STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: September 3, 2013]

THOMAS GOLDBERG	:	
	:	
V.	:	**C.A. NO. PC 07-4046**
	:	
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT and W. MICHAEL SULLIVAN, in his Official Capacity as Director of the Department of Environmental Management of the State of Rhode Island	:	

DECISION

SAVAGE, J. This matter is before this Court on an appeal from an administrative decision of the Department of Environmental Management that limited Appellant Thomas Goldberg's multipurpose commercial fishing license to the use of three lobster traps based on his historical usage of the license in certain years. Appellant challenges this decision, which implemented a regulation designed to protect the lobster resource from overfishing, on constitutional and other legal grounds. For the reasons set forth in this Decision, this Court affirms the decision below.

I

FACTS AND TRAVEL

This case arises from an administrative appeal filed by Thomas D. Goldberg (Goldberg), pursuant to R.I. Gen. Laws §§ 42-35-1 et seq., against the Department of Environmental Management and its Director, W. Michael Sullivan, on August 7, 2007.[1] The complaint asserts that Goldberg is aggrieved by a July 23, 2007 decision (DEM Decision) of the Administrative

[1] It is unclear why, but Goldberg seemingly filed the same complaint that he filed on August 7, 2007 twice on August 14, 2007.

Adjudication Division of the Department of Environmental Management (DEM). That decision limited Goldberg's multipurpose commercial fishing license to the use of three lobster traps based on his historical usage in the years 2001-2003. Goldberg essentially asserts that the DEM Decision prejudices his substantial rights because it is:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 42-35-15(g). Goldberg demands that the administrative decision be overturned and that he be allowed to fish 800 lobster traps or as many as any other commercial license holder. He also requests damages plus interest and attorney's fees.

The initial Area 2 LTA is "the initial (maximum) number of lobster traps authorized to be fished by an individual permit or license holder in Lobster Conservation Area 2 in 2007."[2] Rule 15.14.2-2. Rule 15.14.2-6 spells out the eligibility qualifications for initial area 2 LTAs:

> (a) To be eligible for an initial Area 2 LTA, an applicant:
>
> (i) Must have held a Department-issued commercial fishing license, authorizing the individual to fish commercially for lobster, or a federal lobster permit endorsed for Area 2, at some point during the period 2001-2003; and
>
> (ii) Must have documented fishing performance during the period 2001-2003, i.e., must have landed lobsters with traps from Area 2 at some point during that period; or if unable to do so due to material incapacitation, pursuant to the provisions set forth in section 15.14.2-8, must have documented fishing performance

[2] Area 2 "means Lobster Conservation Management Area 2, as delineated in Amendment 3, Appendix 1 to the Interstate Fishery Management Plan for American Lobster, adopted by the ASMFC in December 1997." Rule 15.14.2-2.

> during the period 1999-2000 and during the year 2004, i.e., must have landed lobsters with traps from Area 2, with a valid license/permit, at some point during those periods; and
>
> (iii) Must have renewed his/her license/permit annually since 2003.

The process used to determine initial Area 2 LTAs is described in Rule 15.14.2-9:

> For each qualified applicant, [the DEM] shall determine initial Area 2 LTAs as follows:
>
> (a) "Predicted Traps Fished" values shall be calculated for 2001, 2002, and 2003 from the applicant's total lobster landings in each of those years using the established regression relationship for Area 2 . . .
>
> (b) "Reported Traps Fished" values, constituting the maximum number of lobster traps reported fished in Area 2 for 2001, 2002, and 2003, shall be obtained from the applicant's logbook reports and/or federal Vessel Trip Reports (VTRs).
>
> (c) "Effective Traps Fished" values shall be determined by comparing the "Predicted Traps Fished" and "Reported Traps Fished" values for each of the three years, and identifying the lower value for each year.
>
> (d) The initial Area 2 LTA is determined by selecting the highest value of the three annual "Effective Traps Fished" values.
>
> (e) No initial Area 2 LTA shall exceed 800 traps. (Graph omitted).

Finally, Rule 15.14.2-11 establishes that upon the issuance of a written decision by the DEM regarding an initial Area 2 LTA, an applicant may appeal the decision to the DEM Administrative Adjudication Division within thirty calendar days of receipt of the DEM's written decision.

On January 26, 2007, Goldberg filed an appeal with the Administrative Adjudication Division, asserting that the LTA violated his constitutional rights under the United States and Rhode Island Constitutions, was made upon unlawful procedure, and was arbitrary, capricious, and characterized by abuse of discretion. On February 12, 2007, the appeal was assigned to

Hearing Officer Joseph F. Baffoni. The appeal was heard before the hearing officer on March 5, May 1, and May 17 of 2007.

