

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
RE: GREGORY DUCKWORTH
AAD No. 07-068/F&WA
AAD No. 07-069/F&WA
Federal Lobster Permit #240801
Federal Lobster Permit #242178
2008

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 determinations by the Department of Environmental Management, Division of Fish and Wildlife (Division) of the Initial 2007 RI/Area 2 Lobster Trap Allocation for his two federal permits: Federal Lobster Permit #240801 and Federal Lobster Permit #242178.

The hearing was conducted on June 2, 2008 immediately following the prehearing conference. Applicant Gregory Duckworth appeared on his own behalf. Gary Powers, Esq. represented the Division.

The adjudicatory 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

The prehearing conference was conducted on June 2, 2008. The parties agreed to the following stipulations of fact:

1. The Administrative Adjudication Division has subject matter jurisdiction over these actions and personal jurisdiction over the Applicant.
2. The Applicant did not land any lobsters harvested by trap attributable to Federal Lobster Permit #240801 (F/V *Reaper*) during the years 2001 - 2003.
3. The Applicant did not land any lobsters harvested by trap attributable to Federal Lobster Permit #242178 (F/V *True American*) during the years 2001 - 2003.
4. The Applicant landed lobsters harvested by trap attributable to Federal Lobster Permit #242517 (F/V *Twister*) during the years 2001 - 2003.
5. The Applicant was allocated 800 lobster traps pursuant to Federal Lobster Permit #242517 (F/V *Twister*) based upon reported activity in the lobster trap fishery attributable to Federal Lobster Permit #242517 (F/V *Twister*) during the years 2001 - 2003.
6. The Applicant did not land any lobsters harvested by trap attributable to MPURP #000146 during the years 2001 - 2003.
7. The North Cape spill occurred on 1/19/96 killing approximately 9 million lobsters.
8. The Lobster Restoration Project undertaken to correct the damaged lobster industry commenced in the year 2000 and was completed in 2006.

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

1. Had the North Cape spill not occurred, Applicant would have shown significant lobster landings with his vessels between 2001 - 2003 just as he had historically done from 1987 - 1999.
2. Applicant was not hauling lobster traps in 2001 - 2003 because he was mitigating his damages from the negative effects of the North Cape spill by doing other things seeing that his catch on lobsters fell below the break-even point.

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

1. Whether 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..

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

HEARING SUMMARY

Four Notices of Initial 2007 RI/Area 2 Lobster Trap Allocation were issued by the Division to Gregory Duckworth. The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation for RI commercial fishing license #MPURP000146 assigned a zero (0) trap allocation. Div 4. The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation for Federal Lobster Permit #242517 assigned an 800 trap allocation. Div 3. The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation for Federal Lobster Permit #240801 assigned a zero (0) trap allocation. Div 1. The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation for Federal Lobster Permit #242178 assigned a zero (0) trap allocation. Div 2. Mr. Duckworth filed an appeal at the AAD on March 15, 2007 that challenged the lobster trap allocations for Federal Lobster Permit #240801 and for Federal Lobster Permit #242178. Div 5.

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 for each of the federal permits pursuant to section 15.14.2-5 of the *Marine Fisheries Regulations*.

The Applicant's only witness was himself. Mr. Duckworth testified that he was a fulltime lobster fisherman from 1987 to 1999, with 90% of his lobster pots in Area 2. As a result of the North Cape oil spill he faced a decrease in lobster catch and huge financial damages, including that his fishing vessel *Reaper* fell below the break-even point in 1998. Mr. Duckworth was dealing with insurance adjusters and trying to negotiate a settlement. He was informed that he and the other lobstermen had a legal obligation to mitigate damages and would not be paid to haul empty lobster traps. In order to avoid more losses, he redirected his vessels out of the lobster fishery and into the gill net fishery.

Applicant argued that using lobster landing history from 2001 to 2003 to determine an allocation was unfair because it was right in the middle of the Lobster Restoration Project which started in 2000 and was completed in 2006. He stated that to use the 2001 - 2003 period caused him to be a victim of the oil spill not just once with his financial damages from the spill, but twice because it compromised his lobster trap allocation.

