

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

RE: ROGERS, SCOTT
LOBSTER TRAP ALLOCATION MPURP 000720

AAD No. 07-089/F&WA

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on the appeal of Scott Rogers ("Mr. Rogers" or "Applicant") of the determination by the Department of Environmental Management, Division of Fish and Wildlife ("Division") that his Initial 2007 Area 2 Lobster Trap Allocation ("Allocation") was untimely. By letter dated May 21, 2007, the Applicant was notified that his application for his Initial 2007 Area 2 Lobster Trap Allocation was rejected because his application was submitted after the end of application period (after February 1, 2007). On June 15, 2007, Applicant filed a request for hearing with the AAD contesting the rejection of his Application. The governing regulations are the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs, dated November 22, 2006¹ ("Regulations").

A status conference was held on July 6, 2007 and an Order and Establishing a Control Date of August 7, 2007 was entered. On July 28, 2007 Applicant requested a hearing in September. On August 22, 2007 an Order was entered establishing a September 12, 2007 hearing date. On September 11, 2007 Applicant called AAD requesting a December hearing. The prehearing and hearing was scheduled for December 3, 2007 at 1:30 p.m. The prehearing conference commenced on December 3, 2007. The Applicant appeared *pro se* and the Division was represented by Gary Powers, Esq. At the prehearing conference the Division waived its

¹ The Regulations applicable to the instant proceeding were filed with the Secretary of State on November 22, 2006. The Regulations were superseded by amended regulations dated April 11, 2007 and August 1, 2007.

objection to the timeliness of Applicant's filing and alleged that Applicant was not entitled to relief on other issues.

EXHIBITS

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

For Applicant:

App. 1 (Full) Copy of Schedule D of Applicant's 2001 Federal Tax Return.

App. 2 (Full) Copy of Schedule D of Applicant's 2002 Federal Tax Return

For the Division of Fish and Wildlife:

Div. 1 (Full) The Division's Notice dated April 12, 2007 that the Applicant's application for a determination as to his Initial Area 2 Lobster Trap Allocation had not been submitted in a timely manner. 1 Page (Copy).

Div. 2 (Full) The Applicant's submission dated April 14, 2007 of Required Information in response to the Division's notice dated April 12, 2007. 1 Page (Copy).

Div. 3 (Full) The Applicant's letter dated June 14, 2007 requesting a hearing before the Administrative Adjudication Division concerning the Division's April 12, 2007 Notification Letter. 1 Page (Copy).

Div. 4 (for ID) A summary of the Applicant's Lobster Landings and Trap Deployment Data relative to MPURP 000720 for the years 1999 through 2004 as reported to the Division and as prepared by Marine Biologist Thomas Angell on November 27, 2007. 1 Page (Copy).

Div. 5 (Full) A summary of the Applicant's Lobster Landings and Trap Deployment Data for the years 1999 through 2004 relative to Federal Lobster Permit 134196 as reported to

Page 3

the Division and as prepared by Marine Biologist Thomas Angell on November 27, 2007. 1

Page (Copy).

Div. 6 (Full) Vessel Permit History for the F/V Amy Lee Hull Id. #R15878N A relative to Applicant Scott Rogers as prepared by the National Marine Fisheries Service. 1

Page (Copy).

Div. 7 (Full) Vessel Permit History for the F/V Amy Lee Hull Id. #R15878N A relative to Captain Robert W. Trager as prepared by the National Marine Fisheries Service. 1

Page (Copy).

Div. 8 (Full) *Curriculum vita* of Thomas E. Angell. 2 Pages (Copy).

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 transferred Federal Lobster Permit 134196, i.e., the F/V Amy Lee Hull Id. #R15878N to Captain Robert W. Trager on May 1, 2003.

(3) When the Applicant transferred Federal Lobster Permit 134196, i.e., the F/V Amy Lee Hull Id. #R15878N to Captain Robert W. Trager on May 1, 2003, the history of lobster trap fishery during the target years of 2001 through 2003 by the F/V Amy Lee was transferred from the Applicant to Captain Trager.

WITNESSES

For Applicant

Scott Rogers testified regarding facts in support of his appeal.

For the Division of Fish and Wildlife

Thomas E. Angell, Principal Marine Biologist, Division of Fish and Wildlife (offered as a lay witness and as an expert witness concerning the lobster fishery as well as an expert witness concerning the interpretation and application of the Department's lobster regulations)

ISSUES

Applicant identified the issue as "The Law is unfair because he is the holder of a state license and was not aware of the fact that he would not receive an allocation based on the transfer of his fishing history at the time of the sale of his boat and Federal Permit".

The Division identified the issue as "The Applicant is not entitled to a Lobster Trap Allocation due to the fact that his only history of lobster trap fishing activity during the target years of 2001 through 2003 was generated relative to Federal Lobster Permit 134196, i.e., The F/V Amy Lee Hull id. # R15878N and when the Applicant sold said vessel and permit he also sold his fishing history".

HEARING SUMMARY

The Applicant, Scott Rogers, testified on his own behalf. He testified that he felt that the law was unfair. He testified further that he had fished commercially in this state with a state license for 9 to 10 years. He stated that he did not realize that when he sold his vessel with Federal Permit and fishing history that he would lose his right to fish under his state license.

On cross examination Mr. Rogers acknowledged harvesting lobsters by trap on the vessel Amy Lee. He further acknowledged that on May 1, 2003 he sold the vessel Amy Lee,

Hull Id. #R15878N to Captain Robert W. Trager together with Federal Lobster Permit 134196 and fishing history. After the conclusion of cross-examination Applicant rested.

