

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

**RE: CHARLES BORDEN**

**AAD NO. 07-028/F&WA**

**DECISION AND ORDER**

**AMENDED**

This matter is before the Director on the appeal of Charles Borden of his Initial 2007 Area 2 Lobster Trap Allocation as determined by the Department of Environmental Management Division of Fish and Wildlife. The applicant was notified by letter dated January 17, 2007 of his allocation of Three Hundred and Forty (340) traps. On February 7, 2007, Mr. Borden filed a request for hearing with the Administrative Adjudication Division of Rhode Island Department of Environmental Management contesting the Allocation.

A status conference was held on March 9, 2007. On July 17, 2007, a Notice of Administrative Hearing and Prehearing Conference was issued. The prehearing conference was held on August 1, 2007 followed immediately by the administrative hearing.

During these processes the following stipulations of fact were agreed upon by the parties:

1. The Administrative Adjudication Division had subject matter jurisdiction over the 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 17, 2007 advising the Applicant that his initial 2007 allocation was determined to be Three Hundred and Forty (340) traps based on his reported activity in the lobster fishery in the target period of the years 2001-2003.
3. The Applicant failed to present written documentation that a governmental agency(ies) had rendered a final agency decision documenting the existence of a disabling physical or medical illness during the target years of 2001-2003 pursuant to the requirements set forth in R.I.M.F.R. Parts 15.14.2-5(d) and (e)(1).
4. If the Applicant were found to satisfy the regulatory requirements for a medical hardship during the target period, the better of the Applicant's history of participation in the lobster trap fishery in the years 1999 and 2000 would result in a modification of his Initial Trap Allocation from Three Hundred Forty (340) traps to Four Hundred Thirty-One (431) traps.

**RE: CHARLES BORDEN**

**AAD NO. 07-028/F&WA**

The Applicant bears the burden of proof in this process and raised the issues of:

1. Do the amended Rhode Island Marine Fisheries Regulations filed by the Director with the Rhode Island Secretary of State on April 11, 2007 and effective May 1, 2007 govern his appeal and
2. Does the Applicant meet the medical hardship standard as established by the applicable regulations?

The DEM Division of Fish and Wildlife identified as issues the following:

1. Whether the Applicant' initial lobster trap allocation was calculated consistent with the requirements of Part 15.14.2- Area 2 Lobster Trap Effort Control that was promulgated pursuant to R.I. General Laws 42-35-1 et seq. filed by the Director with the Secretary of State on October 22, 2006, effective November 12, 2006 and
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) of the November 2006 Regulations.

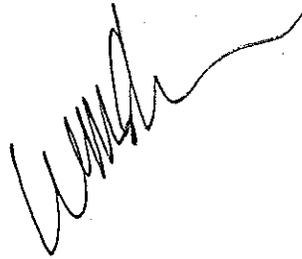
After due consideration of the documentary evidence of record forwarded by the Administrative Adjudication Division of the Rhode Island Department of Environmental Management I accept the findings of fact as presented by Hearing Officer Lanphear.

Pursuant to the authority granted by R.I. General Laws 42.17.7-6 I hereby accept in part and reject in part the decision issued by Hearing Officer Kathleen M. Lanphear on November 2, 2007 and conclude and order as follows:

1. The Amended Regulations were promulgated with the intent that they be in place prior to making any final decisions on appeals.
2. Adherence to the plain language of the savings clause of the Amended Regulations would lead to an absurd result.
3. When language of any law, rule or regulation could be interpreted with more than one conclusion both the 'intent' of the authority promulgating the law, rule or regulation must be gathered from a reading of the entire statute and not an individual or isolated provision.

4. The essential definition within section 15.14.2-2 of the Amended Regulations reads as follows: *Material Incapacitation – means a verifiable event beyond the control of the license/permit holder, such as a medical condition, that adversely affected his/her fishing performance during the three-year period 2001-2003, inclusive. Military service performed during the three year period 2001-2003 also constitutes material incapacitation. Other than a decision to serve in the military, material incapacitation can not involve a choice by the license/permit holder to pursue other interest; or to a short-term illness or injury that would not have incapacitated a person for the three qualifying years.'*
5. The Applicant failed to satisfy the regulatory requirements as set forth in this definition. Applicant's fishing performance during the three year period 2001-2003 must have been impacted for the full three year period. He demonstrated an injury and an impact during April to September 2003 only.
6. The Applicant's Initial Trap Allocation shall remain at Three Hundred and Forty (340) traps.

