

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

RE: CAVANAGH, ANDREW
LOBSTER TRAP ALLOCATION MPURP 001268

AAD NO.07-078/F&WA

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 Andrew Cavanagh appeared on his own behalf. Gary Powers, Esq. appeared on behalf of the Division.

The hearing was conducted on May 7 and 22, 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*, November 22, 2006 (*Marine Fisheries Regulations*).

Prehearing Conference

A prehearing conference was conducted on May 7, 2007. The parties did not agree to any stipulations of fact.

Applicant identified the following as issues to be considered by the Hearing

Officer at the hearing:

1. Regulation based on 2001-2003 history. Applicant was 10-12 years old at the time and physically unable to haul lobster pots.
2. Communication from DEM regarding change in regulations was not timely or fair to enable proper planning
3. Applicant has a documented history of learning disabilities and needs representation.
4. Trap allocations not fairly administered and hearings on regulations did not consider all evidence in determining the regulations.

The Division identified the following issue 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.

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

HEARING SUMMARY

Three (3) Notices of Initial 2007 RI/Area 2 Lobster Trap Allocation were issued to the Applicant by the Division. They were explained by Division's witnesses John Lake and Thomas Angell during their testimony as is set forth below. The Lobster Trap Allocation that was the subject of the hearing allowed Applicant twenty-one (21) traps.

Jt 1.

Mr. Cavanagh filed an appeal at the AAD on April 11, 2007. The hearing was conducted immediately following the prehearing conference on May 7, 2007 and also on

May 22, 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 called four (4) witnesses: **Gladys Rosa Silveira**, who was offered as an expert in the field of education; **David Grote**; **Andrew Cavanagh**; and **Robert Cavanagh**, who was offered as an expert in lobster fishing. The Division called two (2) witnesses: **Thomas E. Angell**, a Principal Marine Fisheries Biologist in the Division of Fish and Wildlife who was offered as an expert concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations; and **John M. Lake**, RI Coastal Cooperative Statistics Program Coordinator for the Atlantic States Marine Fisheries Commission (ASMFC), who was offered as an expert concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations.

The Applicant was sworn in at the commencement of the hearing so it could be established under oath that he required assistance in delivering his opening statement. Andrew Cavanagh explained that he was dyslexic and had difficulty reading. David Grote was then allowed to read Applicant's opening statement.

In the statement Applicant contended that the license holders pay the same application fee, yet are awarded varying numbers of traps in a manner that is not fair and discriminates. He argued that the permit he obtained in 2006 allowed 800 traps and that he should be able to fish that number of traps until the end of the permit period in December 2007.

Applicant's first witness was his grandmother, Gladys Silveira. She testified that she has been an educator for fifty (50) years and has operated a nursery school since

1957. The school currently oversees 170 children. Ms. Silveira stated that she received a two year degree in early childhood education from the Community College of Rhode Island and has taken additional courses in administration, psychology, children's literature, and courses concerning nursery school teaching techniques. Although the witness was originally offered as an expert in the field of education, the Applicant narrowed the field to early childhood education. The Division's objection that expert opinion regarding early childhood education was not relevant in this matter was sustained. The Division's objection to the witness subsequently being offered as an expert in special education was also sustained.

Ms. Silveira expressed her opinion that Andrew Cavanagh "should go on to what suits him best" — being a commercial lobster fisherman.

The Division waived cross-examination of the witness.

Applicant's next witness was his father, Robert Cavanagh, who was offered as an expert in the lobster fishery. Mr. Cavanagh has been fishing for 30 years and currently is a licensed 100 ton near-coastal captain who has run an offshore lobster boat for 18 years; he is the owner/operator of the fishing vessel *Alison Rose*. In the Division's *voir dire* of the witness, Mr. Cavanagh stated that he was licensed for multispecies and held a Federal Permit for scallop along the East Coast and a permit for lobster in Area 3 and in the Area 2/3 Overlap. The Division agreed that Robert Cavanagh was an expert in the area of lobster fishery.

Robert Cavanagh testified that several years ago Area 3's lobster fishery was also in crisis and a historic participation plan with similar guidelines to those now being

used in Area 2 was proposed. He stated that the plan was created by the industry and opined that it was "a disaster", resulting in the large boats obtaining even more traps.

The Division waived cross-examination of the witness.

Applicant next testified on his own behalf. Andrew Cavanagh stated that he was born on July 28, 1989 and was 17 years old on the dates of the hearing. Mr. Cavanagh obtained his license in 2004 and has since borrowed and spent money for the boat, motor and traps. He renewed the license in December 2006 and expected the same number of traps as allowed in the previous year. He considered the reduction in traps as an act to "disenfranchise" him.

The Division waived cross-examination of the witness.