Testimony of Thomas Goldberg

At the March 5, 2007 hearing, Thomas Goldberg testified that his full-time occupation is a lawyer in the general practice of law at Goldberg Law Offices. (Tr. at 26, Mar. 5, 2007.) He first obtained a commercial fishing license about thirty-seven years before his March 5, 2007 testimony. (Tr. at 27, Mar. 5, 2007.) He continuously maintained that license in excess of twenty-five or thirty years prior to his testimony. (Tr. at 27, Mar. 5, 2007.) Though he had used as many as twenty-five traps when he was a teenager, more recently Goldberg had only used three traps because, among other things, he was engaged as a full-time lawyer. (Tr. at 28-29, Mar. 5, 2007.) Goldberg has maintained a fishing vessel in conjunction with his license. (Tr. at 29, Mar. 5, 2007.) Despite Goldberg's limited use of his commercial fishing license, he explained why he maintained it:

> It was my hopes in the future to increase my ability to lobster certainly after I retire. It's something I've engaged in all my life, all my adult life. I've been engaged in lobstering. Some years more than others. Some years not at all. I've done it pretty much continuously over the years. I was hoping upon retirement that I could do it as a profitable venture for recreation that I enjoy doing.

(Tr. at 33, Mar. 5, 2007.) Goldberg testified that going back over the course of the previous thirty years, there have been years when he has used substantially more than three traps. (Tr. at 35, Mar. 5, 2007.)

Regarding the initial notice of Area 2 LTA dated January 16, 2007, Goldberg testified that prior to this letter, he did not have any notice concerning the elimination of his right to fish for lobster. (Tr. at 36, Mar. 5, 2007, State's Ex. 1.) He was not given any opportunity for a meeting or discussion with DEM prior to receipt of the notification (Tr. at 37, Mar. 5, 2007.)

Goldberg indicated that to the best of his knowledge, the notice he received from the Division accurately reflected the amount of lobster fishing he did in 2001-2003. (Tr. at 41-42, State's Ex. 1.)

Goldberg testified that commercial fishing restrictions are something that is modified on a regular basis. (Tr. at 43, Mar. 5, 2007.) But, Goldberg explained that those changes never stopped him from engaging in the activity of the fishery. (Tr. at 44, Mar. 5, 2007.) Of the new restriction, Goldberg said, "It prohibits me from lobstering ever again other than the three traps. I'm not going to be able to ever participate in the commercial lobster fishery with just three traps." (Tr. at 48, Mar. 5, 2007.) Further:

> [I]t would be economically unfeasible to do so. And I'm not going to be able to lobster. I've got a big investment in the boat. I've got a lot of costs associated with the license. And with just three traps, I'm not going to be able to do that in the future in the manner I was hoping to do, be able to do so.

(Tr. at 48, 3/5/07.) Goldberg also testified that it costs $300 to renew his license each year. (Tr. at 48, Mar. 5, 2007.)

Testimony of Thomas Angell[3]

Thomas Angell, the principal marine biologist at the DEM Division of Fish and Wildlife, also testified. (Tr. at 51-52, Mar. 5, 2007.) Angell explained that the type of license in dispute in this case was a multipurpose license. (Tr. at 55, Mar. 5, 2007.) Prior to the implementation of the regulations at issue, Angell testified that people with multipurpose licenses could fish using a maximum of 800 traps for the Area 2 lobster fishery. (Tr. at 57, Mar. 5, 2007.)

Angell is in his seventeenth year with the Division. (Tr. at 102, Mar. 5, 2007.) He serves on the ASMFC Lobster Technical Committee. (Tr. at 102, Mar. 5, 2007.) The Committee's

[3] Angell was qualified as an expert concerning the lobster fisheries as well as the interpretation and application of DEM's lobster regulations. (Tr. at 113, Mar. 5, 2007.)

primary responsibility "is to compile the data that is collected throughout these states and apply that to the lobster stock assessment work that is done periodically to assess the status of the lobster resource from Maine through New Jersey." (Tr. at 103, Mar. 5, 2007.) Additionally, Angell serves as a staff representative on the Rhode Island Marine Fisheries Council Lobster Advisory Panel. (Tr. at 102, 105, Mar. 5, 2007.)

Angell explained that he, along with his superiors, created a draft of the regulatory language based upon the elements and provisions in Lobster Addendum VII from the ASMFC. (Tr. at 66, Mar. 5, 2007.) In terms of the implementation of Addendum VII, Angell testified that his role was "to translate from the ASMFC Addendum VII document to take the elements of that document and develop the regulatory language that the statute would presumably adopt to implement the management plan." (Tr. at 105-06, Mar. 5, 2007.) He "created draft regulatory language based upon the elements of Addendum VII that were debated and eventually put into regulatory language and adopted by the State of Rhode Island." (Tr. at 106-07, Mar. 5, 2007.) Angell testified:

> The goal of the regulation and implementation of this plan was to . . . be in compliance with the management plan as put forth by the Atlantic States Marine Fisheries Commission. This plan was designed to cap the effort, lobster trap fishing effort that was occurring in lobster management area two at levels that existed during the 2003 time frame in order to control fishing mortality rates on the lobster resource.

