

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

RE: CAVANAGH, SEAN

AAD NO. 07-057/F&WA

LOBSTER TRAP ALLOCATION MPURP 000598

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 21, 2007 filed on behalf of Sean Cavanagh (Applicant) on February 26, 2007 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 17, 2007. A prehearing conference was conducted on April 24, 2007 and the hearing commenced immediately thereafter.

The Division was represented by Gary Powers, Esq. Mr. Cavanagh 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 for 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 17, 2007 advising the Applicant that his initial 2007 allocation was determined to be Eighty (80) 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 submitted the following as the issue to 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.*

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, Sean Cavanagh, testified on his own behalf. It was Mr. Cavanagh's testimony that his 2007 lobster trap allocation was calculated on the basis of target years 2001-2003, during which Applicant was a minor and not

capable of running a business. The Applicant introduced no Applicant's exhibits (as noted in Appendix A attached hereto), and rested his case.

Thomas E. Angell, a Principal Marine Biologist with the Division, was 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.

It was the testimony of Mr. Angell that in his opinion the Applicant's initial 2007 allocation was determined to be Eighty (80) 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 in the lobster fishery during the target years of 2001-2003.

Mr. Angell further testified as to his research on the condition of the lobster resource in Lobster Management Area 2 and as to 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). He testified that with the ASMFC Technical Committee had concluded that the American Lobster was overfished. Mr. Angell went on to testify that he assisted both the Technical Committee of the ASMFC and the Lobster Advisory Panel of the Rhode Island Marine Fisheries Council (RIMFC) 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. Mr. Angell described the various attempts that the ASMFC had taken including

the adoption of Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster. He stated that the ASMFC had taken several measures in an effort to address the problem of overfishing faced by American Lobsters in Lobster Management Area 2. Mr. Angell then described how the ASMFC had made earlier attempts to address the overfishing problem in Area 2 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, (such as 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 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 the Area.

Mr. Angell then testified as to his role as the staff coordinator for the Lobster Advisory Panel of the RIMFC. He stated that in that capacity,

he had assisted in the drafting and promulgation of R.I.M.F.R. Part 15.14.2 by which the State of Rhode Island adopted the subject regulations in an effort by the State to implement Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster. In addition to his testimony regarding the adoption of R.I.M.F.R. Parts 15.14.2 *et seq.* – Area 2 Lobster Trap Effort Control 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, Mr. Angell also testified that Massachusetts had adopted regulations that were similar in all significant respects to R.I.M.F.R. Parts 15.14.2 *et seq.* prior to Rhode Island's promulgation of the subject regulations.

It was explained by Mr. Angell 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 and the Secretary of the Interior who would then impose a sanction of a moratorium on the taking or landing within the noncompliant state of the species which the subject management plan governed. In the matter at hand, a finding of non-compliance would result in closure of the State's entire lobster industry. Mr. Angell further testified 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 (500 lbs.) per trips at sea of five (5) days or longer. He testified, however, that due to the adoption of the required regulations subsequent to the threat, the moratorium had been avoided.

Mr. Angell stated that he had participated in the hearings relative to R.I.M.F.R. Parts 15.14.2 before the Lobster Advisory Panel of the Rhode Island Marine Fisheries Council, the Rhode Island Marine Fisheries Council, as well as three public comment hearings concerning the proposed regulations.

Following Mr. Angell's testimony, the Division called the Applicant to the stand. It was elicited in the testimony of Mr. Cavanagh that since being issued his multi-purpose commercial fishing license in 1994, he had experienced numerous changes in the restrictions imposed relative to the taking of various species permitted to be harvested pursuant to such a license.

CONCLUSION

It is argued by Applicant that the allocation plan does not take into consideration his minority and consequent reduced productivity during the target years. Wherefore Applicant contends that the plan is discriminatory and unconstitutional, and does not work for the State of Rhode Island. Applicant urges that a new plan be developed that does not discriminate against some, while rewarding others. Wherefore, the Applicant requests that the whole allocation plan "be thrown out and equal traps allocated, or else the 800 traps need reinstated for all license holders for the 2007 year."

The Applicant does not dispute the accuracy of the data upon which his Initial 2007 Lobster Management Area 2 Lobster Trap Allocation was calculated by Division. It is acknowledged by Mr. Cavanagh that said data concerning Applicant's participation in the lobster fishery in the target period of the years 2001 through 2003 is accurate and was presented by the Applicant himself.

