

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

RE: TORTOLANI, MICHAEL
LOBSTER TRAP ALLOCATION CFL 000295

AAD No. 07-004/F&WA

DECISION AND ORDER

This matter came before the Department of Environmental Management Administrative Adjudication Division for Environmental Matters (AAD) pursuant to the request for hearing dated January 30, 2007 filed by Michael Tortolani (Applicant) concerning Applicant's Initial 2007 RI/Area 2 Lobster Trap Allocation. The Allocation was established by letter from the Division of Fish and Wildlife (Division) dated January 16, 2007. A prehearing conference was conducted on March 1, 2007 and the hearing commenced immediately thereafter.

The Division was represented by Gary Powers, Esq. Mr. Tortolani represented himself.

The proceedings were 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.); Section 15.14.2-5 of "PART XV: Lobsters, Other Crustaceans, and Horseshoe Crabs" of the Rhode Island Marine Fisheries Regulations (Marine Fisheries Regulations) and the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD Rules).

PREHEARING CONFERENCE

At the prehearing conference, the parties agreed to the following stipulations of fact:

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 10 traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.

At the prehearing conference, the parties submitted the following as issues to be considered by the Hearing Officer at the hearing:

APPLICANT:

1. It would be ludicrous to base any settlement on years 2001 through 2002 in that they predate the actual issuance of the license.
2. Applicant has answered the questions regarding the data dispute and medical disability in his plea.

DIVISION:

1. The Division is uncertain at this time as to the precise nature of the challenge that the Applicant intends to offer to the Division's determination as to his Initial Lobster Management Area 2 Lobster Trap Allocation.
2. The Division contends that the Applicant's allocation was calculated consistent with the requirements 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.*; and that the individual calculation was prepared on the basis of data concerning Applicant's participation in the lobster fishery presented by the Applicant himself.

A list of the exhibits, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

HEARING SUMMARY

The Applicant, Michael Tortolani, testified on his own behalf. It was Mr. Tortolani's testimony that he was not issued a license until 2003. However, he was not prepared to go out and fish fully at that time because he had to get his gear, which he did slowly. The Applicant introduced Applicant's exhibits (as identified in Appendix A attached hereto), and rested his case.

Thomas E. Angell, a Principal Marine Biologist with the Division, was called as a witness for Division. Mr. Angell testified as a lay witness and also as an expert witness in lobster fishery and as an expert witness in the interpretation and application of the Department's lobster regulations.

It was the testimony of Mr. Angell that Parts 15.14.2 et seq of the Marine Fisheries Regulations were required to be adopted and the trap allocations determined pursuant to these regulations in order for the State of Rhode Island to come into compliance with Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster (Addendum VII) as adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

Mr. Angell explained that the ASMFC adopted Addendum VII in an effort to address the problem of over fishing faced by American Lobsters which Mr. Angell had helped to document. In an effort to address this problem, the ASMFC adopted a management plan to reduce the number of traps authorized to be

deployed which includes those deployed in Lobster Management Area 2 (which includes Rhode Island coastal waters).

Mr. Angell testified that if the Department refused to adopt or apply the subject regulations in order to comply with the efforts of the ASMFC lobster management plan, the State of Rhode Island faced a finding of noncompliance by the ASMFC; and thereby with it the imposition of a moratorium on the landing of any lobsters in this state, which would crush the fishing industry.

It was elicited in cross-examination of Mr. Angell that Mr. Tortolani's application was assessed in the same manner as everyone else.

CONCLUSION

It is pointed out by Applicant in his Post Hearing Memorandum that during the hearing he submitted exhibits as evidence of his disability dating from January, 2003. Also that he was awarded his 100 Trap Allocation in a lottery, for no fee in the spring of 2003, and that he spent nearly \$20,000.00 in order to make use of his new allotment.

The Applicant does not contest the accuracy of the data upon which his Initial Lobster Management Area 2 Lobster Trap Allocation was calculated by Division. It is acknowledged by Mr. Tortolani that said data concerning Applicant's participation in the lobster fishery was presented by the Applicant himself. Also, Mr. Tortolani concedes that the Applicant's Allocation determination was accomplished in accordance with the requirements of Part

15.14.2-Area 2 Lobster Trap Effort Control.

Mr. Tortolani concurs with the testimony of Thomas Angell that all the applicants were treated equally as to their respective allotments. However, it is Mr. Tortolani's contention "that attempts by the Department to apply the law equally has denied applicant his right to a fair allocation of his lobster trap license."

Applicant posits that he meets one of the exceptions to the allocation calculation, in that he suffered a medical hardship that established a material incapacitation which prevented him from participating in the lobster fishery during a portion of the 2001-2003 target period upon which the allocation was calculated. Mr. Tortolani avers that he was suffering from a medical condition that precluded his ability to fish during part of the year 2003, because of frequent hospitalization for a condition that actually resulted in his being determined permanently disabled in December, 2003. More extensive details concerning Applicant's medical condition and his Social Security Administration Disability Award are contained in the Exhibits submitted by Applicant (Applicant's Exhibits 6 FULL and 7 FULL).

