

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

RE: TOOHEY, RICHARD
LOBSTER TRAP ALLOCATION
MPURP 001094

AAD NO. 07-041/F&WA

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on the appeal of Richard Toohey ("Mr. Toohey" 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 zero (0) traps. By letter dated February 15, 2007, Applicant requested a 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, 2006¹ ("Regulations").

A status conference was held on March 13, 2007. The prehearing conference and hearing were scheduled for April 17, 2007 but were continued at the request of the Applicant. The prehearing conference was held on June 15, 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 (Full) Letter from Mr. Toohey to Mark Gibson (undated)
- App. 2 (Full) Citation from Governor Almond to Applicant dated 12/9/98
- App. 3 (Full) Correspondence from Charles Samson, MD. dated 6/14/07
- App. 4 (ID) Documents relating to Applicant's Boating Accident While Fishing Commercially in 1995

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to the determination of Applicant's allotment and subsequent to the filing of this appeal, the Regulations were superseded by an April 6, 2007 filing with the Secretary of State.

For the Division of Fish and Wildlife:

- Div. 1 (Full) Notice of 2007 Lobster Trap Allotment dated January 16, 2007
- Div. 2 (Full) Hearing Request of Richard Toohey, dated February 15, 2007
- Div. 3 (Full) Landing and Trap Deployment Data for Applicant 1999-2004
- Div. 4 (Full) Curriculum Vitae of Thomas E. Angell, 2pp.

The following stipulations of fact were agreed upon by the parties:

1. The Applicant reported no participation in the lobster fishery to the Department during the years 2001 through 2003.
2. The Applicant reported no landings of lobster to the Department during the year 2004.

The Applicant bears the burden of proof in this proceeding. Applicant identified the following issues:

1. Whether Applicant meets the medical hardship exception set forth in the Regulations.
2. Whether the Regulations should include a "grandfather" provision requiring an increase in his allocation based on his fishing history for years other than 2001, 2002 and 2003.

The Division identified the issue as follows:

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.*

Thomas E. Angell was offered as an expert in the lobster fishery and as an expert in the interpretation and application of the Department's lobster regulations.

Testimony

Mr. Toohey testified on his own behalf. He explained his participation in the fishing industry over many years and testified that his most productive years were when he was in his thirties and forties. He stated that DEM began collecting lobster landing data when he was fifty years old and that DEM has no records of his fishing history before that time – when he was most productive. Mr. Toohey voiced his concern that corporate fishing has taken over the fishery at the expense of independent fishermen. As a result, he is concerned that lifelong fishermen are being eliminated from the fishery and that the Regulations, as enacted, contribute to this process. Mr. Toohey acknowledged that there are environmental concerns that need to be addressed by the Regulations but he feels that the Regulations ignore an individual's fishing history but for the qualifying years of 2001, 2002 and 2003.

Although there was very little testimony in this regard, Mr. Toohey alleges medical hardship based upon a boating accident in 1995. There was no cross examination of this witness. I found Mr. Toohey to be a very credible witness with great concern for the fishing industry.

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. After questioning by Mr. Powers and by the Applicant, Mr. Angell was qualified as an expert in the lobster fishery and as an expert in the interpretation and application of the Department's lobster 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. 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. Mr. Angell testified that he drafted the initial regulations which were then forwarded 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 testified that he was present for all of Applicant's testimony. With regard to Applicant's fishing history, Mr. Angell testified that the Regulations contain no provision to consider the optimal years for calculating the Allotment and that the Regulations specifically provide that absent a regulatory exception, the qualifying years are 2001, 2002 and 2003. Should Applicant establish medical hardship, the years 1999 and 2000 may be used to calculate the Allotment. Mr. Toohey did not participate in the lobster fishery in those years.

Upon cross-examination, Mr. Angell was questioned regarding notification to license holders concerning restrictions on lobstering. Mr. Angell indicated that in 1999 every commercial license holder was notified that the Regulations could be changed and that future participation in the industry may be determined by historical participation. He further testified that prior to these Regulations dealing with lobster effort control, notice was sent to license holders prior to renewal indicating that one's ability to participate would be determined by historic trap allocation.

The parties were afforded the option of making closing arguments or filing a brief or written statement after the conclusion of the hearing. Mr. Toohey 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. 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 holders² 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. The information provided by Applicant established that he did not fish traps in 2001, 2002 or 2003. 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 zero (0) traps.

