

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

RE: ROGOWSKI, JOHN T.
LOBSTER TRAP ALLOCATION MPURP 000924

AAD No. 07-066/F&WA

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD) pursuant to Applicant's request for hearing on the Initial 2007 RI/Area 2 Lobster Trap Allocation as determined by the Department of Environmental Management, Division of Fish and Wildlife (Division). Applicant John T. Rogowski appeared on his own behalf. Gary Powers, Esq. appeared on behalf of the Division.

The hearing was conducted on May 9, 2007 immediately following the prehearing conference.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 *et seq.*); the *Administrative Procedures Act* (R.I. GEN. LAWS § 42-35-1 *et seq.*); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD Rules)*; and the *Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans, and Horseshoe Crabs (Marine Fisheries Regulations)*.

PREHEARING CONFERENCE

A prehearing conference was conducted on May 9, 2007. The parties did not agree to any stipulations of fact.

Applicant identified the following as issues to be considered by the Hearing Officer at the hearing:

1. He is losing rights in future traps.
2. He is paying same fee for license whether it is for 800 pots or 94 pots.
3. He is disabled and on social security; he is 100% disabled under Veterans Affairs.
4. He suggests an alternative measure to handle the reduction in lobster stock by doing something similar as aquaculture farming but with lobster stock.
5. The oil spill in 1996 affected the lobster stock and he was not compensated for the loss then, and he is losing pots now.
6. He wants back pay for the 20 years he has held the license.
7. The allocation is taking away his rights; he should be treated equally with others.

The Division identified the following as issues to be considered by the Hearing Officer at the hearing:

1. Whether the Applicant's initial lobster trap allocation was calculated consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control that was duly promulgated pursuant to R.I. GEN. LAWS § 42-35-1 *et seq.*.
2. Whether the Applicant suffered a medical hardship during the target years of 2001-2003 as that term is set out in Part 15.14.2-5(d).
3. If the finding to the issue set out above in Issue II is in the affirmative, whether the Applicant landed any lobsters as required by Part 15.14.2-5(e)(3).
4. If the findings to the issues set out above in Issues II and III are both answered in the affirmative, the degree to which the Applicant participated in lobster fishery in 1999 or 2000 as determined by Part 15.14.2-5(e)(3) in order to permit the Applicant pursuant to Part 15.14.2-3 a modification in the Initial Lobster Trap Allocation which is the subject of this appeal by substituting the better performance documented in either 1999 or 2000.

A list of the exhibits that were presented by the parties is attached to this Decision as Appendix A.

HEARING SUMMARY

The first Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation, issued by the Division on January 17, 2007, assigned a zero (0) trap allocation to John T. Rogowski. Div 2. Mr. Rogowski filed an appeal at the AAD on March 12, 2007, stating that the information regarding lobster landings in 2001, 2003 and 2004 was incorrect. Div 1. A second Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation, which updated the lobster trap allocation, was issued by the Division on March 12, 2007 and assigned a ninety-four (94) trap allocation. Div 3.

Applicant bears the burden of proving 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 of the *Marine Fisheries Regulations*.

The Applicant's only witness was himself. The Division called one (1) witness: Thomas Angell, a Principal Marine Biologist in the Division of Fish and Wildlife who, by agreement, was qualified as an expert concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations.

The Applicant testified that he has been fishing Narragansett Bay for 53 years, approximately 50 years of which have been in shellfishing and commercial fishing. He stated that the DEM's denial of the license with an 800 pot allocation was not justified. He opined that taking away his pots would not increase the lobster population. He stated that as a disabled veteran, he should have the right to fish 800 pots. He argued that he was paying twice for the damage caused by the oil spill in the 1990's: he received no compensation then and he is losing pots now. He stated that noncitizens were allowed to obtain allocations, if they purchased the allocation from another lobsterman, which was unfair to US citizens.

The Division waived cross examination of the witness. Applicant then rested his case.

Division's witness Thomas Angell testified that among his responsibilities are monitoring the lobster fishery and the Area 2 lobster resource, and compiling data. He serves on the Lobster Technical Committee of the Atlantic States Marine Fisheries Commission where it is his task to compile lobster data for stock assessment; he reviews lobster management plans; and he makes recommendations to the Atlantic States Marine Fisheries Commission (ASMFC). He stated that the American Lobster has been assessed by the ASMFC in three studies (1996, 2000, and 2006) which all concluded that Area 2's lobster stock resource was overfished. The ASMFC then took several steps to encourage the re-building of the resource: increasing the minimum size of a legal lobster; increasing escape vent size; placing restrictions on the use of nontrap gear; and developing an effort control plan in Area 2. All of Rhode Island's waters and portions of Massachusetts' are located in Area 2.

Mr. Angell explained that he took the elements of the plan, further identified as *Addendum VII* to Amendment 3, and translated it into regulatory language that in due course was adopted by the Department of Environmental Management. Mr. Angell stated that each member state of the ASMFC is required to implement the *Addendum VII* management plan. If a state does not comply, then the United States Secretary of Commerce and the Secretary of the Interior could begin the process of shutting down the lobster fishery in the offending state through the imposition of a moratorium on the fishery.

Following the adoption of Rhode Island's regulations, he and a colleague, John Lake, then determined the lobster trap allocation for each lobsterman based upon the individual's lobster fishing history.

The witness explained that the first Notice of Initial Area 2 Lobster Trap Allocation issued to Mr. Rogowski was based upon data that showed no lobster fishing history for 2001 through 2003. Div 2. Mr. Rogowski then provided further information during the data dispute and the allocation was adjusted to ninety-four (94) traps. Div 3. Mr. Angell stated that this second allocation superseded the earlier one. He added that although the allocation limited the number of lobster traps, Mr. Rogowski's multipurpose fishing license allowed the holder to participate in all three fisheries: finfish, shellfish and crustacean.

