

Department of Environmental Management  
Administrative Adjudication Division  
State of Rhode Island  
Re: Proffit, Walter  
AAD No. 07-075/F&WA  
Lobster Trap Allocation PEL 001290  
June 2007

**DECISION AND ORDER**

This matter is before the Administrative Adjudication Division for Environmental Matters (“AAD”) on the appeal of Walter Proffit (“Mr. Proffit” 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 April 2, 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, dated November 22, 2006<sup>1</sup> (“Regulations”).

A status conference was held on April 19, 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 was held on June 12, 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 below:

For Applicant:

**App. 1 (FULL)** Statement of Walter Proffit dated 6/12/07

For the Division of Fish and Wildlife:

**Div. 1 (Full)** Notice of 2007 Lobster Trap Allotment dated January 16, 2007

**Div. 2 (Full)** Applicant's Request for Hearing dated 3/27/07

**Div. 3 (Full)** Lobster Landing and Trap Deployment Data for Applicant for Years 1999, 2000 and 2004.

**Div. 4 (Full)** Curriculum Vitae of Thomas E. Angell, 2pp.

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 reported no participation in the lobster fishery to the Department during the years 2001 through 2003.
  3. 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's issues are that the Regulations adversely affect his participation in the fishery and that the fishery is not appropriately managed.

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. Proffit testified on his own behalf. Mr. Proffit holds a commercial fishing license that entitles him to fish only for lobsters. His trap allocation was reduced from eight hundred (800) pots to zero. With moratoriums imposed on commercial fishing licenses for other species, he feels that he has been unfairly impacted as he can no longer fish for lobsters, nor can he fish other species. He stated that he does not agree with the Regulations regarding the method and manner by which lobster trap allocations are determined. He testified that the Regulations do not treat him fairly as he has fished responsibly and his participation in the lobster fishery has not negatively impacted the fishery. Mr. Proffit also asserted that as a Native American of Wampanoag descent, he believes that he is entitled to exercise his aboriginal rights to fish. Although this issue will not be addressed in this decision, Mr. Proffit's assertion is preserved for the record. I found Mr. Proffit to be a credible and candid witness.

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. 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 and forwarded them 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 indicated that the result of the lobster management effort set forth in the Regulations was to reduce the number of lobster traps from approximately 300,000 to approximately 150,000 - 160,000. He stated that effort reduction was part of the overall management plan and that prior to the Regulations, licensees could fish up to 800 traps but that many license holders did not participate in the lobster fishery. Mr. Angell referred to these license holders as "latent" fishermen. He further explained that the years 2001, 2002 and 2003 were selected because the ASMFC Lobster Management Board wanted to cap the effort levels at the lowest point.

Mr. Angell next explained his involvement in the implementation of the Regulations. With the assistance of a colleague, 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 explained that Applicant's Allotment was determined to be zero (0) traps because the data supplied to the Division by Applicant showed no participation in the lobster industry for 2001, 2002, or 2003. It was Mr. Angell's opinion, based on the data provided by the Applicant and the fact that Applicant is not alleging military service or medical hardship, that the Allotment was determined in conformance with the Regulations.

Upon cross-examination, Mr. Angell was questioned regarding the effects of the oil spill in 1996 on the lobster stocks. Mr. Angell indicated that efforts have been made to restore the lobster stocks and that such a program takes time to demonstrate results. The benefits of the restoration program are now noticeable but not complete. Applicant also questioned Mr. Angell as to why the lobster trap effort embodied in the Regulations was chosen over other regulatory alternatives. Mr. Angell responded that this method was chosen after lengthy deliberations over several months by the ASMFC Area 2 Lobster Management Team and the RIMFC Lobster Team. He indicated that representatives of the lobster industry participated in these deliberations and that every standard and not-so-standard management technique was considered including closed

seasons, further gauge increases, limiting the season, several types of quotas, daily catch limits, and landing limits. He testified that all these alternatives were met with objection by persons engaged in the fishing industry. Finally, regulators selected the Area 2 Lobster Trap Effort Control embodied in Part 15.14.2 of the Regulations. There was a very brief redirect examination and 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. Mr. Proffit asked that Applicant's Exhibit 1 be considered as his closing statement and Mr. Powers waived closing argument or the filing of a brief.

## **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 holders<sup>2</sup> 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 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 allotment was reduced to zero (0) traps.

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 Regulations<sup>3</sup> which, if applicable, allow a departure from the 2001 -2003 qualifying period. Those exceptions involve military service and disabling physical or medical illness, neither of which is alleged by Applicant.<sup>4</sup> The issue before the AAD in this matter is not one of regulatory interpretation. The Regulations are clear and unequivocal. It is a well established tenet of statutory construction that "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Union Village Development Associates v. Town of North Smithfield Zoning Board of Review, 738 A.2d 1084, 1086 (R.I.1999) (quoting Providence & Worcester Railroad Co. v. Pine, 729 A.2d 202, 208 (R.I.1999)). If a statute is unambiguous and its words can be plainly interpreted, then the " 'work of judicial interpretation is at an end.' " Kelly v. Marcantonio, 678 A.2d 873, 877 (R.I.1996) (quoting DeAngelis v. Rhode Island Ethics Commission, 656 A.2d 967, 969 (R.I.1995)).

In the instant matter, the same rules of statutory construction are applicable to the Regulations. The Regulations concerning the qualifying years for computation of the 2007 Area 2 Lobster Trap Allocation are plain. The qualifying years are 2001 - 2003. The Division appropriately employed the data provided by Applicant and determined his allocation under the Regulations, to be zero.

Mr. Proffit candidly stated that his issue is that he disagrees 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

three 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 on the part of the Department after notice and public hearing to implement the management method reflected in those Regulations. 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 (PEL 001290).
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. The lobster trap allocation dated January 16, 2007 was calculated 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.
5. Applicant's Allotment for 2007 is zero (0) traps.
6. Applicant filed a request for hearing with the Administrative Adjudication Division on April 2, 2007
7. The Applicant reported no participation in the lobster fishery to the Department during the years 2001 through 2003.
8. The Applicant reported no landings of lobster to the Department during the year 2004.
9. The Applicant reported no landings of lobster or traps fished to the Department during the years 1999 and 2000.
10. Applicant's license authorizes him to participate only in the lobster fishery.
11. Applicant disagrees with the Regulations as adopted.
12. The Regulations contain only two exceptions to the 2001-2003 qualifying years.
13. Applicant does not allege medical hardship or military service.
14. Lobster stock assessments commencing in 1996 establish 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. Numerous fisheries management methods were considered by the Department prior to the adoption of the Regulations.
17. Public hearings were held prior to adoption of the 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's 2007 Initial Area 2 Lobster Trap Allotment was calculated in accordance with the Regulations.

3. 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 \_\_\_\_\_ day of June, 2007 and herewith forwarded to the Director for issuance as a Final Agency Order.

Kathleen M. Lanphear

Chief Hearing Officer

Entered as a Final Agency Order this \_\_\_\_\_ day of \_\_\_\_\_, 2007

W. Michael Sullivan, PhD.

Director

### **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.

### **Footnotes**

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.

2

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

3

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

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.