(Tr. at 66, Mar. 5, 2007.) Further,

> The implementation of this particular management plan was done due to findings by the Atlantic States Marine Fisheries Commission Lobster Technical Committee through peer-reviewed stock assessments that the area two lobster fishery resource is being overfished and that the capping of trap effort in area two and presumably further reduction of trap effort in area two was an approved method by which fishing mortality on the lobster resource could be reduced over time.

(Tr. at 70-71, Mar. 5, 2007.) Thus, Angell testified that the Division wanted to reduce the overall catch by limiting the number of traps that could be set. (Tr. at 71, Mar. 5, 2007.) Although the number of traps each individual would get was not the same, the determination of each allocation was conducted the same way. (Tr. at 73, Mar. 5, 2007.)

Angell explained that there are no provisions currently providing for transfer of partial trap allocations. (Tr. at 81, Mar. 5, 2007.) He testified that entire allocations can be transferred along with the sale of a business, a fishing boat, and gear. (Tr. at 81, Mar. 5, 2007.) The cost of the license has not changed despite changes in allocations. (Tr. at 82, Mar. 5, 2007.) Angell stated that no new licenses are being issued for the lobster fishery. (Tr. at 82, Mar. 5, 2007.) That restriction has existed since 2002. (Tr. at 85, Mar. 5, 2007.) The noncommercial fishery is not subject to these regulations. (Tr. at 83, Mar. 5, 2007.) Five is the legal number of traps allowed for noncommercial licenses. (Tr. at 83, Mar. 5, 2007.)

Angell described the data used in application of the regulations: "The data that was used to apply to the application of those regulations was the landings, total lobster landings and maximum number of traps reported to be fished by each individual fisherman during the qualifying period of 2001 through 2003." (Tr. at 107, Mar. 5, 2007.) Further, "[e]ach individual fisherman either reported that information to the Division through our state issued catch and effort logbook [o]r if they were federally permitted and required to fill out what is referred to as a federal vessel trip report, their information was taken from that source." (Tr. at 107-08, Mar. 5, 2007.)

Angell testified that the letter dated January 16, 2007 was the first notification to Goldberg that his trap allocation was reduced to three traps. (Tr. at 59, Mar. 5, 2007.) Angell characterized three traps as a de minimis number for a commercial fisherman. (Tr. at 95, Mar. 5,

2007.) Further, three traps would be essentially useless for a commercial fisherman. (Tr. at 95-96, Mar. 5, 2007.) Some people obtained an allocation of 800 traps and others received none. (Tr. at 59, Mar. 5, 2007.)

Angell testified that no one was given the opportunity for a hearing prior to a reduction in their allocation. (Tr. at 85-86, Mar. 5, 2007.) He described several alternative means for achieving landing goals that are frequently used in the commercial fishing industry, including a moratorium on licenses, closing a fishery upon a certain amount of poundage caught, or changing the permissible trap size or vent size. (Tr. at 86-87, Mar. 5, 2007.)

Mark Gibson's Testimony[4]

Mark Gibson, the Deputy Chief of the Fish and Wildlife Division of DEM, also testified. (Tr. at 115, Mar. 5, 2007.) He began working at the Division in January of 1978. (Tr. at 115, Mar. 5, 2007.) As Deputy Chief, he administers the marine fisheries section of the Division. (Tr. at 115, Mar. 5, 2007.) He serves as the Administrative Commissioner for the State of Rhode Island to the ASMFC. (Tr. at 116-17, Mar. 5, 2007.) In this role, he provides administrative policy input to the ASMFC on behalf of Rhode Island. (Tr. at 117, Mar. 5, 2007.) Gibson is also the Chairman of the Rhode Island Marine Fisheries Council. (Tr. at 119, Mar. 5, 2007.)

Gibson provided background on ASMFC and Addendum VII:

> The ASMFC manages the American lobster resources, one of their species, one of their managed species. The states from Maine to New Jersey have a vested interest in the lobster fishery. They all have delegates, delegations at the commission which participate in the development of fishery management plans including the one that's in operation right now, which is Amendment III. That Amendment III has a number of supporting addendum or addenda. Addendum VII being one of them. That came out of the commission process.

[4] Gibson was qualified as an expert concerning the lobster fisheries as well as the interpretation and application of DEM's lobster regulations. (Tr. at 126, Mar. 5, 2007.)

(Tr. at 121, Mar. 5, 2007.) Gibson offered his opinion, as an expert, on the availability of lobster:

> The lobster resource is overfished. Three successive stock assessments that have been peer reviewed in 1996, 2000, and 2006 found that the lobster resource in this area, in area two of the Rhode Island waters was overfished and overfishing was occurring.