Applicant's final witness was his uncle, David Grote. Mr. Grote has known Andrew Cavanagh for twelve (12) years. He stated that Andrew is hardworking, conscientious, and focused on commercial fishing and commercial lobstering. According to the witness, the Applicant has been working on a used skiff, buying lobster pots and preparing to launch his career this year. He testified that his nephew had obtained loans from friends and family to prepare for the business.

The Division waived cross examination of the witness.

The Division then presented its case. The Division's first witness was John Lake. Mr. Lake stated that among his responsibilities as a Fishery Specialist 2 and as the coordinator of the Atlantic Coastal Cooperative Statistics Program for the State of Rhode Island, are to manage collection of lobster data and of the database, and to conduct data analysis of lobster landings. He testified that he had provided the data to determine the

lobster trap allocations and had had a role in determining the three (3) Notices of Initial 2007 RI/Area 2 Lobster Trap Allocation that were issued to Andrew Cavanagh.

The first Notice sent to Andrew Cavanagh, dated January 16, 2007, established an Initial 2007 RI/Area 2 Lobster Trap Allocation of zero (0) traps for multipurpose commercial fishing license # MPURP001268. Jt 3. The witness explained that the license was issued in 2004, so there was no history of lobster landings for the years 2001-2003.

Upon receiving information from the Applicant that the license had been a permit transfer from Robert Cavanagh, the allocation was modified using Robert Cavanagh's landings history for 2001-2003. The new Initial 2007 RI/Area 2 Lobster Trap Allocation, dated January 29, 2007, was determined to be 659 traps. Jt 2.

Mr. Lake stated that after that Notice was sent, they realized an error had been made: Robert Cavanagh's lobster landings history was from Lobster Management Area 3 and the data could not be used to determine the lobster trap allocation for Area 2. The witness cited the provisions of section 15.14.2-2(c) of the *Marine Fisheries Regulations* which requires that the documentation must be in Area 2 for 2001-2003.

After further review it was discovered that one (1) fishing trip had been made in Area 2 and a third Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation, dated April 25, 2007, was sent to Andrew Cavanagh. The final lobster trap allocation was 21 traps. Jt 1.

Following Applicant's *voir dire* of the witness, Applicant was satisfied that Mr. Lake was qualified as an expert witness concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations.

Applicant waived cross-examination of the witness.

The Division's final witness was Thomas Angell. Mr. Angell stated that among his responsibilities as a Principal Marine Fisheries Biologist are collecting data to assess the status of the lobster fishery and conducting lobster stock assessments. As a member of the Lobster Technical Committee of the ASMFC he provides Rhode Island data for the assessment models and reviews lobster management proposals. At the state level he serves as staff coordinator for the Rhode Island Marine Fisheries Council Lobster Advisory Panel.

Mr. Angell was questioned by Division's counsel about his *curriculum vita* (Div 3) and then offered as an expert witness concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations. Applicant agreed that Mr. Angell was qualified as an expert witness.

The witness explained that based upon stock assessment reports of the American Lobster from 1996, 2000 and January 2006, it was determined that Area 2, which runs from the Rhode Island/Connecticut state border and includes all of Rhode Island to Martha's Vineyard and Nantucket, had been overfished. Steps had been taken in recent years to address the situation through increasing the size of a legally taken lobster, increasing the size of the escape vent to allow more lobsters to escape from the traps, and finally the adoption of an Area 2 effort control plan. The effort control plan was designed to cap the effort in Area 2 to allow the lobster resource to rebuild itself. The allocation of traps would be based upon the individual's historic participation in the lobster fishery.

The management plan had also addressed the nontrap lobster fishery (those commercial fishermen using gear other than traps) through limitations on catch per day and catch per trip.

After the Area 2 effort control plan was developed, it was Mr. Angell's responsibility to take the elements of the plan and translate it into regulatory language. He stated that the proposed regulations were reviewed by the Area 2 Lobster Conservation Management Team and were presented for public hearings by the ASMFC and by the Rhode Island Marine Fisheries Council.

According to the witness, the affected states were required to come into compliance with the management plan, also referred to as "*Addendum VII*". If a state did not comply, then the United States Secretary of Commerce and the Secretary of the Interior could take action against the offending state.

Thomas Angell's explanation of the three (3) Notices issued to Andrew Cavanagh was similar to the one given by John Lake. He stated that since Robert Cavanagh had transferred the state license to his son Andrew Cavanagh, he had used the father's participation in the lobster fishery to reach the second allocation of 659 traps. Jt 2. Upon later review, he realized that the information was for the fishing vessel *Alison Rose*'s participation in Lobster Management Area 3. The lobster trap allocation was then modified again, resulting in the third Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation of 21 traps. Jt 1. He asserted that the allocation of 21 traps was the correct allocation based upon the data obtained by the Division, and that it was consistent with the *Marine Fisheries Regulations*.