² Recreational (non-commercial) lobster trap license holders are exempt from this process.

Medical Hardship

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 Regulations³ which, if applicable, allow a departure from the 2001 -2003 qualifying period. Those exceptions involve military service and disabling physical or medical illness. Applicant alleges medical hardship.

Part 15.14.2-5 (d) governs the issue of medical hardship and alternative use of one's fishing history from 1999 and 2000 in computing one's lobster trap allotment. It reads as follows:

(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 (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.

Although subsection (e) proceeds to delineate further what shall be considered if medical hardship is proven, a determination of medical hardship is unnecessary since the alternative calculation provided in section 15.14.2-5(d) would not serve to increase Applicant's Allotment. The agreed documentary evidence (Division's Exhibit 3- Full) establishes that Mr. Toohey did not land lobster in the years 1999 and 2000. Consequently, Mr. Toohey has no lobster fishing history permitted by the Regulations to substitute for the lack of lobster landings in the qualifying years of 2001 through 2003.

Moreover, even if this Applicant proved that he meets the medical hardship exception, he did not land lobster in 2004 and therefore cannot demonstrate compliance with Section 15.14.2-5 (e) 3 of the Regulations which states as follows:

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. (emphasis added)

³ See, Regulations 15.14.2-2 (c); 15.14.2-5(d).

Based on the documentary and testimonial evidence adduced at hearing, Applicant has failed to meet the Regulatory standard set forth in Part 15.14.2-5(e) and it is therefore unnecessary to reach the issue of medical hardship.

Consideration of Years Other Than 2001 – 2003

Mr. Toohey asserts that the fishing years used to establish his lobster trap allotment should include years previous to 2001, 2002 and 2003. Mr. Toohey maintains that his most productive years were when he was younger and as a participant in the lobster fishery for many years, he should be “grandfathered” into a higher trap allotment.

The Regulations concerning the qualifying years for computation of the 2007 Area 2 Lobster Trap Allocation are clear. 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.⁴ 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. Any additional exceptions to these regulatory provisions must be added in conformance with the process for adoption set forth in the Administrative Procedures Act, R.I. Gen. Laws §42-35-1 *et. seq.*

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 (MPURP 001094).
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 16, 2007.

⁴ Even if applicable, Applicant’s Lobster Landing and Trap Deployment Data (Div. 3 Full) indicates that he did not report traps or land lobsters in the years 1999, 2000, or 2004.

4. 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 Zero (0) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
5. Applicant filed a request for hearing with the Administrative Adjudication Division on February 15, 2007.
6. The Applicant reported no participation in the lobster fishery to the Department during the years 2001 through 2003.
7. The Regulations contain only two exceptions to the 2001-2003 qualifying years.
8. The Applicant reported no landings of lobster to the Department during the years 1999 and 2000.
9. The Applicant reported no landings of lobster to the Department during the year 2004.
10. Applicant presented evidence of his boating accident in 1995 and his subsequent medical condition.

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:

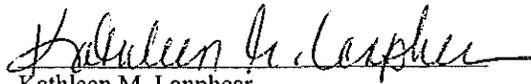
1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. Applicant has failed to prove by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation pursuant to section 15.14.2-5 (e) 3 of the Regulations.
3. Because Applicant has failed to prove by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation pursuant to section 15.14.2-5 (e) 3 of the Regulations, it is unnecessary to reach the issue of medical hardship.
4. AAD must follow the plain language of the Regulations and may not write exceptions into the Regulations which the Department chose to omit.
5. Applicant's 2007 Initial Area 2 Lobster Trap Allotment was calculated in accordance with the Regulations

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 25th day of July, 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
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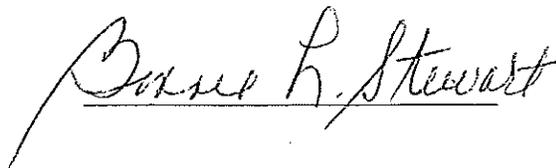
Entered as a Final Agency Order this 25th day of July, 2007



W. Michael Sullivan, PhD.
Director
Rhode Island Department of Environmental Management
235 Promenade Street, 4th 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: Richard Toohey, 17 Spring Street, Wakefield, RI 02879; and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 26th day of July, 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.