Applicant argues that attempts by the Department to apply the law equally has denied the Applicant his right to a fair allocation of his lobster trap license. Applicant maintains that an allocation based upon the highest value of "Effective Traps Fished" during any year of the 2001-2003 qualifying period, discriminates

against any licensee not given the opportunity to profit from a three year period of yields.

Mr. Tortolani urges the "Division" to revisit his allocation, adjusting it in a more favorable manner so that he may pursue his supplemental disability income. In addition, Applicant seeks a formula that fairly assesses his disposition as non-licensee holder for the years 2001-2002.

It is Division's contention that the Applicant having established a material incapacity for twelve (12) days of the last year of the target period and thereby a medical hardship pursuant to §15.14.2 5 (d), the Regulations specifically provide the remedy permitted for an applicant establishing such a hardship. The Division maintains that Part (d) of the Regulations explicitly mandate that ". . . the years 1999-2000 be employed to calculate the (subject) applicant's initial Area 2 lobster trap allocation." Wherefore, since the Applicant had no lobster history in the 1999-2000 substituted period, the Applicant is required to be awarded ten (10) traps as his Initial Lobster Management Area 2 Lobster Trap Allocation based upon his 2003 lobster participation.

It is undisputed that the Applicant suffered a material incapacitation which prevented him from participating in the lobster fishery during a portion of the 2001-2003 target period upon which the allocation was calculated. The Applicant satisfied this obligation by meeting the requirements set forth in the Rhode Island Marine Fisheries Regulations. As provided in the definition of "material incapacitation" set forth in the Regulations, the Applicant was determined to be

disabled by the Social Security Administration as of December 19, 2003.
(Applicant's Exhibit 7 Full).

The Rhode Island Marine Fisheries Statutes and Regulations provide in pertinent part as follows:

Section 15.14.2-5 (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.

Section 15.14.2-5 (e) 3.

If an applicant is found to have presented persuasive evidence to qualify pursuant to part 15.14.2-5 (d), the applicant may use landings from any year or years (highest or the average) during the years 1999 and 2000 as the basis for their allocation, provided that the individual must also have landed lobsters with traps during 2004, and must have possessed a state or federal commercial fishing vessel registration and/or a state commercial fishing license or federal lobster permit to land lobster continuously during the period 1999-2004.

The issue for consideration herein is whether the Applicant has proven by a preponderance of the evidence that he is entitled to a modification of the Initial Trap Allocation pursuant to Section 15.14.2-5 of the Marine Fisheries

Regulations. Undoubtedly, the Applicant suffered a material incapacitation which prevented him from participating in the lobster fishery during a portion of the 2001-2003 target period upon which the allocation was calculated. Applicant was determined to be disabled by the Social Security Administration as of December 19, 2003. (Applicant's Exhibit 7 FULL). Thus the Applicant clearly established a material incapacitation for twelve (12) days of the last year of the target period and thereby a medical hardship pursuant to §15.14.2-5 (d) of the Fisheries Regulations.

Although I am keenly aware of the Applicant's hardship, the Regulations specifically provide the remedy permitted for an applicant establishing a material incapacitation during the years 2001-2003. §15.14.2-5 (d) of the Regulations explicitly mandates that ". . . the years 1999-2000 be employed to calculate the applicant's initial area 2 lobster trap allocation." The Applicant failed to cite any statutory or regulatory authority that would create a new formula or consider Applicant's other fishing history in determining a new Lobster Trap Allocation. Since Applicant had no lobster history in the 1999-2000 substituted period, pursuant to Section 15.14.2 of the Marine Fisheries Regulations, Applicant is awarded ten (10) traps as his Initial 2001 RI/Area 2 Lobster Trap Allocation based upon his 2003 participation in the lobster fishery.

The Administrative Adjudication Division is a statutory tribunal, and as such the jurisdiction of AAD is circumscribed by its enabling legislation and other

statutes. The AAD was established by Chapter 17.7 of Title 42 of the R.I. GEN. LAWS. The AAD is charged per §42—17.7-3 with the authority to hear licensing proceedings pursuant to the regulations promulgated by the Director of the Department of Environmental Management.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant, Michael Tortolani.
2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation (Allocation) from the Division of Fish and Wildlife (Division) dated January 16, 2007 advising the Applicant that his initial 2007 Allocation was determined to be 10 traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. On January 30, 2007 the Applicant filed a request for an adjudicatory hearing at the Administrative Adjudication Division.
4. The data upon which the Division calculated Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation was presented by the Applicant himself.
5. The Applicant's Allocation determination was accomplished consistent with the requirements of Part 15.14.2 – Area 2 Lobster Trap Control that was duly promulgated pursuant to R.I. GEN. LAWS §42-35-1 et seq.
6. The Applicant was initially awarded his one hundred (100) Trap Allocation in a lottery, for no fee, in the spring of 2003.
7. The Applicant held a current commercial lobster license during the period 2001-2003.