Under cross-examination by the Applicant, Mr. Angell explained that Robert Cavanagh could have transferred any Area 2 fishing history to his son but then fishing vessel *Alison Rose* "would lose that amount." He stated that in the federal waters of the Area 2/3 Overlap, federally permitted fishermen from Area 2 were allowed to proceed

"out a certain distance" and those licensed for Area 3 were allowed "to come in a little bit closer." If the permit was for Area 2, then lobster caught in the Area 2/3 Overlap would be attributed to Area 2's catch. Similarly, a fishing vessel such as the *Alison Rose* which possessed the Area 3 license, could fish in the Area 2/3 Overlap but the lobster landings would be attributed to Area 3.

Neither party presented closing arguments.

Conclusion

Section 15.14.2-2 of the *Marine Fisheries Regulations* provides in pertinent part:

- (c) To be eligible for an Area 2 lobster trap allocation, Area 2 trap allocation applicants must present documentation to the trap allocation authority, establishing to the authority's satisfaction that said applicant lawfully harvested lobsters via lobster traps in Area 2 during the years 2001-2003.

...

When Robert Cavanagh transferred his state multipurpose commercial fishing license to his son, he also transferred lobster landing history from Area 2 to his son. Pursuant to the above section, Andrew Cavanagh then became eligible for an Area 2 lobster trap allocation.

Section 15.14.2-3 of the *Marine Fisheries Regulations* provides the method to calculate the lobster trap allocation:

- (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, and shall be the highest value of "Effective Traps Fished" during any year of the 2001 - 2003 qualifying period. . .

Although the issuance of three (3) Notices may have caused confusion, the Division has adequately explained the basis for each Notice's issuance and has verified the final Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation of 21 traps. Applicant

has not presented any evidence that this allocation was incorrectly calculated or was otherwise not in accordance with the *Marine Fisheries Regulations*.

Applicant has asserted that the regulations were not fair and the allocations were not fairly administered. He has presented no evidence, however, that the relevant provisions of the *Marine Fisheries Regulations* were not duly promulgated in accordance with the *Administrative Procedures Act*.

Based upon the above, I conclude that Mr. Cavanagh has not proven that he is entitled to a modification of his Area 2 lobster trap allocation.

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

FINDINGS OF FACT

1. Applicant Andrew Cavanagh obtained multipurpose commercial fishing license # MPURP001268 via transfer from his father, Robert Cavanagh, in 2004.
2. The first Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Applicant, dated January 16, 2007, allowed zero (0) traps because Andrew Cavanagh had no history of lobster landings for the years 2001- 2003.
3. The second Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Applicant, dated January 29, 2007, allowed 659 traps based upon Robert Cavanagh's lobster landings for the years 2001- 2003.
4. The second Notice was based upon Robert Cavanagh's lobster landings in Area 3.
5. It was determined that Robert Cavanagh made one (1) fishing trip in Area 2 during the 2001-2003 qualifying period.
6. Based upon Robert Cavanagh's reported lobster landings of 32 pounds and the reported 180 traps fished for Area 2 during the 2001-2003 qualifying period, an "Effective Traps Fished" of 21 was obtained.
7. The third Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation, dated April 25, 2007 [sic], allowed Applicant 21 traps.

8. Applicant filed a request for hearing at the Administrative Adjudication Division on April 11, 2007.
9. Andrew Cavanagh is a high school student and was seventeen (17) years old on the dates of the hearing.
10. Andrew Cavanagh has dyslexia and has difficulty reading.
11. In December 2006 Andrew Cavanagh renewed his multipurpose commercial fishing license with a limit of 800 traps.

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. Pursuant to the provisions of section 15.14.2-2(c) of the *Marine Fisheries Regulations*, Applicant was eligible to receive an Area 2 lobster trap allocation.
3. In accordance with the method of calculation set forth in section 15.14.2-3 of the *Marine Fisheries Regulations*, Applicant Andrew Cavanagh received an Initial 2007 RI/Area 2 Lobster Trap Allocation of twenty-one (21) traps based upon the "Effective Traps Fished" in Area 2 of transferor Robert Cavanagh.
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 of twenty (21) traps.
5. Applicant has failed to prove by a preponderance of the evidence that the *Marine Fisheries Regulations* were not promulgated and adopted in compliance with the requirements of the *Administrative Procedures Act*.

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 # MPURP001268 shall remain at twenty-one (21) traps.

Entered as an Administrative Order this 14th day of September, 2007 and herewith recommended to the Director for issuance as a Final Agency Order.



Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
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Entered as a Final Agency Decision and Order this 14th day of September, 2007.



W. Michael Sullivan, Ph. D.
Director
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