

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

RE: KEANE, TIMOTHY G.
LOBSTER TRAP ALLOCATION CFL000290

AAD No. 07-005/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 Timothy Keane appeared on his own behalf. Gary Powers, Esq. appeared on behalf of the Division.

The hearing was conducted on April 2, 2007. With no objection from the Division, Mr. Keane was allowed until April 13, 2007 to submit the exhibit identified as "Copy of DD Form 214 Certificate of Release or Discharge From Active Duty" and, by agreement, marked as "Appl 7 Full".

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 April 2, 2007. The parties agreed to the following stipulations of fact:

1. 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 twenty-three (23) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
2. The Applicant's Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 was calculated on the basis of data concerning Applicant's participation in the lobster fishery presented by the Applicant himself.

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

1. Applicant wants the 100 traps he was initially given in the 2003 lottery.

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

1. Whether the Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation was calculated to be twenty three (23) traps 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. The governing regulations, i.e., Part 15.14.2-Area 2 Lobster Trap Effort Control, have no provision whereby licensees who were first issued a Commercial Fishing License (CFL) authorizing the deployment of lobster traps for the commercial taking of lobster sometime during the 2001-2003 target period may be allocated a lobster trap allocation in the amount authorized pursuant to the licensee's CFL as opposed to the number of traps determined to be deployed in the governing regulations.

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

HEARING SUMMARY

The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued by the Division assigns a twenty-three (23) trap allocation to Timothy Keane. Div. 1 at 1. Mr. Keane filed an appeal at the AAD indicating that he had obtained his Commercial Fishing License (CFL) as a result of a lottery in 2003 and that he had been recalled to Active Duty in the Coast Guard from February 2003 to July 2003. Div. 2.

The hearing was conducted immediately following the prehearing conference on April 2, 2007. 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.

By letter dated March 28, 2003 Applicant was informed that he had been chosen for one of the 48 available lobster endorsements from the lobster endorsement lottery conducted on March 25, 2003. Appl 5. Mr. Keane testified that he had until the end of April 2003 to obtain the endorsement that authorized one hundred (100) lobster traps. Although he was in the military and stationed in New York at the time he received the letter, Mr. Keane returned to Rhode Island to purchase the CFL with the new lobster endorsement.

He testified that he was released from Active Duty on June 30, 2003; in the following month he acquired traps and readied his boat for fishing. For the first three years Mr. Keane "lobstered" by hand and accumulated more lobster pots. In 2006 he

purchased an electric hydraulic hauler for his 22 foot boat. He explained that these efforts were made so he could fish up to the full amount of authorized traps and that in each year he increased the number of traps and purchased equipment. By the end of last season he was actively fishing sixty (60) traps. The witness explained that the local lobster season was considered to be from the end of April to the end of December.

Applicant stated that his fishing history for the 2001-2003 target period amounted to only three (3) months at the end of the lobster season in 2003.

The Division waived cross-examination of the witness.

The Division's only witness was Thomas Angell. Mr. Angell stated that among his responsibilities as a Principal Marine Biologist, are monitoring the lobster fishery; collecting data; and participating on panels and committees. He serves on the Area 2 lobster technical committee of the Atlantic States Marine Fisheries Commission (ASMFC) and as staff support for the Rhode Island Marine Fisheries Council lobster advisory panel.

The witness explained that the ASMFC lobster technical committee gathers data on the lobster stock to determine the status of the lobster resource. The last three assessments, conducted in 1996, 2000 and 2005, found that the Area 2 lobster fishery was in an overfished condition. Area 2 is one of several lobster management areas created through the ASMFC, and includes all of Rhode Island waters to the Connecticut border and extends to Massachusetts waters at or near Cape Cod.

In order to protect the lobster fishery and reduce lobster mortality in Area 2, the ASMFC had adopted *Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for the American Lobster (Addendum VII)*. Mr. Angell stated that the *Addendum VII* plan was applicable to Massachusetts and Rhode Island, those states

having primary interest in the Area 2 lobster fishery. Massachusetts implemented the provisions of *Addendum VII* in June 2006; Rhode Island adopted regulations in October 2006 to implement *Addendum VII*.

Mr. Angell explained that Rhode Island and Massachusetts were members of the ASMFC. If a member state did not adopt regulations implementing the *Addendum VII* management plan, 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 implementation of a moratorium on the fishery.

Mr. Angell stated that he was "fairly involved" in developing the new regulations: he took elements of the *Addendum VII* management plan and translated it into regulatory language for Rhode Island's adoption. The effort control measures set forth in 15.14.2 of the *Marine Fisheries Regulations* provide for a lobster trap allocation based upon the actual deployment of traps as reported by the fisherman. According to Mr. Angell, two trap numbers are then compared: the number of traps reported in the logbook for that year and the predicted number of traps based upon the poundage of lobster reported taken. He stated that the lesser number is the Initial Lobster Trap Allocation. The number of traps authorized by the CFL or by the Multi-Purpose or Principal Effort Licenses is not considered in determining the allocation.

Mr. Angell explained that the goal of *Addendum VII's* effort control plan was to cap the number of lobster traps in Area 2 based upon the individual's catch and effort history for the years 2001 through 2003. The cap for Area 2 was calculated from the number of traps reported to be actually deployed, not from the number of authorized traps for each license. Mr. Angell stated that Rhode Island's regulations do not consider

using lobster trap data more recent than 2003 in the allocation program; Massachusetts also does not allow using data after 2003.

Under cross-examination the witness stated that CFLs were only issued in 2003 and only fifty (50) licenses had been issued, with fewer current CFLs since some licenses were not renewed. Each CFL was authorized for a maximum of one hundred (100) traps.

Applicant waived his closing argument.

