

7/23/07

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

RE: GOLDBERG, THOMAS D.
LOBSTER TRAP ALLOCATION MPURP000102

AAD No. 07-002/F&WA

DECISION AND ORDER

This matter came before the Department of Environmental Management Administrative Adjudication Division for Environmental Matters (AAD) pursuant to the request for hearing dated January 25, 2007 filed by Thomas D. Goldberg (Applicant) on January 26, 2007 concerning Applicant's Initial 2007 RI/Area 2 Lobster Trap Allocation. The Allocation was established by letter from the Division of Fish and Wildlife (Division) dated January 16, 2007. The hearing in the above captioned matter was conducted on March 5, May 1 and May 17, 2007.

The Division was represented by Gary Powers, Esq. Mr. Robert D. Goldberg represented the Applicant.

The proceedings were 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.); Section 15.14.2-5 of "PART XV: Lobsters, Other Crustaceans, and Horseshoe Crabs" of the Rhode Island Marine Fisheries Regulations (Marine Fisheries Regulations or R.I.M.F.R.) and the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD Rules).

PREHEARING CONFERENCE

At the prehearing conference, the parties agreed to the following stipulations of fact:

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 three (3) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.

The Applicant bears the burden of proof in this proceeding.

A list of the exhibits, marked as they were admitted at the hearing, 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 notified Applicant that his allocation for 2007 is three (3) traps. Applicant filed a claim of appeal of this lobster trap allocation at the AAD, in which the Applicant stated as a basis for said appeal that the trap allocation was (a) in violation of his constitutional rights under the Federal and State Constitution; (b) was made upon unlawful procedure; and (c) that it was arbitrary, capricious and characterized by an abuse of discretion.

The Applicant, Thomas D. Goldberg, testified at the hearing that prior to January 1, 2007, he was permitted to fish eight hundred (800) lobster traps as a holder of a multi purpose commercial fishing license. Applicant stated that

pursuant to his commercial license, he was allowed to fish for lobster in excess of thirty (30) years. Applicant testified that in the past he has fished as many as twenty-five (25) lobster traps; and that he owns a commercial fishing vessel with a value of approximately Fifteen Thousand Dollars.

It is claimed by Applicant that he was never notified prior to 2001 that his ability to lobster would be based upon his usage in the years 2001, 2002 and 2003.

The Division offered testimony from two witnesses, Mark R. Gibson, Deputy Chief, Division of Fish and Wildlife and Thomas E. Angell, Principal Marine Biologist, Division of Fish and Wildlife who were both qualified as expert witnesses with an expertise concerning the lobster fishery as well as an expert witness concerning the interpretation and application of the Department's lobster regulations.

Mr. Angell testified that in his opinion the Applicant's initial 2007 allocation was determined to be three (3) traps in a manner that accurately and consistently reflected the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control based upon the data provided by the Applicant relative to his participation in the lobster fishery during the target years of 2001-2003.

Both witnesses also testified as to their research and review of the results of the surveys and research of other scientists that had concluded that the American Lobster was over fished. Mr. Angell went on to testify that he assisted both the Technical Committee of the Atlantic States Marine Fisheries

Commission (ASMFC) and the Lobster Advisory Panel of the Rhode Island Marine Fisheries Council in addressing this overfishing problem which had been determined in three peer-reviewed lobster survey reports completed by the ASMFC Technical Committee in 1996, 2000, and 2005. Mr. Gibson and Mr. Angell also testified as to the efforts of the ASMFC in adopting Addendum VII in order to address the problem of overfishing faced by American Lobsters in Lobster Management Area 2. These efforts included the ASMFC's attempts to address overfishing by increasing the minimum size of lobster which may be harvested, increasing escape vents on lobster traps, reducing the number of lobsters which may be landed by non-trap fishers, e.g., otter trawlers, and finally through the adoption of Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster. Mr. Gibson and Mr. Angell both testified that Addendum VII (which was the subject of public notice/comment hearing in the Rhode Island) was adopted as a means of limiting the number of lobster traps that may be deployed, with a goal of capping effort at the number of traps deployed during the year 2003.

Mr. Gibson and Mr. Angell described their roles as the chair of the Rhode Island Marine Fisheries Council (the "RIMFC") and the staff coordinator for the Lobster Advisory Panel of the Rhode Island Marine Fisheries Council, respectively. In that capacity, they both stated that they had assisted in the drafting and promulgating of R.I.M.F.R. Part 15.14.2 by which the State adopted regulations to implement the Plan by the State of Rhode Island. Mr. Gibson

geographically defined Lobster Management Area 2 as an area composed of the state and federal waters bordering Rhode Island and the Commonwealth of Massachusetts south of Cape Cod extending to the Rhode Island/Connecticut border, although a limited number of lobster fishers from Connecticut and New York fish in the Area.

