

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
RE: Joseph MacAndrew
AAD NO. 07-067/F&WA
Lobster Trap Allocation
MPURP 001131
2008

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters (“AAD”) on the appeal of Joseph MacAndrew (“Mr. MacAndrew” 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 three (3) traps. On March 14, 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 establishing a hearing date of June 8, 2007. The prehearing conference and hearing were continued at Applicant's request and without objection. The prehearing conference was held on December 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: No exhibits were offered.

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

- Div. 1 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 (Full) by the Division to be Three (3) 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 Copy of Applicant's Letter dated March 14, 2007 requesting a hearing concerning the (Full) Division's Allocation Letter. (1 page)
- Div. 3 Copy of Curriculum Vita of Thomas E. Angell (2 pages) (Full)

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

1. DEM issued a lobster log book to each commercial license holder commencing in 1999.
2. Lobster logbook data included number of lobsters and the weights of those lobsters.
3. Rights to sell lobster traps has not been communicated in writing to license holders.
4. American Lobster management authority lies with the coastal states and is coordinated through the Atlantic States Marine Fisheries Commission (ASMFC).
5. Recreational lobster licenses allow for 5 lobster traps.
6. Joseph MacAndrew's lobster trap allotment is 3 traps.
7. Recreational lobster trap fee is \$40.
8. Multipurpose commercial fishing license fee is \$300.

The parties agreed that the hearing officer would take administrative notice of the following:
Declaration of Independence in its entirety

The US Constitution in its entirety
The Bill of Rights in its entirety
The Rhode Island Constitution in its entirety
Metric Act of 1866

Title 6, Commerce and Trade Subtitle III, Weights, Measures and Standards, Chapter 51

Title 42, The Public Health and Welfare, Chapter 21 - Civil Rights, Subchapter 1

US Antitrust Laws in its entirety - including but not limited to The Sherman Antitrust Act (1890), the Clayton Antitrust Act (1914), and the Federal Antitrust Statutes for Monopolies & Combinations in Restraint of Trade (Title 15, Chapter 1)

The Applicant bears the burden of proof in this proceeding to demonstrate by a preponderance of the evidence that he is entitled to a modification of his Initial Area 2 Lobster Trap Allocation. Applicant raised several issues which are set forth in abbreviated fashion below. The full original text stating the issues raised by Mr. MacAndrew is set forth in Appendix A to this Decision and Order.

1. The failure to validate the catch data contained in the vessel trip reports and logbooks violates the Metric Act of 1866 and Title 6, Commerce and Trade Subtitle III, Weights, Measures and Standards, Chapter 51 as well as state and federal constitutional rights.
2. The lobster pot allocation program is unconstitutional under the documents referenced above.
3. According to the Declaration of Independence, the US Constitution, The Bills of Rights and the RI Constitution, All men are created equal. According to Title 42, The Public Health and Welfare, Chapter 21 - Civil Rights, Subchapter 1 all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, to be parties, give evidence and to the full and equal benefit of all laws. Therefore license holders, of the same license, must have the same rights within the state of RI and lobsterman in RI must have the comparable rights as other New England states.
4. Rhode Island commercial license holders, via lobster trap allocation system (and the option to sell lobster pot rights) are not being treated equally by the DEM or ASMFC, violating US Antitrust laws including the Sherman Antitrust Act of 1890, The Clayton Antitrust act of 1914 and Federal Antitrust Statutes for Monopolies & Combinations in Restraint of Trade (Title 15, Chapter 1).

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. MacAndrew testified briefly on his own behalf. He stated that commercial fishing license holders have been treated inequitably as a result of the Regulations and that in his case, in particular, he has been allocated less traps than a recreational lobster license holder. Mr. MacAndrew highlighted the fact that recreational lobster license holders are allocated five traps for an annual fee of forty dollars (\$40.00) while he has been allocated only three traps at an annual fee of three hundred dollars (\$300.00).

