

2010-7

8/10/07

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

- RE: CONSOLIDATED CASES
- MORRIS, ROBERT : AAD No. 07-034/F&WA
FEDERAL PERMIT/ LOBSTER TRAP
ALLOCATION 240102
- MORRIS, ROBERT : AAD No. 07-035/F&WA
FEDERAL PERMIT/ LOBSTER TRAP
ALLOCATION 230233
- MORRIS, ROBERT : AAD No. 07-043/F&WA
FEDERAL PERMIT/ LOBSTER TRAP
ALLOCATION 126648
- MORRIS, ROBERT : AAD No. 07-045/F&WA
FEDERAL PERMIT/ LOBSTER TRAP
ALLOCATION MPURP000058

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on the consolidated appeals of Robert Morris ("Mr. Morris" or "Applicant") of his Initial 2007 Area 2 Lobster Trap Allocations ("Allocations") as determined by the Department of Environmental Management, Division of Fish and Wildlife ("Division"). By letters dated January 16, 2007, the Applicant was notified that the Division of Fish and Wildlife determined his Initial Lobster Management Area 2 Lobster Trap Allocation relative to MPURP000058, Federal Lobster Permit #240102, and Federal Lobster Permit # 126648 to be Zero(0) traps and Federal Lobster Permit # 230233 was determined to be One Hundred (100) traps. On February 14, 2007 and February 16, 2007, the Applicant filed requests for hearing with the AAD contesting the Allocations. The governing regulations are the Rhode Island Marine Fisheries Regulations,

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Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs, dated November 22, 2006¹
("Regulations").

A status conference was held on April 10, 2007 and upon joint oral motion of the parties, these matters were consolidated for prehearing and hearing. 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 July 10, 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 (ID) Privatizing Rights of Access for the Rhode Island Fishery
Revised April 2007

For the Division of Fish and Wildlife:

- Div. 1 (Full)** 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 relative to Federal Lobster Permit # 240102 . 3 Pages (Copy).
- Div. 2 (Full)** 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 relative to Federal Lobster Permit #126648. 3 Pages (Copy).
- Div. 3 (Full)** 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 One Hundred (100) traps relative to Federal Lobster Permit # 230233. 3 Pages (Copy).

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 Allocation and subsequent to the filing of this appeal, the Regulations were superseded by an April 6, 2007 filing with the Secretary of State.

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- Div. 4 (Full)** 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 relative to State Commercial Fishing License MPURP000058. 3 Pages (Copy).
- Div. 5 (Full)** The Applicant's letter requesting a hearing concerning the Division's Allocation relative to Federal Lobster Permit # 240102. 1 Page (Copy).
- Div. 6 (Full)** The Applicant's letter requesting a hearing concerning the Division's Allocation relative to Federal Lobster Permit # 230233. 1 Page (Copy).
- Div. 7 (Full)** The Applicant's letter requesting a hearing concerning the Division's Allocation relative to Federal Lobster Permit # 126648. 1 Page (Copy)
- Div. 8 (Full)** The Applicant's letter requesting a hearing concerning the Division's Allocation relative to State Commercial Fishing License MPURP000058.1 Page (Copy).
- Div. 9 (Full)** A computer printout summarizing the history of Applicant's participation in the lobster fishery during the period 1999, 2000, and 2004 relative to Federal Lobster Permit #240102, Federal Lobster Permit # 230233, and Federal Lobster Permit #126648 and MPURP000058.1 Page, (Copy).
- Div. 10 (Full)** *Curriculum vita* of Thomas E. Angell. 2 Pages (Copy).

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 participation in the lobster fishery to the Department during the years 2001 through 2003 relative to Federal Lobster Permit # 230233 which would call for a calculation of an Initial 2007 Lobster Trap Allocation for Management Area 2 in the amount of One Hundred (100) traps consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control.

