

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

RE: KOZA, RUSSELL C., JR.
LOBSTER TRAP ALLOCATION
MPURP 001266

AAD NO. 07-070/F&WA

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on the appeal of Russell C. Koza, Jr. ("Mr. Koza" 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. On March 16, 2007, Applicant filed a request for 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 ("Regulations").

A status conference was held on April 10, 2007 and the parties indicated to the hearing officer that the matter was unlikely to settle. An Order and Notice of Administrative Hearing and Prehearing Conference was issued to the parties at the status conference. The prehearing conference and hearing were continued twice at Applicant's request and without objection. The prehearing conference was ultimately held on September 17, 2007 followed immediately thereafter by the administrative hearing. The Applicant was represented by Christopher T. Millea, Esq., and the Division was represented by Gary Powers, Esq. At the prehearing conference, the following documents were submitted and marked as indicated below:

For Applicant: No exhibits were offered.

For the Division of Fish and Wildlife: The following exhibits were agreed to by the parties as full exhibits:

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| Div. 1 (Full) | Copy of 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 Zero (0) traps based upon his reported activity in the lobster trap fishery in the target period of the years 2001 through 2003. (3 pages) |
| Div. 2 (Full) | Copy of Applicant's Letter dated March 16, 2007 requesting a hearing concerning the Division's Allocation Letter. (1 page) |

Div. 3 (Full) Copy of a compilation of the Division's records concerning the Applicant's reported activity in the lobster trap fishery during the years 1999, 2000 and 2004. (1 page)

Div. 4 (Full) Copy of Curriculum Vita of Thomas E. Angell (2 pages)

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 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 trap fishery in the target period of the years 2001 through 2003.

The Applicant bears the burden of proof in this proceeding that he is entitled to a modification of his Initial Area 2 Lobster Trap Allocation. Applicant's issues are that the Regulations cause financial hardship for him; that the Department selected the years 2001 – 2003 to calculate the Allocation knowing that these years were the lowest catch years for the lobster trap fishery; and that he qualifies for the medical hardship exception contained in the Regulations.

The Division identified the issue as "Whether the Applicant's January 16, 2007 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 qualified, by agreement of the parties, as an expert in the lobster fishery and as an expert in the interpretation and application of the Department's lobster regulations.

Testimony

Mr. Koza testified on his own behalf. Mr. Koza holds a commercial fishing license that entitles him to fish for several species including lobster. His trap allocation for lobsters was reduced from eight hundred (800) pots to zero although he may still harvest lobsters by other methods. He testified about his fishing history in Rhode Island since 1988 and stated that he did not lobster at all from 1996 through 2002 because it was not financially viable for him to do so. Mr. Koza attributed this to the impact of the oil spill on the lobster stock in 1996 and subsequent years.

Mr. Koza further explained that he was caring for his ill father during the years 1999 to 2001. As a result, he did not renew his commercial fishing license for a few years. After his father's death, Mr. Koza attempted to renew his commercial fishing license and was denied. He appealed that determination and based upon what Mr. Koza characterized as "medical hardship", an agreement was reached and his renewal was issued prior to hearing. Mr. Koza essentially contends that this issuance of a renewal of his commercial fishing license based on "medical hardship" binds the Department in this proceeding.¹

Mr. Koza next testified concerning the formulation and adoption of the Regulations. It was his testimony that he was not notified of proposed changes to lobster trap allocations. When asked if he knew of public hearings being held to consider the Regulations, he stated that he did attend two meetings of the DEM Lobster Advisory Panel but he was not allowed to make comments at those meetings. Mr. Koza concluded his testimony by requesting that his previous limit of eight hundred (800) traps be restored. There was no cross-examination of Mr. Koza.

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. 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. The ASMFC lobster management plan was in response to lobster assessments that concluded that Area 2 was overfished for lobsters. Mr. Angell testified that in preceding years, many measures were taken to attempt to reduce that overfishing including an increase in the gauge size for lobsters and an increase in the vent escape size on traps. Mr. Angell was responsible for extracting the necessary elements of the ASMFC management plan and drafting state regulations compliant with the ASMFC management plan.