By the authority granted to the Director I issue this decision with respect to the parties involved and with the following finding of fact on this   2nd   day of January 2008 as my Final Agency Order.

A handwritten signature in black ink, appearing to be 'W. M. M.', is written over the text of the decision.

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

RE: CHARLES BORDEN  
LOBSTER TRAP ALLOCATION

AAD NO. 07-028/F&WA

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on the appeal of Charles Borden ("Mr. Borden" 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 17, 2007, the Applicant was notified that his Allocation for 2007 is Three Hundred and Forty (340) traps. On February 7, 2007, Applicant filed a request for hearing with the AAD contesting the Allocation.

A status conference was held on March 9, 2007. A control date was set to allow the parties to discuss resolution of the appeal. These discussions did not result in a settlement and on July 17, 2007, a Notice of Administrative Hearing and Prehearing Conference was issued. The prehearing conference was held on August 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:

**For Applicant:**

- App. 1 (ID) Applicant's statement of facts (5pp.)
- App. 2 (Full) Medical Documentation and Correspondence (Copy, 14 pages)
- App. 2-1 (ID)\* Copy of Rules and Regulations Filing Form filed with the Secretary of State October 23, 2006; Copy of Transmittal Letter dated October 23, 2006; and copy of Regulations cover page. (3 pages)
- App. 2-2 (ID)\* Copy of Rules and Regulations Filing Form filed with the Secretary of State April 11, 2007; Copy of Transmittal Letter dated April 11, 2007; and copy of Regulations cover page. (3 pages)
- App. 2-3 (ID)\* Printed excerpts from the website of the Atlantic States Marine Fisheries Council (ASMFC)
- App. 2-4 (ID)\* Copy of Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster, dated November 2005

**App. 2-5 (Full)\*** Copy of Notice to Applicant from Division of Fish and Wildlife dated January 29, 2007 notifying Applicant of his Allocation and Right to Appeal

**App. 2-6 (Full)\*** Copy of Proceedings of the Atlantic States Marine Fisheries Commission American Lobster Management Board. (45 pages)

**App. 2-7 (Full)\*** Copy of Memorandum from Director W. Michael Sullivan, PhD. to Mark Gibson, Deputy Chief for Marine Fisheries, dated April 24, 2007 (5 pages)

\* These exhibits were submitted post-hearing. For ease of reference, I have maintained Applicant's numbering of these exhibits to correspond to the citations in his post-hearing memorandum.

The Division objected to Exhibits 2-1 through 2-5 and filed a Motion to Strike. The Motion is denied and the Exhibits are admitted to the extent indicated above.

**App. 3 (Full)** Correspondence from Charles Borden to John Lake and Thomas Angell dated 1/26/07

**For the Division of Fish and Wildlife:**

**Div. 1 (Full)** The Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 17, 2007 advising the Applicant that his initial 2007 allocation was determined by the Division to be Three Hundred and Forty (340) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003, (3 pages, Copy)

**Div. 2 (Full)** Applicant's letter requesting a hearing concerning the Division's Allocation Letter, 1p. (Copy)

**Div. 3 (Full)** Curriculum Vita of Thomas E. Angell, 2pp. (Copy)

**Div. 4 (Full)** A computer printout summarizing the history of Applicant's participation in the lobster fishery during the period 1999, 2000, and 2004. (1 page, Copy)

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 17, 2007 advising the Applicant that his initial 2007 allocation was determined to be Three Hundred and Forty (340) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. The Applicant failed to present written documentation that a governmental agency(ies) has rendered a final agency decision documenting the existence of a disabling physical or medical illness during the target years of 2001-2003 pursuant to the requirements set forth in R.I.M.F.R. Parts 15.14.2-5(d) and (e)(1).