(Tr. at 127, Mar. 5, 2007.) Gibson testified that 3.8 million pounds of lobster were fished in Area 2 in 2006, while 3.1 million pounds were fished in 2005. (Tr. at 70, May 1, 2007.) In 2003 and 2004, there was a lobster stock collapse for a number of reasons, including overfishing, an oil spill in the winter of 1996, and an ongoing incidence of shell disease. (Tr. at 71, May 1, 2007.)

Gibson explained that he wrote a letter dated December 18, 2000 to all Rhode Island commercial fishing license holders:

> advising them that there was an ongoing process with which the Rhode Island system of commercial licensure was being adjusted by the department and by the Rhode Island General Assembly and for those license holders to be advised that there could be changes in their license status, particularly insofar as a harvester's or commercial license holder's future access and participation in the fishery may be governed by their past performance.

(Tr. at 17-18, May 17, 2007.) This letter was mailed to all license holders. (Tr. at 18-19, May 17, 2007.) Gibson explained that individual license holders were notified of the potential promulgation of Rule 15.14: "In one of those [license] renewal notices, I edited it to include a notice to license holders to be advised that their ability to participate in the lobster fishery in future years may be dependent on fishing performance pending Atlantic States Marine Fisheries Commission action." (Tr. at 59, May 1, 2007.) Specifically, Gibson described another letter sent in the fall of 2005:

> [T]here was a second letter sent in the fall of 2005, by Margaret McGrath —chief of our office of licensing —which I had occasion to edit sections for her. And I believe in that we reminded all

> license holders— particularly license holders for the lobster fishery —that there was a possibility their future allocations were going to be determined by their past fishing practices.

(Tr. at 33, May 17, 2007.) Gibson did not know whether McGrath's letter was ever sent to Goldberg. (Tr. at 34, May 17, 2007.)

Describing his involvement with the development of Rule 15.14.2, he said:

> I had substantial involvement in it both at the ASMFC level through the Addendum VII, and I also had extensive involvement with it at [the] state level in terms of developing draft regulations for consideration by the public under our Administrative Procedures Act as well as consideration by our marine fisheries council and then have carried them forward to [DEM] Director Sullivan's office during the promulgation process.

(Tr. at 120-121, Mar. 5, 2007.) Further, Gibson re-explained his involvement in Rule 15.14.2:

> [T]he regulations that were adopted have their genesis in a commission action that is a modification to the lobster fishery management plan of the Atlantic States Marine Fisheries Commission. It's called Addendum 7 to Amendment 3. It was a program that was developed.
>
> I had extensive involvement in the development of it, since I'm the administrative commissioner to the Atlantic States Marine Fisheries Commission and also represent the state on the Lobster Management Board.
>
> So in recognition of the large collapse of abundance that took place in 2002 and 2003, the commission undertook a number of actions—emergency actions—to begin restoration of the lobster resource.
>
> But also, this Addendum 7—the so-called effort control plan—was designed to cap fishing effort of the amount of participation in the fishery at or near 2003 levels so as to afford the lobster resource an opportunity to recover.
>
> So I had extensive involvement in the development of it at the commission level and then here in my state responsibilities, both as a marine fishery administrator as well as chair of the counsel, local marine fisheries counsel.

> I had the responsibility of overseeing my staff's rendering of the commission plan and to enable [it] into state regulation by essentially carrying that through the regulatory process, which involves our marine fishery counsel in advisory mode, advise to the director and eventual promulgation of the regulation.

(Tr. at 13, May 1, 2007.)

In response to the overfishing problem, ASMFC adopted Addendum VII in an attempt to cap the fishing effort at or near 2003 levels. (Tr. at 131, Mar. 5, 2007; Tr. at 72, May 1, 2007.) Gibson did not believe that the stock assessments of 1996 and 2000 were the motivating factor behind the adoption of Addendum VII. (Tr. at 86, May 1, 2007.) If a state were to fail to implement plans that the ASMFC required, then the ASMFC could issue a noncompliance finding. (Tr. at 132, Mar. 5, 2007.) Gibson explained the significance of a noncompliance finding:

> A noncompliance finding left unanswered by an offending state can have cataclysmic impacts to their fishing industry. Because were the secretaries of commerce and interior to concur with the commission's noncompliance finding, they are authorized under the Atlantic Coastal Act to impose a fishing moratorium on the state that failed to commission a plan. That would mean there could be no fishing for that particular species in the state and no landing of that particular species at commercial ports within the state.

(Tr. at 132, Mar. 5, 2007.)

Lobsters can be fished commercially in ways other than lobster traps, including by dragging nets on the ocean floor or diving. (Tr. at 134, Mar. 5, 2007.) At the ASMFC meeting in January of 2007, the Lobster Management Board advised Rhode Island of several inconsistencies between the regulations that implemented Addendum VII and Massachusetts' regulations and the ASMFC's plan. (Tr. at 140, Mar. 5, 2007.) At the time of Gibson's

testimony, the ASMFC had not acted further on the inconsistencies. (Tr. at 141-42, Mar. 5, 2007.)

