second the Applicant must have landed lobsters with traps during 2004; and finally, an Applicant 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. In the present matter, Applicant did have landings for the years 1999 and 2000 and he did possess a state commercial fishing license to land lobster continuously during the period 1999 – 2004. What Applicant concedes that he did not have, and the agreed exhibits demonstrate, is that Applicant did

³ See, Regulations 15.14.2-2 (c); 15.14.2-5(d).

not have any lobster landings for the year 2004. Factually, Applicant does not meet the mandates of Part 15.14.2-5(e)(3).

The issue before the AAD in this matter is not one of regulatory interpretation. The Regulations are clear and unequivocal. It is a well established tenet of statutory construction that "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Union Village Development Associates v. Town of North Smithfield Zoning Board of Review, 738 A.2d 1084, 1086 (R. I.1999) (*quoting Providence & Worcester Railroad Co. v. Pine*, 729 A.2d 202, 208 (R.I.1999)). If a statute is unambiguous and its words can be plainly interpreted, then the "work of judicial interpretation is at an end." *Kelly v. Marcantonio*, 678 A.2d 873, 877 (R.I.1996) (*quoting DeAngelis v. Rhode Island Ethics Commission*, 656 A.2d 967, 969 (R.I.1995))."

In the instant matter, the same rules of statutory construction are applicable to the Regulations. The Regulations for computing the lobster trap allotment after establishing medical hardship are plain. An Applicant may use landings from the years 1999 and 2000 as the basis for their allocation *provided that the individual must also have landed lobsters with traps during 2004*. See, Part 15.14.2-5(e)(3) of the Regulations. Regrettably, AAD is without discretion to apply these Regulations differently and the plain words of the Regulations must be given effect.

Findings of Fact

After consideration of the documentary and testimonial evidence presented I make the following findings of fact:

1. The Applicant is the holder of a multi-purpose commercial fishing license (MPURP 001045).
2. Applicant filed an application with RIDEM for a 2007 Initial Area 2 Lobster Trap Allotment determination.
3. 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 Zero (0) traps based upon his reported activity in the lobster fishery in the target years 2001 through 2003.
4. The lobster trap allocation dated January 16, 2007 was calculated on the basis of data concerning Applicant's history of participation in the lobster fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.

5. Applicant filed a request for hearing with the Administrative Adjudication Division on February 21, 2007.
6. The Division's history of the Applicant's participation in the lobster fishery in 1999 and 2000 would have yielded an Initial Area 2 Lobster Trap Allocation in the amount of Three Hundred (300) traps.
7. The Applicant has fished for thirty seven (37) years.
8. Applicant had no reported traps or landings in 2001, 2002, or 2003.
9. Applicant did not participate in the lobster fishery during the years 2001, 2002, and 2003 due to depleted lobster stocks and a disabling medical condition.
10. The Division's history of the Applicant's participation in the lobster fishery reveals that Applicant had no lobster landings in the year 2004.
11. Applicant landed lobsters in 2005.
12. It is not economically viable for Applicant to participate in the lobster fishery with an allotment of zero.
13. Lobster stock assessments commencing in 1996 establish that Area 2 is overfished for lobsters.
14. The Regulations were adopted to conform to a management plan for lobsters in Area 2 adopted by the Atlantic States Marine Fisheries Council and were intended to reduce the number of traps fished..

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:

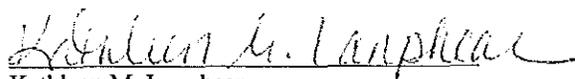
1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. Applicant's 2007 Initial Area 2 Lobster Trap Allotment was calculated in accordance with the Regulations.
3. Applicant meets the medical hardship exception set forth in Part 15.14.2-5(d) of the Regulations.
4. 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 Regulations.

Based on the foregoing, it is hereby

ORDERED

Applicant's appeal of his 2007 Initial Area 2 Lobster Trap Allocation is DENIED.

Entered as a Recommended Decision and Order this 17th day of July, 2007 and herewith forwarded to the Director for issuance as a Final Agency Order.



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

Entered as a Final Agency Order this 20th day of July, 2007



W. Michael Sullivan, PhD.
Director
Rhode Island Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908
(401) 222-2771

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Steven O. Gagne, P.O. Box 575, Little Compton, RI 02837; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 20th day of July, 2007.



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.