The Division contended that there is no regulatory scheme whereby relief is available to this Applicant.

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...

Section 15.14.2-5 of the *Marine Fisheries Regulations* provides for an alternative calculation if a medical hardship or military service hardship existed during the target years:

- (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. (emphasis added)

Under subsection (e)(2) of 15.14.2-5, use of the military service hardship exception is restricted:

In order to permit the employment of the military service hardship exception set out in part 15.14.2-5(d), an applicant must present to the RIDEM, written documentation establishing that the applicant either served on active duty of one hundred eighty (180) or more days during the years 2001-2003 in the Army, Navy, Air Force, Marines or Coast Guard of the United States; or as a member of a national guard or reserve component of the same which was activated by order of the Department of Defense for a period of one hundred and eighty (180) or more days during the years 2001 – 2003.

Mr. Keane testified about his military service and provided a Certificate of Release or Discharge from Active Duty. Appl 7. The document established that he was on Active Duty with the United States Coast Guard Reserve from February 14, 2003 through June 30, 2003, a period totaling 137 days. Because the exhibit was submitted following the hearing, there was no opportunity for Mr. Keane to explain items set forth in the document, specifically "Members [sic] Initial Service Contract Was For 8 Years" and "Total Prior Active Service" which appears to indicate 3 years, 11 months and 28 days. It may be that Applicant served at least some of this Active Duty during the target years 2001-2003 but the only clear evidence presented was the military service of 137 days during 2003.

Undoubtedly Mr. Keane's 2003 military service imposed a hardship upon him and his family. The *Marine Fisheries Regulations*, however, has set a numerical

as a requirement to claim the military service hardship exception for an alternative calculation of the Initial Lobster Trap Allocation. Mr. Keane has not established that he served 180 or more days of Active Duty during the target period.

It is interesting to note that if Mr. Keane had achieved the 180 days threshold, he, like all other CFL holders, would not have had a 1999-2000 fishing history to substitute in an alternative calculation. Under the circumstances of this case, however, it is unnecessary for me to reach the issue of the reasonableness of providing a phantom alternative calculation to CFL holders.

Based upon the above, I conclude that Mr. Keane is not entitled to a modification of his Initial Lobster Trap Allocation.

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

FINDINGS OF FACT

1. Commercial fishing licenses (CFLs) with the lobster endorsement were only issued in 2003, via the lottery, and approximately fifty (50) individuals were CFL lottery winners.
2. The CFLs with lobster endorsement authorized one hundred (100) traps.
3. Applicant was chosen in the 2003 lobster endorsement lottery for one of the available lobster endorsements to be added or issued with his CFL.
4. Applicant is currently the holder of a CFL with lobster endorsement (CFL000290).
5. 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 twenty-three (23) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
6. Applicant filed a request for hearing at the Administrative Adjudication Division on January 30, 2007.

7. Applicant was on Active Duty in the United States Coast Guard Reserve from February 14, 2003 until his release from Active Duty on June 30, 2003, a period of 137 days.
8. Applicant presented evidence that he landed lobsters with traps in 2003 through 2006.

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 the military service hardship exception set forth in sections 15.14.2-5 (d) and (e) of the *Marine Fisheries Regulations*.
3. 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 to sections 15.14.2-5 (d) and (e) of the *Marine Fisheries Regulations*.

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 Initial 2007 RI/Area 2 Lobster Trap Allocation is DENIED.
2. The Initial 2007 RI/Area 2 Lobster Trap Allocation for RI Commercial License # CFL000290 shall remain at twenty-three (23) traps.

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

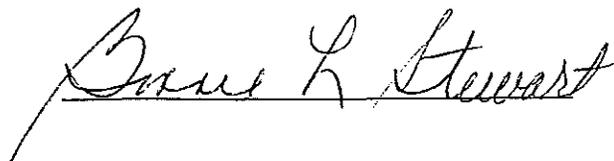

Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this 10th day of September,
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 Decision and Order to be forwarded, via regular mail, postage prepaid to: Timothy G. Keane, P.O. Box 1720, Block Island, RI 02807; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 11th day of September, 2007.



RE: KEANE, TIMOTHY G.
LOBSTER TRAP ALLOCATION CLF000290
Page 11

AAD No. 07-005/F&WA

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

- | | |
|----------------|---|
| Appl 1
Full | Copies of relevant pages of Timothy G. Keane's 2003 Lobster Catch and Effort Logbook |
| Appl 2
Full | Copies of relevant pages of Timothy G. Keane's 2004 Lobster Catch and Effort Logbook |
| Appl 3
Full | Copies of relevant pages of Timothy G. Keane's 2005 Lobster Catch and Effort Logbook |
| Appl 4
Full | Copies of relevant pages of Timothy G. Keane's 2006 Lobster Catch and Effort Logbook |
| Appl 5
Full | Letter from Margaret McGrath, Programming Services Officer, DEM Office of Boat Registration and Licensing, dated March 28, 2003 |
| Appl 6
Full | Copy of Receipt from Electra-Dyne, Co., Inc. dated April 4, 2006 |
| Appl 7
Full | Copy of Form DD-214, Certificate of Release or Discharge from Active Duty |

DIVISION OF FISH AND WILDLIFE'S EXHIBITS

- | | |
|---------------|--|
| Div 1
Full | The Notice of Initial Area 2 Lobster Trap Allocation issued to Timothy Keane dated January 16, 2007. 3 Pages (Copy). |
| Div 2
Full | Applicant's letter to AAD dated January 29, 2007 requesting a hearing. 1 Page (Copy). |
| Div 3 | Withdrawn by Division |
| Div 4
Full | <i>Curriculum vita</i> of Thomas E. Angell. 2 Pages (Copy). |
| Div 5 | Withdrawn by Division |