Under cross examination Mr. Angell stated that the effort control plan assigned the total number of lobster pots for Area 2 based upon the number of traps that were deployed in 2003; there are only approximately 200,000 traps available for all of Rhode Island and parts of Massachusetts, New York and Connecticut.

Although the trap cap was determined by the ASMFC, the method to achieve that cap by allocating the traps to each lobsterman based upon the individual's historic fishing performance was determined by the Area 2 Lobster Conservation Management Team (Team). Mr. Angell stated that all of the members of the Team are lobstermen and that the majority of the Rhode Island members of the Team received the 800 trap allocation.

At the conclusion of testimony Mr. Rogowski presented his closing argument. He asserted that the process is neither just nor fair; it does not treat lobstermen equally. He paid the full fee for his multipurpose commercial fishing license but has only received a 94-pot allocation when others have received the maximum 800-pot allocation.

The Division stated in its closing argument that the regulations were duly promulgated and that they have been equally applied to each fisherman based

upon the individual's activity during the 2001-2003 target years. Counsel urged that the revised Lobster Trap Allocation of 94 traps be upheld.

Conclusion

Section 15.14.2-3 of the *Marine Fisheries Regulations* provides in pertinent part:

(a) Initial Area 2 lobster trap allocations shall be based on reported lobster landings and reported traps fished in the RIDEM lobster catch/effort logbooks (logbooks) and/or the federal Vessel Trip Reports (VTR) during the qualifying years 2001 -- 2003...

Mr. Rogowski has not argued that the revised Initial 2007 RI/Area 2 Lobster Trap Allocation of 94 traps was incorrectly calculated; rather, Applicant asserts that taking away his right to 706 traps (800 previously authorized, minus the 94 allocated) is not justified. He presented neither argument nor evidence that the *Marine Fisheries Regulations* were not duly promulgated and adopted by the Department.

Although Applicant is a disabled veteran (Appl 3) and on social security (Appl 2), Applicant has not requested that the trap allocation be re-calculated pursuant to Part 15.14.2-5 of the *Marine Fisheries Regulations*, which provides for an alternative calculation if a medical hardship existed during the target years of 2001 through 2003. If the Applicant had met the regulatory definition of medical hardship, then his lobster landings history from 1999-2000 could have been used to re-calculate the trap allocation. Yet the Applicant did not seek the substitution; indeed, no evidence was presented regarding the number of traps fished or lobster landings for those years.

Based upon the above, I conclude that the Applicant has not proven that he is entitled to a modification of the revised Initial 2007 RI/Area 2 Lobster Trap Allocation of 94 traps.

Wherefore, after considering the testimonial and documentary evidence

of record, I make the following:

FINDINGS OF FACT

1. The first Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Applicant, dated January 17, 2007, allowed zero (0) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
2. Applicant filed a request for hearing at the Administrative Adjudication Division on March 12, 2007.
3. Based upon further information provided by Applicant of landings in 2001-2003, a revised Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation was issued to Applicant, dated March 12, 2007, that allowed 94 traps
4. Applicant is currently on social security and is classified as 100% disabled by the US Department of Veteran Affairs.
5. Applicant did not present evidence that he was on 100% disability or on social security during the years 2001 -- 2003.
6. Applicant did not present evidence of the number of traps fished or lobster landings for the years 1999 or 2000.

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. In accordance with the method of calculation set forth in Part 15.14.2-3 of the *Marine Fisheries Regulations*, Applicant John T. Rogowski received a revised Initial 2007 RI/Area 2 Lobster Trap Allocation of 94 traps.
3. Applicant has failed to prove by a preponderance of the evidence that he is entitled to a modification of the revised Initial 2007 RI/Area 2 Lobster Trap Allocation of 94 traps.

Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby


ORDERED

1. Applicant's request for a modification of the revised Initial 2007 RI/Area 2 Lobster Trap Allocation is DENIED.
2. The Initial 2007 RI/Area 2 Lobster Trap Allocation for RI Commercial License # MPURP000924 shall remain at 94 traps.

Entered as an Administrative Order this 17th day of October, 2007 and herewith recommended to the Director for issuance as a Final Agency Order.

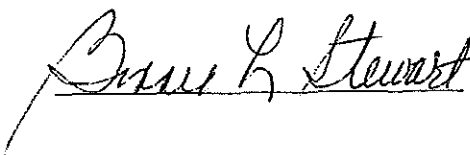

Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this 17th day of October, 2007.


W. Michael Sullivan Ph.D.
Director
Department of Environmental Management
235 Promenade Street, Fourth Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: John T. Rogowski, 197 Grandview Drive, Warwick, RI 02886; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 18th day of October, 2007.



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
LIST OF EXHIBITS

APPLICANT' S EXHIBITS

- | | |
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| Appl 1
for ID | Copy of Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Thomas Wyss |
| Appl 2
Full | Notice of Social Security benefits increase for 2007 |
| Appl 3
Full | Correspondence from U.S. Department of Veterans Affairs to John T. Rogowski confirming 100% service-connected disability |

DIVISION OF FISH AND WILDLIFE' S EXHIBITS

- | | |
|---------------|--|
| Div 1
Full | Copy of Applicant' s hearing request dated March 9, 2007 |
| Div 2
Full | Copy of Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to John Rogowski, dated January 17, 2007. |
| Div 3
Full | Copy of Revised Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to John Rogowski, dated March 12, 2007 |
| Div 4
Full | <i>Curriculum vita</i> of Thomas E. Angell. 2 pages |