¹ The applicable regulations with respect to the renewal of Mr. Koza's commercial fishing license were the Rules and Regulations Governing the Management of Marine Fisheries. The hardship standards for that license differed markedly from those applicable to the instant proceeding. See, In Re: Brian Thibeault, AAD No. 03-006/MSA, Final Decision Issued June 27, 2003.

Mr. Angell testified that he drafted the initial regulations and forwarded them to the Rhode Island Marine Fisheries Council (RIMFC) Lobster Panel for review. Mr. Angel testified that two public hearings were held concerning the proposed regulations at the Corless Auditorium at the University of Rhode Island Bay Campus. According to Mr. Angell, notice of these public hearings was published in the newspaper. He testified that comments were received from attendees at these public hearings and 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 that Applicant's Allocation was determined to be zero (0) traps because the data supplied to the Division by Applicant showed no participation in the lobster trap industry for 2001, 2002, or 2003. He further explained that the goal of the ASMFC plan was to cap the effort levels at years 2001, 2002 and 2003 because that was the lowest point of participation in the lobster trap fishery.

Upon cross-examination, Mr. Angell was questioned regarding the effects of the oil spill in 1996 on the lobster stocks. The parties stipulated that the oil spill of 1996 had an adverse effect on lobster populations. Mr. Angell was questioned regarding the regulatory choice of using the years 1999 and 2000 as substitute years instead of choosing a more recent year. His response was that the decision was made by the Lobster Management Board and ultimately adopted in the Regulations.

Although there was much discussion on cross-examination to attempt to assail the manner in which the Regulations were promulgated, I find no evidence of irregularity. Mr. Angell's testimony establishes that the sub-committee meetings were open to the public (indeed, Mr. Koza testified that he attended a sub-committee meeting); that two public hearings were held prior to adoption by the RIMFC or the Director of DEM; that notice of these public hearings was published in the newspaper; and that attendees had the opportunity to comment on the proposed Regulations at these public hearings. Testimony concluded with 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. Counsel agreed to submit their closing statements in writing. Counsel submitted these statements timely and the hearing was deemed closed on October 9, 2007.

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) of the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs, November 2006 ("November, 2006 Regulations") 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 to the Division from the Applicant's logbook indicates that he did not participate in the lobster fishery in any of the qualifying years. 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 allocation was reduced to zero (0) traps.

Medical Hardship/Material Incapacitation of Family Member

The Regulations establish that the qualifying period for determining the 2007 Area 2 Lobster Trap Allocation is 2001 through 2003. Applicant alleges medical hardship/material incapacitation on the basis of the illness of a family member. That exception, if proven, allows a departure from the 2001 -2003 qualifying period. All versions of the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs require that an individual present notarized documentation of the physical or mental impairment of the individual or family member. Parts 15.14.2-5 (e) of the Rhode Island

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

Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs adopted November, 2006 reads as follows:

(e) The decision maker shall employ the following considerations when determining the initial allocation of traps to be assigned to an applicant:

- a. In order to permit the employment of the medical hardship exception set out in part 15.14.2-5(d), an applicant must present to the RIDEM, written documentation that a governmental agency(ies) has rendered a final agency decision documenting the existence of a disabling physical or medical illness, injury, impairment, or condition that involves inpatient care in a hospital, 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, constituting a material incapacitation during the period 2001-2003. *Such documentation shall include the date of the year and the material incapacitation, which must be notarized as original at the time that the appeal is presented.*
(emphasis added)

The amended Regulations, adopted April 2007 ("April, 2007 Regulations") similarly provide 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.
(emphasis added).