4. If the Applicant were found to satisfy the regulatory requirements for a medical hardship during the target period, the better of the Applicant's history of participation in the lobster trap fishery in 1999 and 2000 would result in a modification of his Initial Trap Allocation from Three Hundred and Forty (340) traps to Four Hundred Thirty One (431) traps.

The Applicant bears the burden of proof in this proceeding and has raised the following issues:

1. Do the amended Rhode Island Marine Fisheries Regulations filed by the Director with the Secretary of State on April 11, 2007 effective May 1, 2007 govern this appeal?
2. Does the Applicant meet the medical hardship standard established by the applicable regulations?

The Division identified the issues as follows:

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.* filed by the Director with the Secretary of State on October 22, 2006, effective November 12, 2006.
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) of the November, 2006 Regulations.

The Applicant indicated that he would testify on his own behalf and that he would call his father, David Borden, as a witness. Thomas E. Angell was offered by the Division as an expert in the lobster fishery and as an expert in the interpretation and application of the Department's lobster regulations. His expertise was agreed upon by the parties.

#### Testimony

The Applicant summarized his medical impairment indicating that he suffered a broken left wrist which required surgery and the insertion of a pin. During the period of recovery, Applicant's wrist was completely immobilized and unusable. The Applicant testified that his wrist injury adversely affected his ability to land lobsters by trap from April 25, 2003 through September 15, 2003 and that he had no use of his hand for the entire period. Applicant submitted medical documentation including a notarized statement from Dr. Manuel F. DaSilva, M.D. of University Orthopedics concerning the injury and surgery regarding Applicant's left wrist. Charles Borden stated that the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs adopted in April of 2007 ("Amended Regulations") should govern his appeal, that he has introduced sufficient medical documentation to meet the requirements of the Amended Regulations as to a finding of material incapacitation. Accordingly, the Applicant testified that his Allotment should be recalculated using his agreed lobster trap history from 1999 and 2000.

The Applicant next called David Borden as a witness. Mr. David Borden testified that he attended the public hearings that were held to consider adoption of the Amended Regulations. He testified that public hearing attendees, including himself, were told by Department representatives that the proposed Amended Regulations were designed to supersede the then existing Regulations and would govern all appeals. He stated that the proposed amendments addressed medical hardship.

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. 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. Rhode Island is required to comply with the management plan or adopt an alternative that meets the goals of the ASMFC plan. 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.

There was no cross examination of 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. Borden and Mr. Powers elected to file post hearing memoranda to address the issue of which version of the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs governs this proceeding. The Applicant timely filed his post-hearing memorandum on September 14, 2007. The Division filed its post-hearing memorandum on September 18, 2007 accompanied by a Motion to Enlarge Time. Applicant's objection notwithstanding, the Division's Motion to Enlarge Time is granted.

#### 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 holders<sup>1</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 that 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. 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 Three Hundred and Forty (340) traps.

**Which Regulations Govern the Instant Proceeding?**

The Applicant asserts that his appeal is governed by the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs, filed with the Secretary of State on April 11, 2007 ("Amended Regulations"). The Division contends that the appropriate regulations governing this appeal are Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs, filed with the Secretary of State October 23, 2006 ("Regulations"). This is a matter of first impression at AAD and a threshold question for this appeal.

The Regulations were amended in April of 2007. Language at the commencement of the Amended Regulations, commonly referred to as a savings clause, states as follows:

**SUPERSEDED RULES AND REGULATIONS**

On the effective date of these rules and regulations, all previous rules and regulations, and any policies regarding the administration and enforcement of Part XV shall be superseded. However, any enforcement action taken by, or application submitted to, the Department prior to the effective date of these Rules and Regulations shall be governed by the Rules and Regulations in effect at the time the enforcement action was taken, or application filed.

As a general rule of statutory construction, because there is an unequivocal expression in the Amended Regulations that they do not affect pending appeals, any inquiry concerning intent would end and the clear language of the regulations would be followed. In this instance, however, blind allegiance to that principle would lead to an absurd result.