Gibson also described in detail how Rule 15.14.2 was considered and promulgated. When the ASMFC passes a compliance requirement, the Division refers the matter to the Marine Fisheries Council which subsequently refers the matter to the Lobster Advisory Panel. (Tr. at 14, May 1, 2007.) The Marine Fisheries Council has established a Lobster Advisory Panel composed of about a dozen people, from the industry, with an interest in the lobster fishery. (Tr. at 17, May 1, 2007; Tr. at 73-74, May 1, 2007.) They deliberate and advise the Marine Fisheries Council regarding possible regulatory measures. (Tr. at 17, May 1, 2007.) Gibson testified that all Advisory Panel, Marine Fisheries Council, and public hearings are open to the public. (Tr. at 18, May 1, 2007.) In this case, a regulatory process was instituted. (Tr. at 19, May 1, 2007.) Public comment was elicited. (Tr. at 20, May 1, 2007.) The hearing held by the Marine Fisheries Council prior to the adoption of the regulation was heavily attended. (Tr. at 20, May 17, 2007.) Gibson observed a wide range of lobster fishermen at the public hearing, including very active and part-time lobstermen. (Tr. at 24, May 17, 2007.) Many people commented at the public hearing. (Tr. at 26, May 17, 2007.) Witnesses were not put under oath at the public hearing. (Tr. at 57, May 1, 2007.) He testified:

> There were groups of fishermen who supported the proposal with some support. There were some who supported it as the lesser of a number of evils. There were people who were adamantly opposed to it. There were people who viewed it as – they [were] opposed to it on fairness issues. People opposed it on constitutional grounds. There was just about every possible opinion that could have been rendered on this set of regulations.

(Tr. at 27, May 17, 2007.) Gibson does not allow debate between members of the public at public hearings. (Tr. at 30-31, May 17, 2007.)

Gibson described the procedure following the public hearing:

> [G]enerally within a week or so of the public hearing, as soon as the public comment summary is prepared and support materials for counsel, we have a follow-up counsel [sic] meeting at which time they are provided a summary of the public hearing documents—summary of the public hearing comments and advisory panel report, if it's applicable at that time.

(Tr. at 20, May 1, 2007.) The Marine Fisheries Council, through Gibson as the Chair and Marine Administrator, prepares a Memorandum of Recommendations for the DEM Director asking for decision on the proposed regulatory measures. (Tr. at 22, May 1, 2007.) In this case, the Marine Fisheries Council more or less adopted the recommendation of the Lobster Advisory Panel. (Tr. at 75, May 1, 2007.) The DEM Director holds the statutory authority to promulgate rules. (Tr. at 37, May 1, 2007.)

In explaining Area 2 waters, Gibson stated:

> For Management Area 2 – which includes Rhode Island state waters as well as some federal waters – it would be the State of Rhode Island, State of Massachusetts, since they have state waters in Area 2; State of Connecticut, since they have waters abutting Area 2; and the State of New York, since they have – I believe they have some waters abutting Area 2 as well and the National Marine Fisheries Service.

(Tr. at 2, May 1, 2007.) Gibson explained the application of the formulas. He said, "The significance of the formulas and the associated procedures are that they provide for an objective and consistent means to evaluate applicants under this program." (Tr. at 25, May 1, 2007.) Further:

> There's a dual criterion for both federal permit as well as state permit holders. . . . The years of record are 2001 to 2003 and . . . you have logbook records.
>
> There are performance records for these years from each fisherman which specify what is the maximum number of pots he fished in either of those three years as well as the pounds that he landed in those three years. So there is a max.[]

> There is also a predicted pot level which flows—which is calculated from a mathematical relationship between the poundage landed and the number of pots that were fished. There is a procedure which requires us to make year-on-year comparisons in each of those three years comparing the max pots to the mathematical prediction based on landings and select the lesser of the two in each of those three years.
>
> Then within the three years, we get to pick or assign the best – the highest value of the three minimums, as it were. That becomes the individual's allocation. So the allocations are rooted in the performance data that's submitted by the applicant.

(Tr. at 29-30, May 1, 2007.) Gibson testified that the logbook program began in 1999. (Tr. at 13, May 17, 2007.)

Gibson described the purpose of Rule 15.14.2 as reducing "the fishing effort to the level that would allow for the stock to recover. (Tr. at 39, May 1, 2007.) He claims that the federal government has not directed the State to do anything, but the federal government is a partner within the ASMFC. (Tr. at 40, May 1, 2007.) Gibson considers Addendum VII an element of the ASMFC Lobster Management Plan, and as such, it is a compliance requirement. (Tr. at 41-42, May 1, 2007.) Although it was a compliance requirement, "some of the public testimony and advice from our Marine Fisheries Counsel [sic], which was adopted by the director, was different than what this plan specified." (Tr. at 42, May 1, 2007.) Gibson explained that the Director thereby exercised some latitude, and "[w]hether or not that leads to a noncompliance finding is yet to be seen." (Tr. at 43, May 1, 2007.) Gibson stated that the Director could have chosen not to promulgate these regulations. Instead, "[h]e could have formulated alternatives. If those were deemed noncompliant with the [ASMFC's] plan, there could have been consequences to that." (Tr. at 45, May 1, 2007.)