In this matter, Applicant presented no notarized documentation to meet the requirements of either the November, 2006 Regulations or the April, 2007 Regulations. But even if Applicant had met this mandate, Applicant's Allocation would still be zero (0). Upon proof of medical hardship/material

incapacitation, the Regulations then allow the Applicant's allocation to be calculated based upon his lobster trap fishing history in the years 1999 and 2000. Section 15.14.2-5 of the November, 2006 Regulations provides for an alternative calculation if a medical hardship or military service hardship existed during the target years:

- (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.* (emphasis added)

Section 15.14.2-8(a) of the April, 2007 Regulations similarly provides for an alternative calculation if a material incapacitation existed during the target years:

- (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.* (emphasis added)

Even if Mr. Koza met the definition of medical hardship/material incapacitation, neither alternative calculation provided in Section 15.14.2-5 (d) or Section 15.14.2-8(a) would serve to increase his allotment of lobster traps. He testified that he did not land lobsters at all in the years 1996 to 2002. Applicant did not participate in the lobster trap fishery in the years 1999 and 2000 and consequently, has no fishing history to substitute for the lack of lobster landings in the target years 2001 through 2003.

The Regulations concerning the qualifying years for computation of the 2007 Area 2 Lobster Trap Allocation are plain. The qualifying years are 2001 – 2003 (or 1999 and 2000 if medical hardship/material incapacitation is proved). The Division appropriately employed the data provided by Applicant and determined his allocation under the Regulations, to be zero.

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Mr. Koza expressed his disagreement with the Regulations and the management methods set forth in the Regulations. Mr. Angell's testimony establishes that many other management options were considered, weighed and deliberated upon. In the end, and after public hearings, the instant Regulations

were enacted. Part 15.14.2 of the Regulations entitled "Area 2 Lobster Trap Effort Control" reflects a policy decision made by the Department, after notice and public hearing, to implement the management method outlined in those Regulations and subsequent amendments. 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). In the present matter, it is not the province of the Adjudication Division to rewrite Regulations to include alternatives which the Department might have included, but chose to omit. Changes to these regulatory provisions must follow the notice and adoption requirements of the Administrative Procedures Act.

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 001266).
2. Applicant filed an application with RIDEM for a 2007 Initial Area 2 Lobster Trap Allocation determination.
3. 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 trap fishery in the target period of the years 2001 through 2003.
4. Applicant filed a request for hearing with the Administrative Adjudication Division on March 16, 2007
5. The Applicant reported no participation in the lobster trap fishery to the Department during the years 1999 through 2004.
6. Applicant testified that he did not lobster at all during the years 1996 through 2002.
7. Applicant's license authorizes him to participate in the lobster fishery by using lobster traps and by other methods.

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8. Applicant's license authorizes him to participate in fisheries other than lobster.
9. Applicant disagrees with the Regulations as adopted.
10. The Regulations contain only two exceptions to the 2001-2003 qualifying years.

11. Applicant alleges medical hardship/material incapacitation based upon the illness of a family member (parent).
12. Applicant did not present notarized documents evidencing that the 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.
13. Applicant did not present notarized documentation evidencing that the applicant had a direct role in the care of the family member.
14. Lobster stock assessments commencing in 1996 established that Area 2 is overfished for lobsters.
15. The Regulations were adopted to conform to a management plan for lobsters in Area 2 adopted by the Atlantic States Marine Fisheries Council and were intended to reduce the number of traps fished.
16. Notice of the public hearings was published in the newspaper.
17. Public hearings were held at Corless Auditorium at the University of Rhode Island prior to adoption of the Regulations. Attendees at these public hearings had the opportunity to make comments concerning the proposed Regulations.

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 (d) of the November, 2006 Regulations.
3. 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) of the November, 2006 Regulations.
4. 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 15.14.2-8 (a) of the April, 2007 Regulations.

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5. 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 15.14.2-8 (b) of the April, 2007 Regulations.
6. Applicant's 2007 Initial Area 2 Lobster Trap Allotment was calculated in accordance with the Regulations.
7. AAD must follow the plain language of the Regulations and may not rewrite Regulations to include alternatives which the Department might have included, but chose to omit.

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 27 day of December, 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 28 day of December, 2007



W. Michael Sullivan, Ph.D.
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 Order to be forwarded, via regular mail, postage prepaid to: Christopher T. Millea, Esq. Thompson and Millea, PC, 127 Dorrance Street, Providence, RI 02903 and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 1st day of December, 2007.

Bruce L. Stewart

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.