Mr. Duckworth reviewed the exhibits he presented: a DEM News Release dated August 10, 2006 celebrating the completion of the North Cape Lobster Restoration Program that was begun in 2000 (Appl 1); a document issued jointly from the National Oceanic and Atmospheric Administration, the United States Fish and Wildlife Service and the Rhode Island Department of Environmental Management providing information regarding the spill and summarizing its cost, including the 9 million lobsters killed (Appl 3); a NOAA News story regarding the assessment of damages from the spill (Appl 5); a statement of lobster traps hauled and pounds caught for the F/V *Reaper* for the years 1993 through 1999, prepared for the insurance adjusters, that documents the dramatic decrease in lobsters harvested from the high in 1995, to the years following the spill (Appl 7); a graph comparing monthly lobster income for the years 1994, 1995 and 1998 (Appl 8);

1994 lobster income statement for the F/V *Reaper* (Appl 9); 1995 lobster and gill net income statement for the F/V *Reaper* (Appl 10); 1998 lobster and gill net income statement for the F/V *Reaper* (Appl 11); and photos of the uninsured F/V *True American* that sank on July 30, 2003, was recovered, but was out of commission for the remainder of the year (Appl 15).

The Division waived cross examination of the witness. Applicant then rested his case.

The Division called one (1) witness: Thomas Angell, a Principal Marine Fisheries 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. Mr. Angell serves as staff coordinator on the Lobster Advisory Panel of the Rhode Island Marine Fisheries Council (RIMFC). Mr. Angell has also served as a member of the Lobster Technical Committee of the Atlantic States Marine Fisheries Commission (ASMFC) for more than ten years. He stated that his primary duties include compiling Rhode Island lobster data for stock assessments.

Stock assessments that were conducted in 1996, 2000 and 2006 concluded that the Area 2 lobster resource, and southern New England's, were overfished. To address the overfished condition, the ASMFC adopted management initiatives to alleviate the overfishing: the minimum size of a legal lobster was increased; escape vent size was increased; and restrictions were placed on non-trap lobster fishermen. Most recently the ASMFC developed the Area 2 Lobster Effort Control Plan, also referred to as *Addendum VII*.

According to the witness, the purpose of the *Addendum VII* plan is to limit the number of lobster traps fished in Area 2 to the number of traps that were fished in 2003. In 2003 there were substantially fewer number of traps fished than in previous years. The plan capped the number of traps to be used in Area 2 at 220,000. Mr. Angell testified that the states in Area 2 had to comply with the *Addendum VII* effort control plan or face a noncompliance finding and sanctions: Letters would be sent to the United States Secretary of Commerce and the Secretary of the Interior who could then impose a moratorium on the lobster fishery. Mr. Angell stated that he took the mandatory and optional elements of the *Addendum VII* effort control plan and drafted section 15.14.2 of the *Marine Fisheries Regulations*.

The effort control plan imposed lobster trap allocations based upon an individual's historic participation in the lobster fishery and used 2001 - 2003 as the qualifying years. Using information from Federal Vessel Trip Reports and from RI Catch and Effort Logbooks, Thomas Angell and colleague John Lake compiled the data to determine each lobster trap allocation, including the allocations for Mr. Duckworth.

The witness explained the allocations assigned to Mr. Duckworth: the F/V *Reaper*, holder of Federal Lobster Permit #240801, had no reported pounds landed or traps fished for the period 2001 - 2003, resulting in the issuance of the Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation of zero (0) traps (Div 1); the F/V *True American*, holder of Federal Lobster Permit #242178, had no reported pounds landed or traps fished, resulting in the issuance of the Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation of zero (0) traps (Div 2); the F/V *Twister*, holder of Federal Lobster Permit #242517, was issued a Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation for the maximum number of traps allowed -- 800 - based upon its landings for the period 2001 - 2003 (Div 3); and the Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation for RI commercial fishing license #MPURP000146 assigned a zero (0) trap allocation because there were no reported landings or traps fished for the period 2001 - 2003. (Div 4).

Under cross examination Mr. Angell identified the states that are members of the ASMFC. He acknowledged that the main area of damage caused by the North Cape oil spill was in Rhode Island waters; that the lobster restoration project was not completed until 2006; and that in 2003 the project was still ongoing. Mr. Angell stated that there had been opposition to using the years 2001 - 2003 at the hearings considering the adoption of section 15.14.2 of the *Marine Fisheries Regulations*.

The Division then rested its case.

In Applicant's closing argument Mr. Duckworth challenged the method chosen to impose the lobster trap allocations. He contended that Rhode Island had more leeway to select an allocation method and should have chosen a different path. He stated that the regulations that were adopted have done an injustice to Rhode Island lobstermen.