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<sup>1</sup> Recreational (non-commercial) lobster trap license holders are exempt from this process.

Under the Amended Regulations the latest date for the filing of an application for a lobster trap allocation was February 2007. If the changes to the medical hardship/material incapacitation standard set forth in the Amended Regulations are applied only to lobster trap applications filed after the effective date of the Amended Regulations (May 1, 2007), the amendment is rendered illusory. Restricting application of the Amended Regulations to prospective applications means that the amended language would apply to nothing – the Amended Regulations set a deadline of February 1, 2007 – a full three months *before* the effective date of the Amended Regulations. Literal application of the savings clause, as suggested by the Division, would render the amendments meaningless and of no effect. Moreover, if the savings clause were applied as argued by the Division, it would leave in place the very narrow and constraining definition of medical hardship that led the agency to promulgate and adopt the amendments.

Our Rhode Island Supreme Court has held that a literal reading of a statute may be ignored if it does not convey a sensible meaning or where it defeats an evident legislative purpose. Kingsley v. Miller, 120 R.I. 372, 388 A.2d 357 (1978). Indeed, in discussing the general applicability of the “plain meaning” rule and its exceptions, it has been explained that “. . . when the problem before the court was not foreseen, or the legislative history yields a definitive answer, the balance is reversed; the court should use the legislative history to determine the proper interpretation.” Sutherland on Statutory Construction, Vol. 2A, Commentary p. 733, (5<sup>th</sup> ed. 1992).

As Applicant argues in his post-hearing submission, what would be the purpose of the changes if the amendments cannot be applied to lobster trap allocations pending appeal? If the intent of the Amended Regulations is to allow a medical hardship exception that is less demanding, to what could that amendment possibly apply if not pending appeals? Applicant’s argument is bolstered by his inclusion in the record of a copy of an intra-agency memorandum from DEM Director W. Michael Sullivan, PhD., dated April 24, 2007 (“Memorandum”) to Mark Gibson, Deputy Chief for Marine Fisheries concerning, *inter alia*, the Lobster Effort Control Plan, the Amended Regulations and the public hearings held during the adoption process (Applicant’s Exhibit 2-7). The Director, under whose signature the Amended Regulations were enacted and filed with the Secretary of State, writes to his Deputy Chief of Marine Fisheries in pertinent part as follows:

Given the pressing need to have a clarified and improved set of regulations in place prior to making any final decisions on appeals, I previously decided (on April 9) to enact the revised regulations governing the lobster effort control plan. . . .

The decision I reached on April 9<sup>th</sup> was to promulgate the new, improved regulations, which essentially just improve the clarity of the original set with two important changes. . . . As urged by several individuals who commented at the public hearing, this change will allow for additional flexibility with regard to documentation required to establish material incapacitation on the basis of a medical condition. I believe this flexibility comports with the intent of the material incapacitation provision set forth by Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster. . . .

. . . I decided not to follow the Council's recommendation to not allow consideration, under appeal, of an applicant whose fishing performance was *adversely affected* due to a material incapacitation. I believe that the more stringent standard – i.e., *prevented from fishing* – is too restrictive and not in keeping with the intent of Addendum VII. . . . I recognize that this issue could subject the State to a possible non-compliance finding by the ASMFC, but I am confident that we can meet that challenge, if it presents itself, by demonstrating of being accommodating with regard to legitimate claims of medical hardship that directly impacted an individual's fishing performance during the qualifying period. Moreover, I am committed to ensuring that the provision is applied judiciously, so that it would only potentially affect a relatively small number of (deserving) appellants. (Emphasis in original).

This Memorandum, issued contemporaneously with the adoption process, evidences the intent of the Amended Regulations as well as the reach with which the Department intended that they apply. The Director's words regarding enactment of the Amended Regulations are definitive,

“Given the pressing need to have a clarified and improved set of regulations in place *prior to making any final decisions on appeals*, I previously decided (on April 9) to enact the revised regulations governing the lobster effort control plan.” Applicant's Exhibit 2-7 (emphasis added).