Mr. MacAndrew also testified concerning the use of logbooks to determine fishing history and Allocations over the qualifying period of 2001 to 2003. He stated that he was not notified, nor was he aware that logbook information would be employed to determine lobster trap allocations in later years. He expressed his disagreement with this method as reporting of one's landings are not validated and that such reported numbers are, as he characterized it, “on the honor system”. Because of this failure to audit or validate catch reports, Mr. MacAndrew contends that the

methods used are unconstitutional and violate interstate commerce laws. There was no cross examination of Mr. MacAndrew.

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 which includes, in part, Rhode Island waters 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. Mr. Angell next explained that Applicant's Allocation was determined to be three (3) traps based upon the data supplied to the Division by Applicant for the years 2001 - 2003. The number of traps allocated was calculated using the number of pounds reported by Applicants on lobster catch effort reports or federal vessel trip reports. Mr. Angell stated that there was an obligation to accurately report one's catch and that the required forms contain language warning the preparer against perjury for a false report. The information supplied by Mr. MacAndrew was put into the standard regression formula used for each Applicant and the resulting Allocation was three (3) pots. Mr. Angell testified that the same criteria and method was employed for each Applicant. Mr. Angell further explained that Applicant's comparison of a commercial fishing license to a recreational lobster license was inapt. A recreational lobster license does allow a maximum of five (5) traps with no limit on the amount taken, however, a recreational lobster license does not allow for the sale of one's catch and is restricted exclusively to lobster. In contrast, Mr. MacAndrew's commercial fishing license authorizes him to participate in three fishery sectors - shellfish, finfish and lobster/crustaceans at the maximum catch levels allowed while also authorizing the sale of his catch.

On cross-examination, Mr. Angell indicated that in December of 2000, a letter was sent to commercial license holders advising them that due to licensing restrictions, future participation in the fisheries may be determined by historical participation. Under questioning from Mr. MacAndrew concerning the methods used by other New England states, Mr. Angell testified that the Commonwealth of Massachusetts employs the same process as Rhode Island and that in some cases, lobster pot allocations were reduced to zero. Mr. Angell answered that all states comprising Area 2 have adopted the same allocation process. Under questioning from Mr. MacAndrew, he conceded that the Gulf of Maine has not adopted this method but explained that the Gulf of Maine is part of Area 1, not part of Area 2.

In response to questioning regarding the accuracy of catch reports, Mr. Angell indicated that all data was derived from either federal vessel trip reports or from an applicant's logbook. The information used in calculating the allocations was self-reported. He conceded that not every catch is further documented by receipts and that the state of Massachusetts does have a program to audit a percentage of catch reports each year. There was no redirect examination of this witness 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. The parties proceeded with closing arguments and the hearing was deemed closed on December 12, 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 holders¹ 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 was not contested and indicates that he participated in the lobster trap fishery in the year 2002. 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 three (3) traps. 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 three (3) traps. Mr. MacAndrew 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 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 the November, 2006 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.

Constitutional and Regulatory Challenges

Mr. MacAndrew raises numerous challenges to the Regulations based upon alleged state and federal constitutional infirmities. Mr. MacAndrew also broadly alleges that the Regulations violate several federal statutory enactments. No substantive testimony addressed the factual issues relating to these claims nor did Applicant offer legal argument or authority to support his position. The burden is upon one challenging the regulations to make his or her case. "However, when the challenger cites no case law and otherwise fails to state the authority upon which he or she relies in challenging the constitutionality of the statute, then the challenger has not met his or her burden." *Henry v. Earhart*, 553 A. 2d 124 (R.I. 1989) at 127, *citing Newport Auto Salvage, Inc. v. Town Council of Portsmouth*, 502 A.2d 339, 343 (R.I.1985). As in *Henry v. Earhart*, the Applicant in the instant matter does not cite any authority whatsoever to support his constitutional challenges and instead identifies a long list of federal laws and the state and federal constitutions

with no guidance or direction to the portions or sections allegedly violated. Similarly, Applicant fails to cite any authority whatsoever concerning the remainder of his claims.