8. The Applicant suffered a severe medical incapacitation that prevented him from participating in the lobster fishery during a portion of the 2001-2003 target period upon which his Allocation was calculated by the Division.
9. Applicant was determined to be disabled by the Social Security Administration as of December 19, 2003.
10. The Applicant established a material incapacitation as set forth in Section 15.14.2-5 (d) of the Marine Fisheries Regulations for twelve (12) days of the last year of the target period.
11. Applicant had reduced, fishing performance during 2001-2003 due to Applicant's documented disabling physical or medical illness, impairment, or condition that constitutes a material incapacitation involving inpatient care in a hospital, and also outpatient care requiring his continuing treatment.
12. The Applicant's allocation was based on Applicant's fishing performance in Area 2, and his fishing performance (lobster landings and maximum number of traps reported fished) for the years 1999-2000 were employed by Division to calculate Applicant's Allocation.
13. The Fisheries Regulations specifically provide that based on Applicant's material incapacitation, "the years 1999-2000 be employed to calculate Applicant's Allocation".
14. Since the Applicant had no lobster history in the 1999-2000 substituted period, the Fisheries Regulations require that the Applicant be awarded ten (10) traps as his Initial Lobster Management Area 2 Lobster Trap Allocation based upon Applicant's 2003 lobster participation.

CONCLUSIONS OF LAW

After due consideration of the above findings of fact and the legal argument of the parties, I conclude the following as a matter of law:

1. The Administrative Adjudication for Environmental Matters (AAD) has jurisdiction over this matter pursuant to R.I. GEN. LAWS §42-17.7-2; and §15.14.2-5(a) of the Marine Fisheries Regulations.

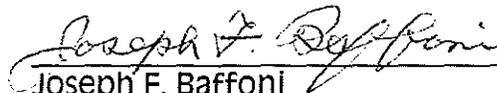
2. The Applicant proved by a preponderance of the evidence that he meets the medical hardship exception set forth in Section 15.14.2-5 (d) of the Marine Fisheries Regulations.
3. The Division's Allocation of ten (10) traps to the Applicant was calculated consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control of the Marine Fisheries Regulations.
4. The Applicant failed to prove by a preponderance of the evidence that his requested increase of his Initial Lobster Management Area 2 Lobster Trap Allocation of ten (10) traps would be consistent with the provisions and purposes of the Marine Fisheries Regulations.
5. The Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation of ten (10) traps is the proper Allocation pursuant to the pertinent statutes and regulations.

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

ORDERED

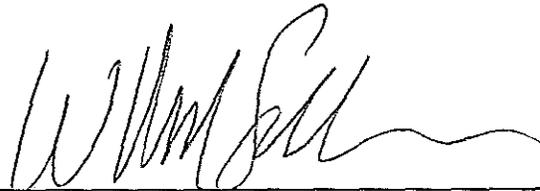
1. Applicant's appeal is DENIED.
2. Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation shall remain at ten (10) traps.
3. Applicant's remaining requests for relief are DENIED.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 7th day of June, 2007.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade St., Room 310
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this 7th day of June, 2007.



W. Michael Sullivan, Ph. D.
Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Michael Tortolani, 7 Aroostook Trail, Narragansett, RI 02882; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 7th day of June, 2007.



APPENDIX A

APPLICANT'S EXHIBITS:

APPLICANT 1 FULL	Bill of Sale for Boat for \$17,000.00
APPLICANT 2 FULL	Bill of Sale for Dinghy for \$450.00
APPLICANT 3 FULL	Bill of Sale for Trailer for \$500.00
APPLICANT 4 FULL	Receipt for Slip for \$300.00
APPLICANT 5 for ID	Notes from Doctor
APPLICANT 6 FULL	Hospital Records
APPLICANT 7 FULL	Social Security Disability Award

DIVISION'S EXHIBITS:

DIVISION 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. 3 Pages (Copy).
DIVISION 2 FULL	The Applicant's letter dated January 30, 2007 requesting a hearing concerning the Division's Revocation Letter. 1 Page (Copy).
DIVISION 3 FULL	<i>Curriculum vita</i> of Mark Gibson. 5 Pages (Copy).
DIVISION 4 FULL	<i>Curriculum vita</i> of Thomas E. Angell. 2 Pages (Copy).
DIVISION 5 FULL	<i>Curriculum vita</i> of John M. Lake. 3 Pages (Copy).