I have looked beyond the plain words of the Amended Regulations to the regulatory history and Memorandum that was prepared contemporaneous with the adoption process. In doing so, I have considered the witness testimony, documentary evidence and the arguments of the parties in this matter, and have determined that the Amended Regulations govern the instant proceeding.

#### **Material Incapacitation on the Basis of a Physical Impairment**

The Amended Regulations establish that the qualifying period for determining the 2007 Area 2 Lobster Trap Allocation is 2001 through 2003. Exceptions are enumerated in the Amended Regulations which, if applicable, allow a departure from the 2001 -2003 qualifying period. Those exceptions involve military service and material incapacitation of the Applicant or others as enumerated in the Amended

Regulations. Applicant alleges material incapacitation on the basis of a medical condition. Part 15.14.2-8 governs the issue of material incapacitation and reads as follows:

15.14.2-8 – Material Incapacitation

- (a) An individual who meets the qualifying criteria set forth in sections 15.14.2-6(a) (i) and (iii), but had no documented, or had reduced, fishing performance during the three-year period 2001-2003, inclusive, due to material incapacitation, as specified in section 15.14.2-2 herein, and as further described below, may request that his/her initial Area 2 LTA be based on his/her fishing performance in Area 2 during the period 1999-2000.
- (b) In order to establish material incapacitation on the basis of a medical condition, an applicant must present the following notarized documentation, which may pertain to the applicant or to the applicant's family member, i.e., a parent, spouse, child, mother-in-law, or father-in-law:
  - (i) Evidence that the applicant or family member had a physical or mental impairment during the period 2001-2003, inclusive, 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; and/or
  - (ii) Evidence that the applicant or family member received, during the period 2001-2003, inclusive, social security disability benefits (SSDI), and/or supplemental security income benefits (SSI), and/or 100 percent disabled benefits from the U.S. Department of Veteran Affairs; and
  - (iii) If the material incapacitation involves a family member, evidence that the applicant had a direct role in the care of the family member.

Material Incapacitation is defined in section 15.14.2-2 of the Amended Regulations as follows:

Material Incapacitation – means a verifiable event beyond the control of the license/permit holder, such as a medical condition, that adversely affected his/her fishing performance during the three-year period 2001-2003, inclusive. Military service performed during the three-year period 2001-2003 also constitutes material incapacitation. Other than a decision to serve in the military, material incapacitation can not involve a choice by the license/permit holder to pursue other interests; or to a short-term illness or injury that would not have incapacitated a person for the three qualifying years.

Sections 15.14.2-6(a) (i) and (iii) of the Amended Regulations state as follows:

15.14.2-6 – Qualifications for Initial Area 2 LTAs

- (a) To be eligible for an initial Area 2 LTA, an applicant:
  - (i) Must have held a Department-issued commercial fishing license, authorizing the individual to fish commercially for lobster, or a federal lobster permit endorsed for Area 2, at some point during the period 2001-2003; and/or

(ii) ...

(iii) Must have renewed his/her license/permit annually since 2003.

Mr. Borden established through his own testimony and by way of a notarized statement from his orthopedist, Dr. Manuel DaSilva, M.D., Assistant Clinical Professor at Brown Medical School, that during the period 2001-2003, specifically from April 2003 through September 2003, he endured a disabling physical condition, specifically an injured left wrist, which required surgery and outpatient care requiring continuing treatment or supervision by a health care provider. This injury prevented Mr. Borden from fishing and reduced his total fishing performance during the qualifying years.

I find that the Amended Regulations are not only ambiguous, but that some definitions and sections of the Amended Regulations are contradictory with regard to whether an individual must be materially incapacitated for each and every year during the period 2001 through 2003 or whether the individual need only be materially incapacitated at some point during that period. I note that there was no testimony or legal argument offered regarding this issue either at the hearing or by way of written argument. I conclude that the Amended Regulations do not mandate that an individual be incapacitated for each of the three qualifying years (2001 through 2003) to be materially incapacitated or to have his or her fishing performance adversely affected *during* the qualifying years. Based upon this interpretation, I find that Applicant has introduced sufficient evidence to meet the material incapacitation standard of the Amended Regulations.

