

Department of Environmental Management  
Administrative Adjudication Division  
State of Rhode Island  
Re: Daniel Savitt  
Lobster Trap Allocation  
AAD NO. 07-012/F&WA  
CFL 000100  
June, 2007

**DECISION AND ORDER**

This matter is before the Administrative Adjudication Division for Environmental Matters (“AAD”) on the appeal of Daniel Savitt (“Savitt” 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 is twenty (20) traps. On February 5, 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, 2006<sup>1</sup> (“Regulations”).

A status conference was held on February 28, 2007 and the parties indicated to the hearing officer that they wished to pursue settlement discussions. A control date of March 22, 2007 came and passed without resolution and the matter was set down for administrative hearing. After a brief continuance at the request of the Division, the prehearing conference was held on June 1, 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 Daniel Savitt, filed with AAD February 5, 2007

**JT 2** Notice of 2007 Lobster Trap Allotment dated January 17, 2007

**For Applicant:** No documents

For the Division of Fish and Wildlife:

**Div. 1** -Curriculum Vitae of Thomas E. Angell, 2pp.

**(FULL)**

These documents were admitted as full exhibits at the hearing.

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 lobster trap allocation dated January 17, 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.

The Applicant bears the burden of proof in this proceeding. Applicant identified as issues the reasons set forth in his request for hearing. They are as follows:

1. The only year available for qualifying my allocation was 2003 which was the first year fished under the license which was awarded as a result of a lottery in May, 2003.

2. An allocation of only 20 traps is not viable commercially as it is unlikely to cover the cost of fuel, bait, maintenance, etc.
3. I have fished at least 30 traps in subsequent years and currently intended to fish up to 50 this year.

The Division identified the issue as “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.”.

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. Savitt testified on his own behalf. He stated that he received his lobster license through the lottery system in May of 2003. Because it was his initial year in the lobster industry, he fished a lower number of traps - twenty. He explained that because 2003 was a startup year, the data, although accurate, was not representative of his lobstering activity. He testified that an allocation of only twenty traps makes his commercial license unviable. He has made an investment and the allocation of just twenty traps will not cover the cost of fuel, bait and equipment maintenance. Mr. Savitt concluded his testimony by stating that the effect of the Regulations, although perhaps unanticipated and unintended, places individuals who were issued a license in 2003 in a very difficult position.

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 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 Council (“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.

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. Mr. Angell explained the formula set forth in the Regulations and used to determine lobster trap allocations for 2007. In conclusion of his direct testimony, Mr. Angell testified that no special dispensation or provision is contained in the Regulations for individuals who did not have a license in 2001 or 2002. Because the allocation was based on the highest number of effective traps during any of the qualifying years (2001, 2002 or 2003), Mr. Savitt's 2003 data was used to determine his 2007 allotment.

Upon cross-examination, Mr. Angell indicated that the result of the lobster management effort set forth in the Regulations was to reduce the number of lobster traps from approximately 300,000 to approximately 150,000 - a reduction of approximately 50%. Under further questioning, Mr. Angell testified that all applicants were treated equally under the Regulations but acknowledged that licensees that entered into the fishery in 2003 may be impacted more harshly. Again, Mr. Angell stated that in drafting the Regulations, no special consideration was given to license holders that acquired their license via a lottery in 2003. He stated that there was an awareness that

such licensees existed. 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. Savitt 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, including the issuance of licenses through a lottery system in 2003 - the means by which this Applicant obtained his license. 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 holders<sup>2</sup> seeking a 2007 Area 2 Lobster Trap Allocation were required by Regulation 15.14.2-2(b) to make 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. Because Applicant did not obtain a valid license until 2003, that was the only year for which he could document the lawful harvesting of lobsters. As a result, and through no fault of the Applicant, no documentation could be provided for the years 2001 and 2002. Mr. Savitt fished only twenty (20) traps in 2003 as this was a startup year and he was unprepared to fish all the traps allotted. 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 reduced to twenty (20) traps.

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 Regulations<sup>3</sup> which, if applicable, allow a departure from the 2001 -2003 qualifying period. Those exceptions involve military service and disabling physical or medical illness, neither of which are alleged by Applicant. 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 concerning the qualifying years for computation of the 2007 Area 2 Lobster Trap Allocation are plain. The qualifying years are 2001 - 2003. A deviation from those qualifying years may only be had by way of the two specifically enumerated exceptions provided within the Regulations - neither of which are applicable to this action.<sup>4</sup> The testimony of Mr.

Angell establishes that the Department knew that lottery licensees such as Mr. Savitt existed, but made no special provision to address their plight. In *Simeone v. Charron*, the Rhode Island Supreme Court held that a court is not “entitled to write into the statute certain provisions of policy which the legislature might have provided but has seen fit to omit \* \* \* \* \* If a change in that respect is desirable, it is for the legislature and not for the court.” *Simeone v. Charron*, 762 A.2d 442, 448 (R.I. 2000), *citing* *Elder v. Elder*, 84 R.I. 13, 22, 120 A.2d 815, 820 (1956). The present matter is analogous. It is not the province of the Adjudication Division to write an exception into the Regulations which the Department might have included, but chose to omit. Additional exceptions to these regulatory provisions must be added by way of notice and adoption in conformance with the requirements of the Administrative Procedures Act.

#### 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 commercial fishing license (CFL 000100) which he obtained in the year 2003 through a Department of Environmental Management sponsored lottery for the issuance of lobster licenses.
2. Applicant filed an application with RIDEM for a 2007 Initial Area 2 Lobster Trap Allotment determination.
3. The Applicant received notice of his 2007 Initial Area 2 Lobster Trap Allotment determination by letter dated January 17, 2007
4. The lobster trap allocation dated January 17, 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's Allotment for 2007 is twenty (20) traps.
6. Applicant filed a request for hearing with the Administrative Adjudication Division on February 5, 2007
7. The Applicant commenced fishing under this license in 2003.
8. Applicant's only qualifying year for the computation of the Allotment is the year 2003.
9. Applicant did not fish to capacity in 2003 as this was the initial year of his license.
10. Applicant fished 20 traps in 2003 and landed a total of 217 pounds of lobster.
11. Applicant fished at least thirty (30) traps in years subsequent to 2003 and intended to fish up to fifty (50) traps in 2007.
12. It is not economically viable for Applicant to participate in the lobster fishery with an allotment of twenty traps.
13. Applicant presented no evidence of medical hardship or military service.
14. Applicant concedes that the existing regulatory exceptions are not applicable to his appeal.
15. Lobster stock assessments commencing in 1996 establish that Area 2 is overfished for lobsters.
16. 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..
17. The Regulations contain only two exceptions to the 2001-2003 qualifying years.
18. The Department was aware that licensees who obtained their license via lottery in 2003 existed, but made no special consideration for such licensees in the Regulations.

#### 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. AAD must follow the plain language of the Regulations and may not write exceptions into the Regulations which the Department chose to omit.

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 \_\_\_\_\_ day of June, 2007 and herewith forwarded to the Director for issuance as a Final Agency Order.

Entered as a Final Agency Order this \_\_\_\_\_ day of \_\_\_\_\_, 2007

Kathleen M. Lanphear  
Chief Hearing Officer  
W. Michael Sullivan, PhD.  
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.

### **Footnotes**

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.

2

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

3

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

4

Even if applicable, the exceptions would provide no relief to Applicant as he did not acquire a license until 2003