The Applicant offered the following issues for consideration at the hearing which are set forth as presented orally by Applicant at the prehearing conference:

1. Economic Hardship

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2. Applicant disagrees with the method selected by DEM to comply with the ASMFC management plan.
3. The Regulations violate the public trust doctrine.
4. The Regulations violate Article I, Section 17 of the Rhode Island Constitution concerning equal access to Rhode Island's fishery.
5. The Regulations violate Article 12 of the Rhode Island Constitution which states that no person shall be deprived of life, liberty or property without due process of law.
6. No one should be denied licensing without just compensation.
7. The use of logbooks as data for computation of lobster trap allocation violates R.I. Gen. Laws §20-7-9.
8. Does Section 15.14.2-6 violate R.I. Gen. Laws §20-2-1-9?
9. Do the Regulations violate R.I. Gen. Laws §42-35-3 because DEM did not consider any alternative approaches?
10. Do the Regulations violate R.I. Gen. Laws §42-35-3 because they fail to minimize impacts to small business?
11. Do the Regulations violate R.I. Gen. Laws §20-2-1-9 (sic) by creating private property rights for select individuals?
12. There is no basis for the decision that less traps will conserve the lobster fishery.

The Division identified the issue as follows:

"Whether each of the Applicant's initial lobster trap allocations were 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.

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Testimony

Mr. Morris testified on his own behalf. Mr. Morris again set forth each issue raised at the Prehearing conference and identified earlier in this Decision and Order.² Mr. Morris testified that he also participates in the non-trap lobster fishery and that his landings from trawling were not used to calculate his Allocation. He believes that his non-trap landings should be included in the calculation of his lobster trap Allocation.

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. He 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

² Mr. Morris acknowledged that these issues were culled from a civil complaint filed in R. I. Superior Court claiming, *inter alia*, the unconstitutionality of the Regulations. Mr. Morris is a named plaintiff in that action. As of the date of this Decision and Order, that action is pending in the Federal District Court for the District of Rhode Island.

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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 Allocation was determined to be zero (0) traps for MPURP000058, Federal Lobster Permit #240102, and Federal Lobster Permit # 126648 because the data supplied to the Division by Applicant for each license or permit showed no participation in the lobster trap industry for 2001, 2002, or 2003. Based on the information provided to the Division for Federal Lobster Permit #230233, the Allocation was 100 traps. It was Mr. Angell's opinion, based on the data provided by the Applicant and the testimony of Applicant at the hearing, that that the Allocations were determined in conformance with the Regulations.

Mr. Angell testified that the current lobster effort control 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 a wide range of alternative management measures was considered including closed seasons, further gauge increases, limiting the season, several types of quotas, daily catch limits and landing limits.

Upon cross-examination, Mr. Angell was questioned as to why the lobster trap effort embodied in the Regulations was chosen over other regulatory alternatives. He testified that he did not know why this particular method was voted for over other alternatives but that many alternatives were debated and the method reflected in the Regulations was ultimately agreed upon. Mr. Angell acknowledged that other alternative methods were considered and could have been employed. Mr. Morris questioned Mr. Angell regarding the composition of the management teams and Mr. Angell stated that every member of the Lobster Management Team was a lobster fisherman. On redirect examination Mr. Angell explained that the Lobster Advisory Subcommittee included lobster fishermen from the inshore trap fishery, the offshore trap fishery,

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the otter trawl fishery and representatives of the scientific community. 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. Morris and Attorney Powers elected to make closing statements.

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 holders³ 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 for MPURP000058, Federal Lobster Permit #240102, and Federal Lobster Permit # 126648 indicates that Applicant did not participate in the lobster trap 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

³ Recreational (non-commercial) lobster trap license holders are exempt from this process.

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the Applicant's Initial 2007 Area 2 Lobster Trap Allocation. The result of that standard calculation was that Applicant's Allocation for MPURP000058, Federal Lobster Permit #240102, and Federal Lobster Permit # 126648 was reduced to zero (0) traps. Similarly, for Federal Lobster Permit #230233, the Division accepted the information provided by Applicant, applied the standard regression formula adopted in the Regulations, and determined the Allocation to be One Hundred (100) traps.

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 Allocations consistent with the mandates of the Regulations.

Mr. Morris identified as issues his disagreement regarding the management methods selected and whether alternatives were considered. 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

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“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.

Constitutional and Regulatory Challenges

Mr. Morris objects to the Regulations promulgated by the Department of Environmental Management. He raises numerous challenges to the Regulations based upon alleged constitutional infirmities and the alleged failure to comply with requirements of the Administrative Procedures Act in adopting the Regulations. Mr. Morris also alleges in his identification of issues for consideration that the Regulations conflict with several statutory enactments.

No testimony addressed factual issues relating to these claims nor did Applicant offer legal argument or authority to support his bare allegations. 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

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matter does not cite any authority whatsoever in his constitutional challenges. Similarly, Applicant fails to cite any authority whatsoever concerning the remainder of his claims.

