

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Anthony Ponte
AAD No. 07-055/F&WA
Lobster Trap Allocation F/V OCEANJEM
July, 2007

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 14, 2007 filed by Anthony Ponte (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 16, 2007. A prehearing conference was conducted on April 16, 2007 and the hearing commenced immediately thereafter.

The Division was represented by Gary Powers, Esq. Mr. Ponte 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 Administrative Adjudication Division for Environmental Matters (AAD Rules).

PREHEARING CONFERENCE

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

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined to be Seven Hundred Eighty (780) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. The Applicant's Initial Lobster Trap Allocation was calculated on the basis of data concerning Applicant's participation in the lobster fishery presented by the Applicant himself.

At the prehearing conference, the parties agreed that the following issue be considered by the Hearing Officer at the hearing:

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.

The Applicant bears the burden of proof in this proceeding.

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

HEARING SUMMARY

The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued by the Division notified Applicant that his allocation for 2007 is Seven Hundred Eighty (780) traps.

The Applicant called Thomas E. Angell, Principal Marine Biologist with Division, as an adverse witness. Applicant inquired of Mr. Angell as to whether public notice and an opportunity for

comment had been afforded to interested parties concerning the methodology to be employed for the lobster trap allocation determination. It was the testimony of Mr. Angell that the factors and methodology to be employed in order to determine the lobster trap allocation pursuant to Part 15.14.2 of the Marine Fisheries Regulations had been noticed to the public and had been the topic of comments at public hearings.

Mr. Ponte then testified on his own behalf. Essentially Mr. Ponte stated that there had been inadequate public hearings concerning the regulation's methodology for the determination of the lobster trap allocation to be assigned to lobster fishers.

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 concerning the interpretation and application of the Department's lobster regulations.

Mr. Angell testified that in his opinion the Applicant's initial 2007 allocation was determined to be Seven Hundred Eighty (780) traps in a manner that accurately and consistently reflected the requirements of Part 15.14.2 - Area 2 Lobster Trap Effort Control based upon the data provided by the Applicant relative to his participation in the lobster fishery during the target years of 2001-2003.

Mr. Angell further testified as to his research and his review of the results of the surveys and research of other scientists that had concluded that the American Lobster was over fished. Mr. Angell went on to testify that he assisted both the Technical Committee of the Atlantic States Marine Fisheries Commission (ASMFC) and the Lobster Advisory Panel of the Rhode Island Marine Fisheries Council in addressing this over fishing 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 over fishing faced by American Lobsters in Lobster Management Area 2.

Mr. Angell also described how the ASMFC attempted to address over fishing by increasing the minimum size of lobster which may be harvested, increasing escape vents on lobster traps, 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. It was stated by Mr. Angell that Addendum VII was the subject of public notice/comment hearing in the Rhode Island; and that it was adopted as a means of limiting the number of lobster traps that may be deployed with a goal of capping effort at the number of traps deployed during the year 2003.

Mr. Angell then 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 the Plan 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 fish in the Area.

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 went on to explain that if a member state like Rhode Island failed to adopt and implement regulations in compliance with an ASMFC management plan like Addendum VII, a finding of non-compliance could be made by ASMFC and forwarded to the Secretary of Commerce who would impose a sanction of a moratorium on the taking or landing within the non-compliant state of the species which is subject of the management plan. In the matter at hand, a finding of non-

compliance would result in closure of the State's entire lobster industry. Mr. Angell testified that the Secretary of Commerce had threatened to impose such a moratorium due to a finding by the ASMFC's earlier adopted plan requiring the promulgation of regulations limiting the non-trap harvesting of lobster; however, due to the adoption of the required regulations, the moratorium had been avoided.

CONCLUSION:

Applicant points out in his Post-Hearing Memorandum that he has owned and operated the subject fishing vessel since 1991, and that he has fished around 600 to 780 lobster traps annually since then. Mr. Ponte asserts that he “paid close attention to all the lobster management meetings”, and that the required public notice and comment requirements were not satisfied during the promulgation of the pertinent regulations.