Mr. Gibson also testified that R.I.M.F.R. Parts 15.14.2 *et seq.* – Area 2 Lobster Trap Effort Control were adopted by the state of Rhode Island in order for the State to come into compliance with ASMFC's Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster. He also stated that Massachusetts had adopted regulations that were similar to Rhode Island's regulations prior to Rhode Island's promulgation of the subject regulations. He went on to explain that if a member state, like Rhode Island, failed to adopt and implement regulations in compliance with an ASMFC management plan like Addendum VII, a finding of non-compliance could be made by ASMFC and forwarded to the Secretary of Commerce who would impose a sanction of a moratorium on the taking or landing within the noncompliant state of the species which the subject of the management plan. In the matter at hand, a finding of non-compliance would result in closure of the State's entire lobster industry. Mr. Gibson testified that the Secretary of Commerce had threatened to impose such a moratorium due to a finding by the ASMFC that the State of Rhode Island had failed to comply with the ASMFC's earlier adopted plan requiring the promulgation of regulations limiting the non-trap harvesting of lobster to one

hundred pounds (100 lbs.) per day or five hundred pounds (500 lbs.) per trips at sea of five (5) days or longer. He testified, however, that due to the adoption of the required regulations, the moratorium had been avoided.

CONCLUSION

It is argued by Applicant that the Atlantic States Marine Fisheries Commissioner has adopted Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobsters; and that it is not a Federal or State Law. Applicant asserts that the Director of the Department of Environmental Management (DEM) has sole, final and discretionary authority as to which regulations will be adopted by the State of Rhode Island. It is averred by Applicant that there are many other alternatives to the enacted regulation; and that there are other approaches that could be utilized without limiting the allocation of traps among holders of commercial lobster licenses.

Applicant maintains that although a commercial lobster fisherman with sufficient traps has the right to sell his traps and the right to engage in the fishery for profit, this right has been denied to Mr. Thomas D. Goldberg. It is Applicant's contention that the regulations as applied to Applicant is discriminatory and capricious and has led to an absurd result; and that the elimination of Applicant's right to commercially fish for lobster breaches and violates his following rights and privileges:

1. It is a taking of property without compensation and violates the due process as guaranteed by the 5th and 14th Amendment of the U.S. Constitution.

2. The regulation violates the equal protection and due process right contained in the Rhode Island Constitution and Federal Constitution.
3. The regulation violates Mr. Goldberg's right as guaranteed of Rhode Island Constitution including but not limited to Article 3, Section 17.
4. The rights guaranteed by R.I.G.L. 20-2.1-2 subsection 4. The rights of R.I.G.L. 20-2.1-2 subsection 1, subsection 3, and subsection 5.
5. The arbitrary and capricious nature of the application of the regulation has led to an absurd result and violated Mr. Goldberg's rights.

Wherefore, the Applicant requests that the regulation should be declared invalid and the limitation of 3 traps to Mr. Goldberg should be vacated.

It is argued by Division that the Applicant, who bears the burden of proof in this challenge to the Division's determination that Applicant's initial 2007 allocation should be three (3) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003, has admitted that the data presented relied upon by the Division in making that determination was accurate. Division contends that it presented competent evidence of a perceived ecological problem and an environmental plan to address that problem; and that the Division further presented testimony as to promulgation of regulations in compliance with R.I. Gen. Laws § 42-35-1 *et seq.* in an effort to address that problem. Division contends that given the dire status of the American Lobster which is attempting to survive in Lobster Management Area 2 and the ominous penalty which would in all probability befall the State if the restrictions imposed by R.I.M.F.R. Parts 15.14.2 *et seq.* were not implemented, the Division requests that

the Applicant's appeal be denied and his Initial Lobster Management Area 2 Lobster Trap Allocation of three (3) traps be retained.

The Applicant does not dispute the accuracy of the data upon which his Initial 2007 Lobster Management Area 2 Lobster Trap Allocation was calculated by Division. It is acknowledged by Applicant that said data concerning Applicant's participation in the lobster fishery in the target period of the years 2001 through 2003 is accurate and was presented by the Applicant himself.

Section 15.14.2-1(a) of the Rhode Island Marine Fisheries Statutes and Regulations provides that the Division shall be the lobster trap allocation authority for Rhode Island residents, both state-licensed and federally-permitted. It also provides that the Division shall process resident Area 2 trap allocation applications, and determine trap allocations for eligible Area 2 licenses/permit holders. It is required by Section 15.14.2-2(c) that applicants must present documentation to the trap allocation authority, establishing that said applicant lawfully harvested lobsters via lobster traps in Area 2 during the years 2001-2003.

Section 15.14.2-3(a) provides that Initial Area 2 lobster trap allocations shall be based on reported lobster landings and reported traps fished 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.

The issue for consideration herein is whether the Applicant has proven by a preponderance of the evidence that he is entitled to a modification of the Initial Trap Allocation pursuant to Section 15.14.2-5 of the Marine Fisheries

Regulations. The Applicant admits that the Division's determination that Applicant's initial 2007 allocation of three (3) traps was calculated on the basis of data submitted by Applicant concerning Applicant's reported activity in the lobster fishery in the target period of the years 2001 through 2003. The Applicant did not introduce any testimony or evidence that would demonstrate that he is entitled to a modification of his Initial Trap Allocation. The applicant did not cite any statutory or regulatory authority that would warrant an increase in Applicant's allocation or which would permit the Hearing Officer to grant any of the relief sought by Applicant. The Administrative Adjudication Division is a statutory tribunal, and as such the jurisdiction of AAD is circumscribed by its enabling legislation and other statutes. The AAD was established by Chapter 17.7 of Title 42 of the R.I. GEN. LAWS. The AAD is charged per §42—17.7-2 with the authority to hear licensing proceedings pursuant to the regulations promulgated by the Director of the Department of Environmental Management.