With regard to the constitutional claims raised by Applicant, the AAD has consistently held that constitutional issues are not properly before this tribunal. Even if these issues were presented to AAD with the necessary factual underpinnings and legal authority and argument, AAD would refrain from addressing the constitutional claims. As pointed out by the U.S. District Court for the District of Rhode Island in *Bowen v. Hackett*, 361 F. Supp. 854,860 (D.R.I. 1973) the “expertise of state administrative agencies does not extend to issues of constitutional law.” Applicant's constitutional arguments are preserved for the record but will not be addressed further in this decision.

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 001131).
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 Three (3) 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 14, 2007
5. Applicant's license authorizes him to participate in the lobster fishery by using lobster traps and by other methods.
6. Applicant's license authorizes him to participate in the shellfish, finfish and lobster/crustacean fisheries.
7. Applicant disagrees with the Regulations as adopted.
8. Lobster stock assessments commencing in 1996 established that Area 2 is overfished for lobsters.
9. 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.

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 the April, 2007 Regulations.
3. Applicant's 2007 Initial Area 2 Lobster Trap Allotment was calculated in accordance with the Regulations.
4. 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.
5. AAD lacks jurisdiction to determine issues of constitutional law.

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 January, 2008 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 _____, 2008
Rhode Island
Department of Environmental Management

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.

APPENDIX A

The applicant offers the following issues for consideration.

The following statements challenge the DEM Lobster pot allocation process.

The lobster logbook which gives the number of lobsters and the weights of lobsters is **not validated** in any manner (based on the honor system of the individual lobsterman). The lobster log book data is not validated, there are no records or receipts validating any lobster catch. If the lobster numbers have not been validated and the lobster weights have not been validated and these lobsters have been shipped interstate there is a violation of the Metric Act of 1866 and Title 6, Commerce and trade Subtitle III, Weights, Measures and Standards, Chapter 51.

A pound of goods is a standardized measurement used for interstate commerce as determined by the NIST (National Institute of Standards and Technology - Federal Agency). If the lobster weight has not been validated and these lobsters were used for interstate commerce, the NIST standards - which standardizes weights for interstate commerce, has been violated. **If the means by which pot allocation is flawed, the process is unfair and violates our state and federal constitutional rights.**

Non-Validated data means any commercial license holder who know of the DEM plans could inflate their catch numbers - Did the lobster catch management team have high allocations?

The lobster pot allocation program is unconstitutional under the authority of the Documentation submitted above.

According to the Declaration of Independence, the US Constitution, The Bills of Rights and the RI Constitution, All men are created equal. According to Title 42, The Public Health and Welfare, Chapter 21 - Civil Rights, Subchapter 1 all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, to be parties, give evidence and to the full and equal benefit of all laws. Therefore license holders, of the same license, must have the same rights within the state of RI and lobsterman in RI must have the comparable rights as other New England states.

Rhode Island commercial license holders, via lobster trap allocation system (and the option to sell lobster pot rights) are not being treated equally by the DEM or ASMFC, violating US Antitrust laws including the Sherman Antitrust Act of 1890, The Clayton Antitrust act of 1914 and Federal

Antitrust Statues for Monopolies & Combinations in Restraint of Trade (Title 15, Chapter 1). These all basically say every contract, combination or in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among several states, or with foreign nations, is to be declared illegal.

A commercial permit is a contract with the state to harvest seafood. If the state only allows a few to have large numbers of lobster pots, and the right to purchase more pots, this creates a restraint in trade for the large number of license holder whose pot allocations were reduced to point of non viability, forcing them to sell the rights to their remaining pots. This will affect interstate trade and could lead to price fixing for lobsters.

In order to preserve the lobster population commercial lobster permits should limit the number of pots permitted under each license regardless of who holds the license and regardless of the state in which the license holder resides thereby complying with state and federal equal rights.

Footnotes

1

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