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. 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. Mr. Angell reviewed in his testimony the data contained in two exhibits: Div 4 (for Id) and Div 5 (Full).

Division's Exhibit #4 was described as lobster landings and trap deployment data for Scott Rogers, MPURP 000720 for 1999 through 2004. Mr. Angell testified as to the method of collection of the data and the interpretation of the information contained therein. In his testimony Mr. Angell stated that the fishing history reflected in MPURP 000720 for Scott Rogers was 0. The Division moved to enter Division's 4 as a full exhibit which, without objection, was so Ordered.

Division's Exhibit #5, which had previously been marked as a full exhibit by agreement, is purported to be a record of lobster landings and trap deployment data for Scott Rogers, Federal Lobster Permit 134196 for the period of 1999 through 2004. The entry at the bottom of the exhibit states: "Scott Rogers' Area 2 lobster trap fishing history was accrued under Federal Lobster Permit 134196. Federal Lobster Permit 134196 was transferred with its Area 2 history (504) traps to Roger Trager in 2003/2004. This resulted in no Area 2 Lobster trap history for Scott Rogers under his RI Commercial Fishing License, MPURP 000720."

Mr. Angell next testified as to Division's Exhibit #6 and 7 which had previously been admitted by agreement as full exhibits. This document, Mr. Angel explained, reflected the

Vessel Permit History for F/V Amy Lee R15878N. Division's 7 show that on or before June 25, 2003 the vessel registration and Federal Permit was placed in the name of Robert Trager. The testimony of the state's expert indicated that as part of the Federal Regulatory system when a vessel is sold together with Federal Permit then the fishing history is also transferred to the purchaser unless expressly retained. Mr. Angell testified that the purchase of F/V Amy Lee was allowed to rely on the fishing history and was given an allocation of 504 lobster traps. Mr. Angell indicated that there can be only one allocation per fishing history.

ANALYSIS

The Division having waived its objection to the timeliness of Mr. Rogers' application, this analysis will only address the Applicant's entitlement to a lobster trap allocation based on his fishing history.

Section 15.14.2-3 of the Marine Fishing 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 . . .

The undisputed facts are that Applicant on or before May 1, 2003 was the holder of two fishing licenses: Rhode Island MPURP 000720 and Federal Lobster Permit 134196. Applicant was also the owner of fishing vessel F/V Amy Lee Hull ID #RI5878N. Testimony and exhibits show that Applicant had a documented fishing history associated with Federal Lobster Permit 134196 which would entitle him to an allotment of 504 traps. Testimony and exhibits show that Applicant had no documented fishing history associated with Rhode Island MPURP 000720.

On or about May 1, 2003, Applicant sold fishing vessel F/V Amy Lee Hull Id #RI5878N to Roger Trager together with Federal Lobster Permit 134196. Under Federal Regulations, unless expressly reserved, when a Federal Lobster Permit is transferred, the transferee also receives the transferor's fishing history. Therefore, when Applicant sold his boat and Federal Lobster Permit on or about May 1, 2003 he also sold his fishing history.

The evidence indicates that the transferee, Roger Trager, applied for and was issued a lobster trap allocation of 504 traps based on the documented fishing history received from the Applicant. The effect of the transfer left Applicant with no documented fishing history. The Applicant indicated that he was unaware that when he transferred his Federal Lobster Permit while retaining his state license that he would be precluded from obtaining any lobster trap allotment.

FINDINGS OF FACT

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant, Scott Rogers.
2. The Applicant received a notice dated May 21, 2007 that his application for Initial Area 2 Lobster Trap Allocation was rejected because his application was submitted after the deadline.
3. The Applicant requested a hearing by letter dated June 15, 2007.
4. Applicant had a documented fishing history of lobster landings by trap on Federal Lobster Permit 134196 for 1999 through 2002 which would have entitled him to an allocation of 504 traps.
5. Applicant had a State License MPURP 000720 with no documented landings of lobster by trap for the period of 1999 through 2003.

6. On May 1, 2003 Applicant transferred to Robert W. Trager fishing vessel F/V Amy Lee Hull ID # R15878N together with Federal Lobster Permit 134196 and fishing history.

7. Robert W. Trager was issued an allocation of 504 traps based on the fishing history under Federal Lobster Permit 134196 which he acquired from Applicant.

8. After transferring his Federal Lobster Permit with his fishing history, applicant had no documented fishing history.

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:

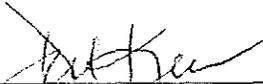
1. The Administrative Adjudication for Environmental Matters (AAD) has jurisdiction over this matter pursuant to R.I. GEN. LAWS § 42-17.7-2; and § 15.14.2-5(a) of the Marine Fisheries Regulations.
2. The Division's Allocation of zero (0) traps to the Applicant was calculated consistent with the requirements 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 Regulations.
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 28th day of December, 2007 and herewith recommended to the Director for issuance as a Final Agency Order.



David Kerins
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 31st day of December,

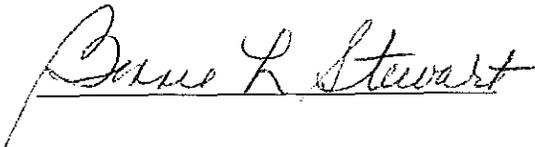
2007.



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: Scott Rogers, 17 North Woody Hill Road, Bradford, RI 02808; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, 4th Floor, Providence, RI 02908 on this 31st day of December,



Bruce R. Stewart

RE: ROGERS, SCOTT

AAD No. 07-089/F&WA

LOBSTER TRAP ALLOCATION MPURP 000720

Page 10

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.