The Applicant has presented numerous issues and legal challenges concerning the constitutionality of the governing regulations as well as the determination of the Division in this matter. However, it is well established that said issues and challenges are not properly before the Administrative Adjudication Division. The U.S. District Court for the District of Rhode Island in Bowen v. Hackett, 361 F. Supp. 854, 860 (D.R.I. 1973), ruled that it would be inappropriate to require exhaustion of administrative remedies where the issue is the constitutionality of a statute the agency must enforce because the "expertise

of state administrative agencies does not extend to issues of constitutional law.” In accordance with this view, the AAD has repeatedly held that constitutional issues are not properly before this tribunal. See Louis G. and Joan R. Roy, AAD No. 95-002/ISA, Final Agency Order entered 6/7/95; Richard and Anita Ally, AAD No. N/A, Administrative Order entered 11/5/91; Bruce T. Cunard, AAD No. N/A, Final Agency Order entered 6/17/91.

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 Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant, Thomas D. Goldberg.
2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation (Allocation) from the Division of Fish and Wildlife (Division) dated January 16, 2007 advising the Applicant that his initial 2007 Allocation was determined to be three (3) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. On January 26, 2007 the Applicant filed a request for an adjudicatory hearing at the Administrative Adjudication Division.
4. The Applicant's Initial Lobster Trap Allocation was calculated on the basis of data concerning Applicant's participation in the lobster fishery presented by the Applicant himself.
5. The Applicant's Allocation determination was accomplished consistent with the requirements of Part 15.14.2 – Area 2 Lobster Trap Control that was duly promulgated pursuant to R.I. GEN. LAWS §42-35-1 et seq.

CONCLUSIONS OF LAW

After due consideration of the above findings of fact and the legal argument of the parties, I conclude the following as a matter of law:

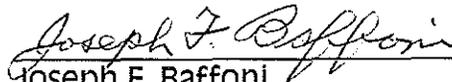
1. The Administrative Adjudication for Environmental Matters (AAD) has jurisdiction over this matter pursuant to R.I. GEN. LAWS §42-17.7-2; and §15.14.2-5(a) of the Marine Fisheries Regulations.
2. The Division's Allocation of three (3) traps to the Applicant was calculated consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control of the Marine Fisheries Regulations.
3. The Applicant failed to prove by a preponderance of the evidence that his requested increase of his Initial Lobster Management Area 2 Lobster Trap Allocation of three (3) traps would be consistent with the provisions and purposes of the Marine Fisheries Regulations.
4. The Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation of three (3) traps is the proper Allocation pursuant to the pertinent statutes and regulations.

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

ORDERED

1. Applicant's appeal is DENIED.
2. Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation shall remain at three (3) traps.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 20th day of July, 2007.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade St., Room 310
Providence, RI 02908
(401) 222-1357

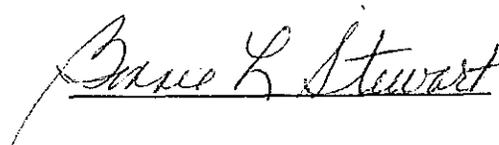
Entered as a Final Agency Decision and Order this 23rd day of July, 2007.



W. Michael Sullivan, Ph. D.
Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: Thomas D. Goldberg, Esquire, Goldberg Law Offices, 226 Cottage Street, Pawtucket, RI 02860; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 23rd day of July, 2007.



APPENDIX A

APPLICANT'S EXHIBITS:

APPLICANT 1 FULL	Rhode Island DEM 2007 Commercial Vessel Declaration of Permit for Applicant 1 Page (Copy).
APPLICANT 2 FULL	Rhode Island DEM 2007 Commercial Boat Plate for Applicant. 1 Page (Copy).
APPLICANT 3 FULL	Rhode Island DEM Commercial Fishing License of Applicant 1 Page (Copy).
APPLICANT 4 FULL	Frequency Distribution of Trap Allocation of Lobsters. 3 Pages (Copy).

DIVISION'S EXHIBITS:

DIVISION 1 FULL	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 three (3) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
DIVISION 2 FULL	The Applicant's letter dated January 25, 2007 requesting a hearing concerning the Division's Allocation Letter. 1 Page (Copy).
DIVISION 3 FULL	<i>Curriculum vita</i> of Mark R. Gibson. 2 Pages (Copy).
DIVISION 4 FULL	<i>Curriculum vita</i> of Thomas E. Angell. 2 Pages (Copy).
DIVISION 5 for ID	<i>Curriculum vita</i> of John M. Lake. 3 Pages (Copy).
DIVISION 6 FULL	Notice from Division to all Rhode Island Commercial Fishing License Holders dated December 18, 2000. 1 Page (Copy).

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.