Gibson also testified to different approaches to reduce pressure on a fishing resource, including catch limits. (Tr. at 46, May 1, 2007.) He elaborated:

> In addition to catch limits, we can employ closed seasons. We can employ closed areas. We can control fishing effort with participation, amount of days at sea an individual is allowed to exercise, the amount of gear that can be deployed, as is the case with this plan. There are a number of ways.

(Tr. at 46-47, May 1, 2007.) Gibson also mentioned minimum sizes and restrictions on harvest of different classes of animals. (Tr. at 49, 5/1/07.) Of these alternatives, Gibson explained, "Some of those alternative measures would have had an equivalent effect on all license holders; some would not. For example, individual fishing quotas, sector allocations might bestow catch privileges differentially." (Tr. at 48-49, May 1, 2007.) Gibson said, aside from sector allocations and individual fishing quotas, "[a]ll of the license holders would be treated in the same way with regards to compliance with a particular rule." (Tr. at 50, May 1, 2007.) In terms of transferring allocations, "there is a provision in state law which allows for the sale of a complete business and the ability for the department to issue a license to the buyer of the business, provided that the seller of the business relinquishes his license." (Tr. at 53, May 1, 2007.)

Like Angell, Gibson testified that prior to the enactment of the regulations, a multipurpose license entitled its possessor to fish 800 traps. (Tr. at 60, 82, May 1, 2007.) The Division's records indicate that, following the enactment of the regulation, over one thousand people were assigned to a zero allocation, while twenty-five were assigned between one and ten pots. (Tr. at 84, May 1, 2007.) Gibson believed that a "three-pot allocation would not be commercially viable, absent participation in other activities that the multipurpose license allows for." (Tr. at 62, May 1, 2007.) Further, "[T]he multipurpose license doesn't preclude other activities and doesn't require that [fishermen] deploy pots." (Tr. at 62, May 1, 2007.) Gibson testified that it would not be very costly for a commercial fisherman to deploy small auto trolls or gill nets off of his or her vessel as an alternative to lobster pots. (Tr. at 63, May 1, 2007.) The

regulation does not restrict catching lobsters using mobile gear or auto trolls, diving, or gill nets. (Tr. at 75-76, May 1, 2007.) The "non-trap gear sector" is allowed to have 100 lobsters per day or 500 per multiday trip. (Tr. at 76, May 1, 2007.)

Administrative Decision

The Hearing Officer rendered his recommended decision on July 20, 2007. W. Michael Sullivan, the DEM Director, entered the recommendation as a final agency order on July 23, 2007. In his decision, the Hearing Officer listed Goldberg's arguments as follows:

> 1. It is a taking of property without compensation and violates the due process as guaranteed by the 5th and 14th Amendments of the U.S. Constitution.
> 2. The regulation violates the equal protection and due process right contained in the Rhode Island Constitution and Federal Constitution.
> 3. The regulation violates Mr. Goldberg's right as guaranteed by the Rhode Island Constitution including but not limited to Article 3, Section 17.
> 4. [The regulation violates his] rights guaranteed by R.I.G.L. 20-2.1-2 subsection 4 . . . [and] R.I.G.L. 20-2.1-2 subsection 1, subsection 3, and subsection 5.
> 5. The arbitrary and capricious nature of the application of the regulation has led to an absurd result and violated Mr. Goldberg's rights.

(DEM Decision 6-7.) The Hearing Officer defined the issue as "whether the Applicant has proven by a preponderance of the evidence that he is entitled to a modification of the Initial Trap Allocation pursuant to Section 15.14.2-5 of the Marine Fisheries Regulations." (DEM Decision at 8-9.) The Hearing Officer noted that Goldberg admitted "that the Division's determination that Applicant's initial 2007 allocation of three (3) traps was calculated on the basis of data submitted by Applicant concerning Applicant's reported activity in the lobster fishery in the target period of the years 2001 through 2003." (DEM Decision at 8-9.) Further, Goldberg "did not introduce any testimony or evidence that would demonstrate that he is entitled to a

modification of his Initial Trap Allocation." (DEM Decision at 9.) The Hearing Officer cited Bowen v. Hackett, 361 F. Supp. 854, 860 (D.R.I. 1973), for the notion that Appellant's constitutional challenges were not properly before the DEM Administrative Adjudication Division. (DEM Decision at 9-10.) In Bowen, the District Court stated:

> It would be inappropriate to require exhaustion of administrative remedies where the issue is the constitutionality or validity of a statute the agency must enforce. The expertise of state administrative agencies does not extend to issues of constitutional law.

