

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

RE: LODGE, RICHARD
LOBSTER TRAP ALLOCATION

AAD No. 07-032/F&WA

FEDERAL PERMIT 211756

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 February 9, 2007 filed by Richard Lodge (Applicant) 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 30, 2007. A prehearing conference was conducted on May 11, 2007 and the hearing commenced immediately thereafter.

The Division was represented by Gary Powers, Esq. Mr. Lodge represented himself.

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 of 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 30, 2007 advising the Applicant that his initial 2007 allocation was determined to be Seven Hundred Two (702) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. The lobster trap allocation calculation was prepared 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.

At the prehearing conference, the parties submitted the following as issues to be considered by the Hearing Officer at the hearing:

APPLICANT:

1. Having been hurt in 2001, my landings only account for 75% of the year (8 months). Under existing regulations this would qualify me to use a previous years landings (1999-2000). I purchased my boat in May of 2000 giving me incomplete landings for this year.

DIVISION:

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.*

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).
3. If the finding to the issue set out above in Issue II is in the affirmative, whether the Applicant landed any lobsters as required by Part 15.14.2-5(e) (3) during 2004.
4. If the findings to the issues set out above in Issues II and III are both answered in the affirmative, the degree to which the Applicant participated in lobster fishery in 1999 or 2000 as determined by Part 15.14.2-5(e) (3) in order to permit the Applicant pursuant to Part 15.14.2-3 a modification in the Initial Lobster Trap Allocation which is the subject of this appeal by the substitution of the better annual performance documented in either 1999 or 2000.

A list of the exhibits, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

HEARING SUMMARY

The Applicant, called Thomas E. Angell, Principal Marine Biologist with Division, as his first witness. Applicant questioned Mr. Angell as to the formula employed by the Division to determine lobster trap allocations. In response to the Applicant's questions, Mr. Angell testified that trap allocations were determined on the basis of an applicant's best year performance during the target years 2001 through 2003. The performance was determined on the basis of a regression formula whereby the number of lobster landings was employed to ensure the reasonableness of the number of lobster traps which an applicant may have claimed to have deployed. Mr. Angell stated in response to the Applicant's inquiries that the allocation determination was based upon the best year's

performance of the target period 2001-2003 and that it was calculated upon an entire year and not less than a year's performance. Mr. Angell further testified that no consideration of loss time from fishing or time fished was entered into the equation.

It was stated by Mr. Angell that although the means by which a portion of a year may be expanded to project a complete year's participation may have some validity, that it was not the formula which was adopted by the governing regulations that were based upon an entire calendar year. Mr. Angell offered one of the reasons that may have motivated the decision makers in adopting the entire calendar year formula. Mr. Angell observed that there did not exist any uniformity among the various months. He went on to testify that the seasons and vagaries of water temperatures cause substantial variation as to what might be the anticipated lobster harvest during the months of the year.

The Applicant then testified on his own behalf. It was the testimony of Mr. Lodge that in 2001 he suffered a medical injury that impacted his ability to participate in the lobster fishery during the target years 2001-2003. Specifically, the Applicant asserted that he was unable to participate in the lobster fishery from February 1, 2001 through April 15, 2001 or approximately seventy four (74) days. The Applicant went on to claim support for an increase in his allocation by "extrapolating" the documented number of reported landings and traps deployed during the balance of the year in which he had fished for lobsters. By this method, the Applicant suggested what he believed his annual participation might

have amounted to by using his activity during his non-medically impaired days as means to determine what the entire year's activity would have been but for his medical hardship.

Thomas E. Angell, a Principal Marine Biologist with the Division, was then called as a witness for Division. Mr. Angell testified as a lay witness and also as an expert witness in lobster fishery and as an expert witness in 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 Seven Hundred Two (702) traps consistent with 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, or lack thereof, in the lobster fishery during the target years of 2001-2003.

Mr. Angell described his research and his review of the results of the surveys and research of other scientists working in conjunction with the Technical Committee of the Atlantic States Marine Fisheries Commission (ASMFC), which had concluded that the American Lobster was overfished. Mr. Angell testified that he assisted both the ASMFC Technical Committee of the Atlantic States Marine Fisheries Commission 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. The ASMFC then adopted Addendum VII in an effort to address the problem of overfishing faced

by American Lobsters in Lobster Management Area 2. Mr. Angell explained how the ASMFC attempted to address overfishing by increasing the minimum size of lobster which may be harvested, enlarging the size of the escape vents on lobster traps, limiting 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. Addendum VII (which was the subject of public notice/comment hearing in the Rhode Island) was described by Mr. Angell 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. Angell testified as to his role as the staff coordinator for the Lobster Advisory Panel of the Rhode Island Marine Fisheries Council. In that capacity, he stated that he had assisted in the drafting and promulgation of R.I.M.F.R. Part 15.14.2 by which the State adopted regulations to implement Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster by the State of Rhode Island. Mr. Angell stated that Lobster Management Area 2 is 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 also fish in Area 2.