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. With regard to the constitutional claims raised by Applicant, the AAD has consistently held that constitutional issues are not properly before this tribunal. 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.⁴

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 four commercial fishing licenses as follows: MPURP000058, Federal Lobster Permit #240102, Federal Lobster Permit # 126648 and Federal Lobster Permit #230233.
2. Applicant filed an application with RIDEM for a 2007 Initial Area 2 Lobster Trap Allocation determination for each of the above-referenced licenses or permits.
3. The Applicant received notice of his 2007 Initial Area 2 Lobster Trap Allocation determination by letters dated January 16, 2007.
4. The Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advised the Applicant that his initial 2007 allocation was determined by the Division to be Zero (0) traps relative to Federal Lobster Permit # 240102 .
5. 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

⁴ Applicant's constitutional and statutory claims are pending before the U. S. District Court for the District of Rhode Island.

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determined by the Division to be Zero (0) traps relative to Federal Lobster Permit #126648

6. 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 One Hundred (100) traps relative to Federal Lobster Permit # 230233.
7. 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 relative to State Commercial Fishing License MPURP000058
8. The lobster trap allocations dated January 16, 2007 were 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.
9. Applicant filed a request for hearing with the Administrative Adjudication Division for each of the four matters consolidated herein.
10. The Applicant reported participation in the lobster fishery to the Department during the years 2001 through 2003 relative to Federal Lobster Permit # 230233 which would call for a calculation of an Initial 2007 Lobster Trap Allocation for Management Area 2 in the amount of One Hundred (100) traps consistent with the requirements of Part 15.14.2- Area 2 Lobster Trap Effort Control.
11. The Applicant reported no participation in the lobster trap fishery to the Department during the years 2001 through 2003 for MPURP000058, Federal Lobster Permit #240102, and Federal Lobster Permit # 126648.
12. Applicant disagrees with the Regulations as adopted.
13. The Regulations contain only two exceptions to the 2001-2003 qualifying years.
14. Applicant does not allege medical hardship or military service.
15. Lobster stock assessments commencing in 1996 establish that Area 2 is overfished for lobsters.
16. 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.
17. Numerous fisheries management methods were considered by the Department prior to the adoption of the Regulations.
18. Public hearings were held prior to adoption of the Regulations.

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19. Applicant cited no case law and otherwise failed to state the authority upon which he relies in challenging 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 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 Allocations.
3. Applicant's 2007 Initial Area 2 Lobster Trap Allocation for MPURP000058 was calculated in accordance with the Regulations.
4. Applicant's 2007 Initial Area 2 Lobster Trap Allocation for Federal Lobster Permit #240102 was calculated in accordance with the Regulations.
5. Applicant's 2007 Initial Area 2 Lobster Trap Allocation for Federal Lobster Permit # 126648 was calculated in accordance with the Regulations.
6. Applicant's 2007 Initial Area 2 Lobster Trap Allocation for Federal Lobster Permit #230233 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.
8. AAD lacks jurisdiction to determine issues of constitutional law.

Based on the foregoing, it is hereby

ORDERED

Applicant's appeals of his 2007 Initial Area 2 Lobster Trap Allocations for MPURP000058, Federal Lobster Permit #240102, and Federal Lobster Permit # 126648 and Federal Lobster Permit #230233 are **DENIED**.

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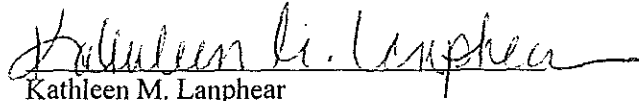
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Entered as a Recommended Decision and Order this 2nd day of August, 2007 and

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 8th day of August, 2007



W. Michael Sullivan, PhD.

Director

Rhode Island Department of Environmental Management

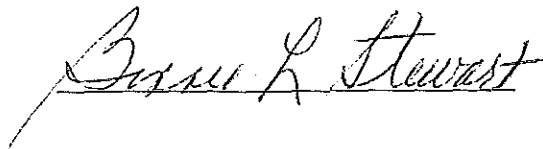
235 Promenade Street, 4th Floor

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: Robert Morris, 93 Kickemuit Avenue, Bristol, RI 02809; and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 8th day of August, 2007.



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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.