#### **Findings of Fact**

After consideration of the documentary and testimonial evidence presented 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 17, 2007 advising the Applicant that his initial 2007 allocation was determined to be Three Hundred and Forty (340) 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 with the Administrative Adjudication Division for Environmental Matters on February 7, 2007.

3. The Applicant did not present any written documentation that a governmental agency(ies) rendered a final agency decision documenting the existence of a disabling physical or medical illness during the target years of 2001-2003.
4. Applicant sustained an injury to his wrist in 2003 which required surgery.
5. Applicant lost complete use of his left hand from April 2003 through September 2003.
6. Applicant required surgery to repair the injury and required outpatient care and treatment as documented in a notarized statement from his treating orthopedist, Dr. Manuel DaSilva, M.D., Assistant Clinical Professor at Brown Medical School.
7. The Applicant's fishing performance was adversely affected by his disabling physical injury.
8. Due to Applicant's documented injury, he had reduced fishing performance during the period 2001-2003.
9. The Applicant reported landings of lobster by trap to the Department during the years 1999 and 2000.
10. The Applicant reported landings of lobster by trap to the Department during the year 2004.
11. The Department filed amendments to the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs on April 11, 2007.
12. The amendments addressed the issue of medical hardship and material incapacitation.
13. Compared to the earlier Regulations, the amendments allow for flexibility with regard to the documentation required to establish material incapacitation on the basis of a medical condition.
14. The Amended Regulations were promulgated with the intent that they be in place prior to making any final decisions on appeals.
15. The savings clause of the Amended Regulations indicates that they supersede all previous regulations but that Applications shall be governed by the regulations in effect at the time the application was filed.
16. The deadline for the filing of applications predates the amendments.
17. If the savings clause were literally applied, no appeals would be governed by the amendments.
18. If the Applicant were found to satisfy the regulatory requirements for a medical hardship during the target period, the better of the Applicant's history of participation in the lobster trap fishery in 1999 and 2000 would result in a modification of his Initial Trap Allocation from Three Hundred and Forty (340) traps to Four Hundred Thirty One (431) 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. Adherence to the plain language of the savings clause of the Amended Regulations yields an absurd result and renders the amendments meaningless.
3. The Amended Regulations govern Applicant's appeal of his Initial 2007 RI/Area 2 Lobster Trap Allocation.
4. Applicant proved by a preponderance of the evidence that he had reduced fishing performance during the three year period 2001 – 2003 inclusive, due to material incapacitation as defined in Section 15.14.2-2 of the Amended Regulations.
5. Applicant proved 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 15.14.2-8 of the Amended Regulations.

Based on the foregoing, it is hereby

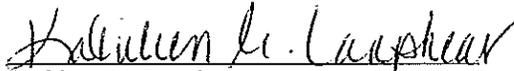
**ORDERED**

1. Applicant's appeal of his 2007 Initial Area 2 Lobster Trap Allocation is SUSTAINED.
2. Applicant's Initial Trap Allocation shall be modified from Three Hundred and Forty (340) traps to Four Hundred Thirty One (431) traps.

I urge the Director to review this recommended decision with particular care. It presents issues which have not been raised and addressed in other such appeals to date. The facts are not in dispute and the core issues concern regulatory interpretation and intent. As final agency decision maker and ultimate policymaker for the Department, the Director is in the best position to determine the intent and applicability of the Amended Regulations. Under R.I. GEN. LAWS § 42.17.7-6 the Director may exercise his authority to accept, reject or modify this recommended decision. Because these are issues of first impression, the final agency ruling will provide guidance concerning the applicability of the Amended Regulations to this

appeal and others. I invite the Director to convey the rationale for his final determination in order to harmonize the seemingly discordant positions advocated by the Division, the Memorandum and the Amended Regulations.

Entered as a Recommended Decision and Order this 2<sup>nd</sup> day of November, 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 \_\_\_\_\_ day of \_\_\_\_\_, 2007

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

**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: Charles Borden, 38 Mullin Hill Road, Little Compton, RI 02837; and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this \_\_\_\_\_ day of November, 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.