Mr. Angell 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 stated that Massachusetts had adopted regulations that were similar to Rhode Island's regulations prior to Rhode Island's promulgation of the subject regulations. Mr. Angell explained 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 involved in the subject management plan. In the matter at hand, a finding of non-compliance would result in closure of the State's entire lobster industry. Mr. Angell stated 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 (500lbs.) per trips at sea of five (5) days or longer. However, due to the adoption of the required regulations, the moratorium had been avoided.

Mr. Angell further testified that the governing regulations provide that if an applicant suffers a medical hardship that adversely impacts his/her ability to engage in the lobster fishery during the target years of 2001-2003 and the Applicant landed lobsters commercially in 2004, then the applicant has the ability

to substitute the better of his/her history in 1999 or 2000. Mr. Angell testified that if the Applicant were found to have suffered a medical hardship that adversely impacted his ability to engage in the lobster fishery during the target years of 2001-2003 and landed lobsters commercially in 2004, then his participation in neither 1999 nor 2000 would yield an increase in his current allocation of Seven Hundred Two (702) lobster traps.

CONCLUSION

The Applicant has stipulated that the subject lobster trap allocation calculation was prepared 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. Mr. Lodge asserts that he sustained a "documental" injury in 2001 which incapacitated him for a portion of 2001 and seriously hindered his ability to fully pursue his lobster fishing for the remainder of that year.

It is argued by Applicant that if he had the opportunity to fish throughout the year, he would have exceeded the poundage requirement for the full 800 pot allocation. Wherefore Applicant urges that an extrapolation formula be utilized to quantify his history of lobster fishery based on a portion of a year's performance; wherefore Applicant requests that his allocation be increased to 800 pots.

Division` submits that this is not a dispute as to accuracy of the data employed in making the subject trap allocation determination or whether the Applicant established the requisite connection between his medical hardship and

its alleged adverse impact upon his ability to participate in the lobster fishery. However, Division contends that the Applicant's performance in one month **cannot** be used as a reliable indicator as what a person's performance might be in the fishery for the balance of the year. Division maintains that even if the proposal advanced by the Applicant were defensible in theory, the Division relied upon the duly adopted regulatory means of resolving the situation presented, and the Applicant has not challenged the fact that those governing regulations were duly promulgated pursuant to R.I. Gen. Laws § 42-35-1 *et seq.*

The Rhode Island Marine Fisheries Statutes and Regulations provide in pertinent part as follows:

Section 15.14.2-5 (d) Medical/Military Service Hardships

Any applicant who holds a current commercial lobster license and who held such authorization during the period 2001-2003 but had no documented, or had reduced, fishing performance during 2001-2003 due to the applicant's military service or the documented disabling physical or medical illness, injury, impairment, or condition that constitutes a material incapacitation 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 of the applicant or the applicant's family member, i.e. a parent, spouse, child, mother-in-law, or father-in-law may appeal in order to request that his/her Initial Lobster Trap Allocation be based on his/her 1999-2000 fishing performance in Area 2, and that his/her fishing performance (lobster landings and maximum number of traps reported fished) for the years 1999-2000 be employed to calculate the applicant's initial Area 2 lobster trap allocation.

Section 15.14.2-5 (e) 3.

If an applicant is found to have presented persuasive evidence to qualify pursuant to part 15.14.2-5 (d), the applicant may use

landings from any year or years (highest or the average) during the years 1999 and 2000 as the basis for their allocation, provided that the individual must also have landed lobsters with traps during 2004, and must have possessed a state or federal commercial fishing vessel registration and/or a state commercial fishing license or federal lobster permit to land lobster continuously during the period 1999-2004.

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. Undoubtedly, the Applicant suffered a material incapacitation which prevented him from participating in the lobster fishery during a portion of the 2001-2003 target period upon which the allocation was calculated. Applicant sustained an injury in 2001 which prevented him from participating in the lobster fishery from February 1, 2001 through April 15, 2001. Thus the Applicant clearly established a material incapacitation for approximately seventy four (74) days in 2001 and thereby a medical hardship pursuant to §15.14.2-5 (d) of the Fisheries Regulations.