Id. (citing Brenden v. Independent School District 742, 342 F. Supp. 1224, 1230 (D. Minn. 1972)). The Hearing Officer found that Goldberg's initial LTA "was calculated on the basis of data concerning [Goldberg's] participation in the lobster fishery presented by [Goldberg] himself." (DEM Decision at 10.) Additionally, "[Goldberg's] [a]llocation determination was accomplished consistent with the requirement of Part 15.14.2 – Area 2 Lobster Trap Control that was duly promulgated pursuant to R.I. Gen. Laws §§ 42-35-1 et seq." (DEM Decision at 10.) The Hearing Officer found that Goldberg failed to prove, by a preponderance of the evidence, that a requested increase of his allocation was consistent with the provisions and purposes of the Marine Fisheries Regulations. (DEM Decision at 11.) Lastly, the Hearing Officer determined that Goldberg's initial allocation of three traps was the proper allocation pursuant to the pertinent statutes and regulations. (DEM Decision at 11.) Accordingly, Goldberg's appeal was denied.

Thomas Goldberg's Arguments

Goldberg's first argument is that his procedural and substantive due process rights have been violated. Specifically, Goldberg contends that the failure of DEM to give him any notice of its intention to limit his ability to fish commercially for lobster based on his license usage in 2001 through 2003 violated his due process rights. Goldberg asserts that he has a "vested property interest" in his multipurpose license. Goldberg's memorandum states, "The DEM, by

implementing this scheme based upon prior usage without notice, impermissibly deprived a duly licensed multipurpose commercial fisherman the right to engage in the lobster fishery." (Goldberg Mem. at 7.) Goldberg's explanation of his substantive due process claim is limited. He merely asserts that this "action is clearly arbitrary [and] capricious given the many alternatives available to regulate the lobster industry without depriving Goldberg of his right to fish commercially for lobster." (Goldberg Mem. at 7.)

Similarly, Goldberg's equal protection argument is limited. He claims, "A classification which seeks to strip some commercial fishermen of their rights to engage in the commercial fishery but not others is inheritably [sic] suspect and should be stricken as a violation of the equal protection laws." (Goldberg Mem. at 7.)

Goldberg's final argument is that his three trap allocation violates R.I. Gen. Laws § 20-2.1-2(4) which provides:

> The purposes of this chapter are, through a system of licensure that is clear, predictable and adaptable to changing conditions, to:
>
> (4) Respect the interests of residents who fish under licenses issued by the state and wish to continue to fish commercially in a manner that is economically viable: provided, it is specifically not a purpose of this chapter to establish licensing procedures that eliminate the ability to fish commercially of any resident as of the date of enactment who validly holds commercial fishing license and who meets the application renewal requirements set forth herein.

Goldberg contends that "[g]iven the many other alternatives to regulating the lobster catch there was no rational reason for stripping Goldberg of his right to engage in the lobster fishery while allowing the other license holders to continue on." (Goldberg Mem. at 10.)

DEM's Arguments

DEM responds that Goldberg failed to prove, by a preponderance of the evidence, that he was entitled to an increase in trap allocation because he failed to present sufficient evidence of incorrect data or a medical or military hardship. (DEM's Mem. at 6.) Yet, Goldberg does not argue on appeal that he presented such evidence or that his allocation was incorrectly calculated.

DEM argues further that Goldberg's fundamental right to a lawful calling is not at stake because Goldberg testified that he is a full-time lawyer; even after he retires, he admitted that he hoped to use his license as a "profitable venture for recreation." (DEM's Mem. at 7.) Additionally, in Riley v. Rhode Island Dept. of Envtl. Mgmt., 941 A.2d 198, 211 (R.I. 2008), our Supreme Court held that it has never recognized a fundamental right of fishery. DEM notes that no evidence was presented that would support a finding that Rule 15.14.2 implicates Goldberg's fundamental rights.

DEM also asserts that commercial fishermen are not a suspect classification for equal protection purposes. (DEM's Mem. at 8.) Not all legislative classifications are constitutionally impermissible. Thus, DEM argues that because neither a fundamental right nor a suspect classification is implicated, Goldberg's constitutional challenge should be afforded minimal scrutiny. (DEM's Mem. at 9.)

Under minimal scrutiny, DEM contends that a reasonable relationship between Rule 15.14.2 and the public welfare was clearly established at the administrative hearing. (DEM's Mem. at 10.) Further, "the rational basis test was satisfied in that the population of American Lobster was intended to be increased by reducing the number of lobster traps that were permitted to [be] deployed by harvesters, and presumably the number of lobsters that could be taken." (DEM's Mem. at 10.)