It is Division's contention that the Applicant has failed to meet his burden of proof in this matter. Division posits that the Applicant has failed to offer any testimony or other evidence to support Applicant's assertion that the required public notice and comment requirements were not satisfied during the promulgation of the governing regulations.

Division asserts that the testimony of Mr. Angell adequately demonstrates that hearings addressing the employment of data to determine a fisher's lobster trap allocation pursuant to the subject regulations were the subject of public notice and comment hearings conducted by both the ASMFC and the Rhode Island Marine Fisheries Council/Department of Environmental Management in the State. It is argued by Division that Applicant has failed to meet his burden of proof; wherefore, Division requests that the Applicant's appeal be denied and his Initial Lobster Management Area 2 Lobster Trap Allocation remain at Seven Hundred Eighty (780) traps.

It was acknowledged by Applicant that his initial 2007 allocation of Seven Hundred Eighty traps was based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003; and that the data presented and relied upon by Division in making that determination was accurate.

Applicant's assertion that the required public notice and comment requirements were not satisfied during the promulgation of the governing regulations, R.I.M.F.R. Parts 15.14.2 *et seq.* Area 2 Lobster Trap Effort Control was unsupported by any testimony or other evidence documentary or otherwise.

I found the testimony of Mr. Angell to be most credible and clearly established compliance with the required public notice and comment requirements. This witness explained in detail his participation in the crafting of the pertinent regulations. It was his uncontradicted testimony that hearings addressing the employment of data to determine a fisher's lobster trap allocation pursuant to the subject regulations were the subject of public notice and comment hearings conducted by both ASMFC and the Rhode Island Marine Fisheries Council/Department of Environmental Management were conducted in the State.

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, Anthony Ponte.

2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation from the Division of Fish and Wildlife (Division) dated January 16, 2007 advising the Applicant that his initial 2007 Allocation was determined to be Seven Hundred Eighty (780) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. On February 26, 2007 the Applicant filed a request for an adjudicatory hearing at the Administrative Adjudication Division.
4. The Applicant's Initial Lobster Trap Allocation was calculated on the basis of data concerning Applicant's participation in the lobster fishery presented by the Applicant himself.
5. The Applicant's Initial 2007 RI/Area 2 Lobster Trap Allocation determination was accomplished consistent with the requirements of Part 15.14.2 - Area 2 Lobster Trap Control that was duly promulgated pursuant to R.I. GEN. LAWS § 42-35-1 et seq.

CONCLUSIONS OF LAW

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

1. The Administrative Adjudication for Environmental Matters (AAD) has jurisdiction over this matter pursuant to R.I. GEN. LAWS § 42-17.7-2; and § 15.14.2-5(a) of the Marine Fisheries Regulations.
2. The Division's Allocation of Seven Hundred Eighty (780) traps to the Applicant was calculated consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control of the Marine Fisheries Regulations.
3. The required public notice and comment requirements were satisfied during the promulgation of the subject lobster trap allocation regulations.
4. The Applicant failed to prove by a preponderance of the evidence that he is entitled to a modification of his Initial 2007 RI/Area 2 Lobster Trap Allocation of Seven Hundred Eighty (780) traps.
5. The Applicant's Initial 2007 RI/Area 2 Lobster Trap Allocation of Seven Hundred Eighty (780) 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 2007 RI/Area 2 Lobster Trap Allocation shall remain at Seven Hundred Eighty (780) traps.

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

Joseph F. Baffoni
Hearing Officer

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

W. Michael Sullivan, Ph. D.
Director

APPENDIX A

List of Exhibits

APPLICANT:

No documents.

DIVISION:

DIVISION 1 The Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined by the Division to be Seven Hundred Eighty (780) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003. 3 Pages (Copy).

FULL

DIVISION 2 The Applicant's letter dated February 14, 2007 requesting a hearing concerning the Division's Allocation Letter. 1 Page (Copy).

FULL

DIVISION 3 Curriculum vita of Mark R. Gibson. 5 Pages (Copy).

FULL

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

FULL

DIVISION 5 Curriculum vita of John M. Lake. 3 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.