It is Division's contention that the Division's determination that Applicant's initial 2007 allocation should be Eighty (80) traps was properly based upon Applicant's accurately reported activity in the lobster fishery in the target period of the years 2001 through 2003 pursuant to duly promulgated, governing regulations, R.I.M.F.R. Parts 15.14.2 *et seq.*-Area 2 Lobster Trap Effort Control.

Division maintains that the Applicant has failed to allude to any regulatory authority within the duly promulgated, governing regulations which would permit the AAD to entertain Applicant's request to increase his allocation. It is argued by Division that the Applicant cannot be awarded an increase in his allocation based on Applicant's minority and/or alleged reduced productivity during the target years. Wherefore, Division maintains that the Applicant is required to be awarded Eighty (80) traps as his Initial Lobster Management Area 2 Lobster Trap Allocation based upon the data presented by Applicant, and relied on by Division.

Section 15.14.2-1(a) of the Rhode Island Marine Fisheries Statutes and Regulations provide that the Division shall be the lobster trap allocation authority for Rhode Island residents, both state-licensed and federally-permitted. It also provides that the Division shall process resident Area 2 trap allocation

applications, and determine trap allocations for eligible Area 2 licenses/permit holders. It is required by Section 15.14.2-2(c) that applicants must present documentation to the trap allocation authority, establishing that said applicant lawfully harvested lobsters via lobster traps in Area 2 during the years 2001-2003. Section 15.14.2-3(a) provides that Initial Area 2 lobster trap allocations shall be based on reported lobster landings and reported traps fished during the qualifying years 2001-2003, and shall be the highest value of "Effective Traps Fished" during any year of the 2001-2003 qualifying period.

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. The Applicant admits that the Division's determination that Applicant's initial 2007 allocation of Eighty (80) traps was calculated on the basis of data submitted by Applicant concerning Applicant's reported activity in the lobster fishery in the target period of the years 2001 through 2003. The Applicant did not introduce any testimony or evidence that would demonstrate that he is entitled to a modification of his Initial Trap Allocation. The applicant did not cite any statutory or regulatory authority that would warrant an increase in Applicant's allocation or which would permit the Hearing Officer to grant any of the relief sought by Applicant. 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, Sean Cavanagh.
2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation (Allocation) from the Division of Fish and Wildlife (Division) dated January 17, 2007 advising the Applicant that his initial 2007 Allocation was determined to be eighty (80) 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 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:

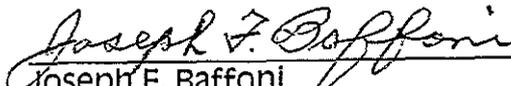
1. The Administrative Adjudication for Environmental Matters (AAD) has jurisdiction over this matter pursuant to R.I. GEN. LAWS §42-17.7-2; and §15.14.2-5(a) of the Marine Fisheries Regulations.
2. The Division's Allocation of eighty (80) traps to the Applicant was calculated consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control of the Marine Fisheries Regulations.
3. The 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 eighty (80) traps would be consistent with the provisions and purposes of the Marine Fisheries Regulations.
4. The Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation of eighty (80) 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 eighty (80) traps.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 16th 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,

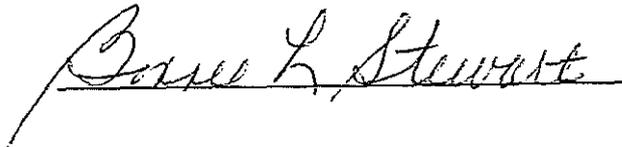
2007.



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: Sean Cavanagh, 59 Long Highway, Little Compton, RI 02837; via interoffice mail to Gary Powers, Esq., DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 20th day of July, 2007.



APPENDIX A

APPLICANT'S EXHIBITS:

None

DIVISION'S EXHIBITS:

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| DIVISION 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 Eighty (80) 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
FULL | The Applicant's letter dated February 21, 2007 requesting a hearing concerning the Division's Allocation Letter. 1 Page (Copy). |
| DIVISION 3
FULL | <i>Curriculum vita</i> of Thomas E. Angell. 2 Pages (Copy). |

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.