

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

RE: KENYON, JOHN III
LOBSTER TRAP ALLOCATION MPURP 000670

AAD No. 07-046/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 Kenyon III appeared on his own behalf. Gary Powers, Esq. appeared on behalf of the Division.

The hearing was conducted on March 26, 2007.

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 March 26, 2007. 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 One Hundred Two (102) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. The Applicant did not land any lobsters during 2004.

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

1. Whether the Applicant did not suffer a medical hardship during the target years of 2001-2003 pursuant to the requirements set forth in R.I.M.F.R. Parts 15.14.2-5(d) and (e)(1).
2. Whether the Applicant cannot present evidence that he landed any lobsters during 2004 as required by R.I.M.F.R. Part 15.14.2-5(e) (3).

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 an allocation of one hundred two (102) lobster traps to John Kenyon III. Mr. Kenyon filed an appeal at the AAD on February 16, 2007, citing

his medical condition from November 1997 up until his discharge from physical therapy on February 8, 2007. The hearing was conducted immediately following the prehearing conference on March 26, 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.

The Applicant testified that he has always fished 150 pots, up until November 1997 when he injured his left rotator cuff. Following unsuccessful treatments and physical therapy, the shoulder was operated on in January 1999. He stated that he tried fishing in June 1999 but found he could not handle 150 pots. Mr. Kenyon injured his right hamstring in 2001 and his right rotator cuff in 2002. The right rotator cuff required surgery in April 2004. Applicant stated that he did not fish in 2004 or 2005.

Under the Division's cross examination the witness testified that he only fishes in July and August, and "maybe some in June." He stated that he had not obtained any determination from a government agency regarding disability. He did not participate in the lobster fishery in 2004.

The Division's only witness was Thomas Angell. Mr. Angell stated that he is employed as a Principal Marine Biologist in the DEM Division of Fish and Wildlife. His duties include monitoring the Rhode Island lobster fishery in Rhode Island waters and in Area 2 to determine the status of the lobster resource. He serves on the Lobster Technical Committee of the Atlantic States Marine Fisheries Commission, which is responsible for compiling data in management areas; analyzing the data; and determining the status of the resource.

The witness explained that the last three stock assessments determined that the Area 2 lobster resource had been overfished. In order to reduce the lobster fishing mortality in Area 2, the Atlantic States Marine Fisheries Commission (ASMFC) adopted *Addendum VII* to cap the number of traps to the level deployed in 2003.

According to the witness, Massachusetts has adopted regulations implementing the provisions of *Addendum VII*. Mr. Angell testified that he was involved in taking the language from *Addendum VII* and drafting regulations for Rhode Island. He stated that *Addendum VII* is a mandated plan and that Rhode Island, as a member of the ASMFC, was required to adopt the management plan. If Rhode Island did not promulgate regulations to implement the plan, then it could either submit an alternative plan that was a conservation equivalent or it would be found "out of compliance". If the latter determination was made by the ASMFC, then the U.S. Departments of

Commerce and the Interior would become involved, imposing a moratorium on the lobster fishery.

Mr. Angell testified that he had a role in calculating Applicant's lobster trap allocation and that he conducted the calculation in the same manner as for all other applicants. He reviewed information regarding the reported pounds of lobster landed and the reported number of traps deployed for the years 2001 through 2003 to arrive at the initial lobster trap allocation. Mr. Angell stated that if Applicant had established a medical hardship under the regulations, then information from 1999 and 2000 could be used to determine the initial lobster trap allocation. He maintained that in order for data from 1999 or 2000 to be considered, however, Applicant must have had lobster landings in 2004. His information showed that Mr. Kenyon had no lobster landings in 2004.

Under cross examination by Applicant the witness repeated the necessity of having landings in 2004 to consider data from 1999 or 2000.

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. Kenyon has not argued that the Initial 2007 RI/Area 2 Lobster Trap Allocation of one hundred two (102) was incorrectly calculated; rather,

Applicant claims a medical hardship during the 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)

Although subsection (e) proceeds to delineate further what shall be considered in determining whether the medical hardship exception may be employed, it is unnecessary to reach that issue since the Applicant cannot demonstrate compliance with Section 15.14.2-5 (e) of the *Marine Fisheries Regulations*, which includes the following requirement:

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. (emphasis added)

Mr. Kenyon did not land lobster in 2004. He is therefore not entitled to a recalculation of his lobster trap allotment.

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 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 one hundred two (102) 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 February 16, 2007.
3. Applicant presented evidence of his medical condition from November 1997 through February 2007.
4. Applicant did not land any lobsters during 2004.

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 to section 15.14.2-5 (e)3 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 # MPURP000670 shall remain at one hundred two (102) traps.

Entered as an Administrative Order this 18th day of July, 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 20th day of July, 2007.



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

APPENDIX A
LIST OF EXHIBITS

APPLICANT'S EXHIBITS

APPL 1 Correspondence from John L. Kenyon III
For Id

APPL 2 Patient Procedure History dated 3/6/07
for ID

APPL 3 Doctors' Reports
for ID

DIVISION OF FISH AND WILDLIFE'S EXHIBITS

DIV 1 The Notice of Initial Area 2 Lobster Trap Allocation from the
Full Division dated January 16, 2007 advising the Applicant that
 his initial 2007 allocation was determined by the Division to
 be One Hundred Two (102). 3 Pages (Copy).

DIV 2 The Applicant's letter requesting a hearing concerning the
Full Division's Trap Allocation Letter. 1 Page (Copy).

DIV 3 *Curriculum vita* of Thomas E. Angell. 2 Pages (Copy).
Full

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CERTIFICATION

I hereby certify that I caused a true copy of the within Final Agency Decision and Order to be forwarded, via regular mail, postage prepaid to: John Kenyon, III, 30 Champlin Drive, Westerly, RI 02891; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 20th day of July, 2007.

A handwritten signature in cursive script, reading "Bruce L. Stewart", is written over a horizontal line.

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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.