I am certainly aware of the Applicant's hardship; however, the Regulations specifically provide the remedy permitted for an applicant establishing a material incapacitation during the years 2001-2003. §15.14.2-5 (d) of the Regulations explicitly mandates that ". . . the years 1999-2000 be employed to calculate the applicant's initial area 2 lobster trap allocation." The Applicant failed to cite any statutory or regulatory authority that would support his request for an increase in his Lobster Trap Allocation. It would be

counterproductive for the Applicant to substitute a less advantageous history of participation in either 1999 or 2000; therefore, pursuant to Section 15.14.2 of the Marine Fisheries Regulations, Applicant's Seven Hundred Two (702) Initial 2001 RI/Area 2 Lobster Trap Allocation should remain unchanged.

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.

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, Richard Lodge.
2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation (Allocation) from the Division of Fish and Wildlife (Division) dated January 30, 2007 advising the Applicant that his initial 2007 Allocation was determined to be Seven Hundred Two (702) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. On February 12, 2007 the Applicant filed a request for an adjudicatory hearing at the Administrative Adjudication Division.
4. The Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation was prepared 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. 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.
6. The Applicant suffered a documented physical injury and medical incapacitation that prevented him from participating in the lobster fishery during a portion of the 2001-2003 target period upon which his Allocation was calculated by the Division.
7. The Applicant established a material incapacitation as set forth in Section 15.14.2-5 (d) of the Marine Fisheries Regulations from February 1, 2001 through April 15, 2001 or approximately seventy four (74) days of the first year of the target period.
8. Applicant had reduced, fishing performance during 2001-2003 due to Applicant's documented disabling physical or medical illness, impairment, or condition that constitutes a material incapacitation involving inpatient care in a hospital, and also outpatient care requiring his continuing treatment.
9. The Applicant's allocation was based on Applicant's best year fishing performance in Area 2, and his fishing performance (lobster landings and maximum number of traps reported fished) during the target period 2001-2003 and it was calculated upon an entire year and not less than a year's performance.
10. The Applicant landed lobsters during the year 2004.
11. The Fisheries Regulations specifically provide that based on Applicant's material incapacitation and the fact that he landed lobsters in 2004, the years 1999-2000 could be employed to calculate Applicant's Allocation.
12. The Applicant's reported lobster history in the 1999-2000 substituted period would not yield an increase of Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation of Seven Hundred Two (702) traps.

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 Applicant proved by a preponderance of the evidence that he meets the medical hardship exception set forth in Section 15.14.2-5 (d) of the Marine Fisheries Regulations.
3. The Division's Allocation of Seven Hundred Two (702) 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.
4. 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 Seven Hundred Two (702) traps would be consistent with the provisions and purposes of the Marine Fisheries Regulations.
5. The Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation of Seven Hundred Two (702) 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 Seven Hundred Two (702) traps.

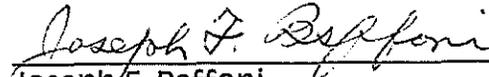
RE: LODGE, RICHARD

AAD No. 07-032/F&WA

LOBSTER TRAP ALLOCATION FEDERAL PERMIT 211756

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Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 17th 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 20th day of July,

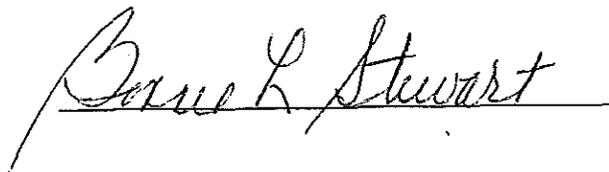
2007.



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: Richard Lodge, 3647 Post Road, Wakefield, RI 02879; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 30th day of July, 2007.



APPENDIX A

APPLICANT'S EXHIBITS:

APPLICANT 1 South County Orthopedics & Physical Therapy, Inc. report
FULL 6 Pages (Copy).

APPLICANT 2 Settlement Proposal from Applicant 1 Page (Copy).
for ID

DIVISION'S EXHIBITS:

DIVISION 1 The Notice of Initial Area 2 Lobster Trap Allocation from
FULL the Division dated January 30, 2007 advising the Applicant
that his initial 2007 allocation was determined by the
Division to be Seven Hundred Two traps based upon his
reported activity in the lobster fishery in the target period of
the years 2001 through 2003. 3 Pages (Copy).

DIVISION 2 The Applicant's letter dated February 9, 2007 requesting a
FULL hearing concerning the Division's Allocation Letter. 1 Page
(Copy).

DIVISION 3 A computer printout of the history of Applicant's participation
FULL in the lobster fishery during the period 1999, 2000, and
2004. 1 Page (Copy)

DIVISION 4 *Curriculum vita* of Thomas E. Angell. 2 Pages (Copy).
FULL

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.