In the Division's closing argument counsel stated that when the regulations were adopted, the Director was aware of the oil spill and its impact on the lobster industry and on Rhode Island fishermen. The regulations employ the period 2001 - 2003 as the target period and have applied the period to all lobstermen in determining the historic participation for each allocation. He stated that this Applicant has not demonstrated any basis for the modification of his lobster trap allocations.

Analysis and Conclusion

Mr. Duckworth was a sincere and credible witness. He voiced a frustration that has been all too common in the lobster trap allocation appeals that have been before the AAD since February 2007. When the lobster resource was devastated by the North Cape oil spill, he behaved responsibly and redirected his business efforts to fishing another resource. Section 15.14.2 of the *Marine Fisheries Regulations* can be viewed as penalizing those individuals who channeled their efforts away from the vulnerable lobster resource to pursue other fishing stock.

Although Mr. Duckworth has challenged the wisdom and effect of section 15.14.2 of the *Marine Fisheries Regulations*, he has not presented evidence to demonstrate that the regulations are invalid. Applicant has not presented any evidence that his Lobster Trap Allocations were improperly calculated or that he is otherwise entitled to a modification of the allocations. Wherefore, after considering the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. Applicant did not land any lobsters harvested by trap attributable to Federal Lobster Permit #240801 (F/V *Reaper*) during the years 2001 - 2003.
2. The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Applicant for Federal Lobster Permit #240801 allowed zero (0) traps.
3. Applicant did not land any lobsters harvested by trap attributable to Federal Lobster Permit #242178 (F/V *True American*) during the years 2001 - 2003.
4. The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Applicant for Federal Lobster Permit #242178 allowed zero (0) traps.
5. Applicant filed a request for hearing at the Administrative Adjudication Division on March 15, 2007.

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 for Federal Lobster Permit #240801.
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 for Federal Lobster Permit #242178.

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 for Federal Lobster Permit #240801 is DENIED.
2. Applicant's request for a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation for Federal Lobster Permit #242178 is DENIED.
3. The Initial 2007 RI/Area 2 Lobster Trap Allocation for Federal Lobster Permit #240801 shall remain at zero (0) traps.
4. The Initial 2007 RI/Area 2 Lobster Trap Allocation for Federal Lobster Permit #242178 shall remain at zero (0) traps.

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

Mary F. McMahon
Hearing Officer

Entered as a Final Agency Decision and Order this _____ day of _____, 2008.
W. Michael Sullivan Ph.D.
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.

APPENDIX A

LIST OF EXHIBITS

APPLICANT'S EXHIBITS

- Appl 1 RIDEM News Release dated August 10, 2006 (3 pages)
Full
- Appl 2 Withdrawn
- Appl 3 "North Cape Oil Spill Restoration" (2 pages)
Full
- Appl 4 Withdrawn
- Appl 5 NOAA News: "NOAA Releases Draft Restoration Plan for North Cape Oil Spill"
Full (3 pages)
- Appl 6 Withdrawn
- Appl 7 Statement for F/V Reaper, Lobster Traps Hauled/Pounds Landed 1993 -- 1999
Full (1 page)

Appl 8 Graph comparing monthly lobster income for the years 1994, 1995 and 1998 (1 page)
Full

Appl 9 1994 lobster income statement for F/V Reaper (3 pages)
Full

Appl 10 1995 lobster income statement for F/V Reaper (3 pages)
Full

Appl 11 1998 lobster income statement for F/V Reaper (4 pages)
Full

Appl 12 Withdrawn

Appl 13 Withdrawn

Appl 14 Withdrawn

Appl 15 2003 photographs of F/V True American (1 page)
Full

DIVISION OF FISH AND WILDLIFE'S EXHIBITS

Div Copy of Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Gregory
1 Duckworth for Federal Lobster Permit #240801 (3 pages).
Full

Div Copy of Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Gregory
2 Duckworth for Federal Lobster Permit #242178 (3 pages)
Full

Div Copy of Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Gregory
3 Duckworth for Federal Lobster Permit #242517 (3 pages)
Full

Div Copy of Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Gregory
4 Duckworth for RI Commercial License #MPURP000146 (3 pages)
Full

Div Copy of Applicant's hearing request dated March 10, 2007 (1 page)
5
Full

Div Curriculum vita of Thomas E. Angell.
6
Full