

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
RE: Peter A. DiBiase
AAD No. 07-049/F&WA
Lobster Trap Allocation MPURP 000697
2008

DECISION AND ORDER

This matter came on to be heard before Hearing Officer David Kerins on the appeal of Peter A. DiBiase (“DiBiase” or “Applicant”) of the determination by the Department of Environmental Management, Division of Fish and Wildlife (“Division”) of his initial 2007 Area 2 Lobster Trap Allocation (“Allocation”). By letter dated January 16, 2007, the Applicant was notified that he was authorized an allocation of (0) traps based on the Applicant's activity in the lobster trap fishery during the target years of 2001 through 2003 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. Applicant requested a hearing by letter dated February 19, 2007. A status conference was held on April 12, 2007. Applicant requested the matter be continued until after resolution of the federal case. On April 15, 2008 a Notice was issued establishing an August 25, 2008 hearing date. On August 19, 2008 a Notice was issued rescheduling the hearing to September 8, 2008 at 2:00 p.m. The prehearing conference commenced on September 8, 2008 followed by the hearing, The Applicant appeared *pro se* and the Division was represented by Gary Powers, Esq.

EXHIBITS

At the prehearing conference, the following documents were submitted and marked as indicated below:

FOR DIVISION:

- DIV 1 (Full) The Notice of Initial Management Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined to be Zero (0) traps based upon his reported activity in the lobster trap fishery in the target period of the years 2001 through 2003. 3 Pages (Copy).
- DIV 2 (Full) The Applicant's letter dated February 19, 2007 requesting a hearing concerning the Division's January 16, 2007 Notification Letter. 1 Page (Copy).
- DIV 3 (Full) A Summary of Lobster Landings and Trap Deployment for the Years 1999 through 2004 reported by Peter A. DiBiase as prepared by Thomas E. Angell on August 22, 2008. 1 Page (Copy).
- DIV 4 (Full) Curriculum vita of Thomas E. Angell. 2 Pages (Copy).
- DIV 5 (Full) The testimony of witness Thomas Angell contained in that certain deposition In Re: Addendum 7 - Lobster Management Area 2 Effort Control Plan dated June 13, 2007 agreed to be accepted in Lieu of live testimony.

STIPULATED FACTS

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 received a Notice of Initial Management Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined to be Zero (0) traps based upon his reported activity in the lobster trap fishery in the target period of the years 2001 through 2003.
3. The lobster trap allocation calculation was prepared on the basis of data concerning Applicant's history of participation in the lobster trap fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.
4. There was a need for the regulation entitled Area 2 Lobster Trap Effort Control and it was properly adopted.
5. The testimony of witness Thomas Angell contained in that certain deposition In Re: Addendum 7 - Lobster Management Area 2 Effort Control Plan dated June 13, 2007 may be accepted in Lieu of live testimony. A copy of said deposition is annexed here to and made a part hereof as DIV 5 (Full).

WITNESSES

FOR DIVISION:

Thomas E. Angell, Principal Marine Biologist, Division of Fish and Wildlife was presented by way of deposition, DIV 5 (Full).

FOR RESPONDENT:

The Applicant testified on his own behalf.

ISSUES

Division identified the following issue:

1. 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.

Applicant identified the following issues prior to hearing:

1. He has had a full multipurpose license for many years and chose not to fish for conservation purposes. He feels that he should not be unreasonably punished for being a conservationist.
2. He questions the constitutionality of the formula as being unfair and a "taking" without compensation.

HEARING SUMMARY

The Applicant Peter A. DiBiase, testified on his own behalf. He testified that he had had a multi-purpose license for more than 20 years. He stated that he chose not to fish for lobster at some point during the target years because of his conservationist leanings and to support the commercial fishermen. He stated his feelings that conservationist should not be punished. He expressed concern about the regulations in that they were onerous and unfair to people who only wanted to fish 20 - 25 traps. He considers the regulations unfair an unconstitutional taking without compensation.

The testimony of Thomas E. Angell, a Principal Marine Biologist with the Division, was taken from a deposition DIV 5 Full. 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. Mr. Angell testified that he is responsible for reviewing data on file regarding individual fishing history for the purposes of determining the 2007 lobster trap allocation.

The hearing officer considered the exhibits admitted by agreement. Division #1 (Full) is a letter from the Division of Fish and Wildlife to Peter A. DiBiase dated January 16, 2007. This letter is Mr. DiBiase's Notice of Lobster Trap Allocation. The exhibit indicates that the Applicant had no reported landings for the target period of 2001 - 2003 and that his Lobster Trap Allocation was Zero (0).

Division's Exhibit #3 is described as lobster landings and trap deployment data for Peter A. DiBiase, MPURP 000697 for 1999 through 2004. The fishing history reflected in MPURP 000697 for Peter A. DiBiase was 0 for the years 99, 01, 02, 03 and 04.

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 holders 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 indicates that he did not participate in the lobster 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 the Applicant's Initial 2007 Area 2 Lobster Trap Allocation. The result of that standard calculation was that Applicant's allotment was reduced to Zero (0) traps.

The Regulations establish that the qualifying period for determining the 2007 Area 2 Lobster Trap Allocation is 2001 through 2003. Only two exceptions are enumerated in the Regulations which, if applicable, allow a departure from the 2001 - 2003 qualifying period. Those exceptions involve military service and disabling physical or medical illness, neither of which is alleged by Applicant. 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. 1966) (*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 clear and unambiguous. The qualifying years are 2001 - 2003. The Division appropriately employed the data provided by Applicant and determined his allocation under the Regulations, to be Zero.

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 a commercial fishing license MP000697.
2. Applicant filed an application with RIDEM for a 2007 Initial Area 2 Lobster Trap Allotment determination.
3. The Applicant received notice of his 2007 Initial Area 2 Lobster Trap Allotment determination by letter dated January 16, 2007.
4. The lobster trap allocation dated January 16, 2007 was 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.
5. Applicant's Allotment for 2007 is Zero (0) traps.
6. Applicant filed a request for hearing with the Administrative Adjudication Division on February 19, 2007.
7. The Applicant reported no participation in the lobster fishery to the Department during the years 2001 through 2003.
8. The Applicant reported no landings of lobster to the Department during the year 2004.
9. The Applicant did not fish for lobster during the target years because of his concerns for the stock and other commercial fishermen.
10. Applicant disagrees with the Regulations as adopted.
11. The Regulations contain only two exceptions to the 2001 - 2003 qualifying years.
12. Applicant does not allege medical hardship or military service.

CONCLUSION 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 Division's Allocation of Zero (0) 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 due to his lack of any documented fishing history.
3. 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 Zero (0) traps would be consistent with the provisions and purposes of the Marine Fisheries Regulation.
4. The Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation of Zero (0) 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 Zero (0) traps.

Entered as an Administrative Order this _____ day of September, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins
Hearing Officer

Entered as a Final Agency Order this _____ day of _____, 2008

W. Michael Sullivan, PhD.
Director

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI Gen. 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