DEM also argues Rhode Island was under a statutory obligation to promulgate Rule 15.14.2 pursuant to 16 U.S.C. §§ 5101 et seq. Noncompliance could result in a moratorium on fishing in state waters and direct federal regulation by the U.S. Department of Commerce. DEM states that Goldberg's inability "to articulate a concrete conservation equivalency proposal undermines his claim that Rhode Island readily *could have* proposed alternative means that would have served the conservation goals of Addendum VII." (DEM's Mem. at 12.) DEM also asserts that because this case depends on the policy discretion of an independent actor, the ASMFC, Goldberg does not satisfy standing requirements.[5]

DEM also argues that Rule 15.14.2 does not amount to a taking of Goldberg's property. DEM states that Goldberg cannot demonstrate that he has a cognizable property interest in his fishing license.

DEM mischaracterizes Goldberg's argument that an allocation of three traps violates § 20-2.1-2(4). DEM claims that Goldberg is arguing that "the regulation of a commercial fishing license implicates a fundamental right guaranteed under R.I.G.L. 20-2.1-2." (DEM's Mem. at 13.) Goldberg has not argued that § 20-2.1-2 provides him a fundamental right. Further, DEM argues that this Court should not consider Goldberg's claim that three traps does not permit him to continue to fish commercially in a manner that is economically viable because this is not Goldberg's intention.

[5] It should be noted that Goldberg did not challenge the binding nature of Addendum VII, and it does not appear relevant to this dispute. The federal government cannot statutorily grant Rhode Island the right to enact unconstitutional legislation. In terms of standing, Goldberg is challenging state government action pursuant to a Rhode Island regulation, not the actions of the ASMFC.

II

STANDARD OF REVIEW

This Court sits as an appellate court with a limited scope of review when reviewing the decisions of the Administrative Adjudication Division of the DEM. See Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). This Court's standard of review is set forth in § 42-35-15(g):

> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or [sic] law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Judicial review of administrative decisions is "circumscribed and limited to 'an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision.'" Nickerson v. Reitsma, 853 A.2d 1202, 1205 (R.I. 2004) (quoting Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). This Court must affirm the agency's decision if any legally competent evidence exists in the record. Rhode Island Pub. Telecomm. Auth., 650 A.2d 479, 485 (R.I. 1994). "Legally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting the agency's findings." Environmental Scientific, 621 A.2d at 208 (citing Sartor v. Coastal Resources Mgmt. Council, 542 A.2d 1077, 1082-83 (R.I. 1988)). This Court may not substitute its judgment for

the agency's view with respect to "credibility of the witnesses or the weight of the evidence concerning questions of fact." Costa v. Registrar of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988) (citing Newport Shipyard, Inc. v. Rhode Island Comm'n for Human Rights, 484 A.2d 893 (R.I. 1984)). "Questions of law . . . are not binding upon the court and may be reviewed to determine what the law is and its applicability to the facts." State v. Faria 947 A.2d 863, 867 (R.I. 2008) (citations omitted).

This Court "may reverse, modify, or remand the agency's decision if the decision is violative of constitutional or statutory provisions . . . ." Nickerson, 853 A.2d at 1205 (quoting Barrington Sch. Comm., 608 A.2d at 1138). Our Supreme Court has explained that the "statutory reference to errors of law or violation of constitutional provisions [extends] only [to] determinations by the agency that might in themselves violate statutory or constitutional principles." Easton's Point Ass'n v. Coastal Resources Mgmt. Council, 522 A.2d 199, 202 (R.I. 1987).

III

ANALYSIS

A

Procedural Due Process

Our Supreme Court has established that the "foundation of due process rests on an opportunity to be heard in a meaningful manner at a meaningful time. Leone v. Town of New Shoreham, 534 A.2d 871, 874 (R.I. 1987) (citing Brock v. Roadway Express, 481 U.S. 252 (1987)); see also Tillinghast v. Town of Glocester, 456 A.2d 781, 785 (R.I. 1983) (stating that "'[i]t is well established that due process within administrative procedures requires the opportunity to be heard at a meaningful time and in a meaningful manner[]"' (quoting Millett v.

Hoisting Engineers' Licensing Div., 119 R.I. 285, 296, 377 A.2d 229, 235-36 (1977))). But, "the exact dimensions of the due-process guarantee may vary from case to case. . . ." Id. at 785; see Bell v. Burson, 402 U.S. 535, 540 (1971) (establishing that a "procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case[]"); 3 Ronald D. Rotunda et al., Treatise on Constitutional Law: Substance and Procedure, § 17.4(d)(iv) at 93 (4th ed. 2008) (providing that "if the government revokes someone's license to engage in a commercial enterprise, it must grant him a hearing to determine any factual issues which relate to the basis for the revocation of the license[]") (footnote omitted).

Our Supreme Court also has established that a "property interest exists when a person has a 'legitimate claim of entitlement' to a benefit." Leone, 534 A.2d at 874 (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). Further, "[l]icenses granted by the government represent property." Id. (citing Sanderson v. Village of Greenhills, 726 F.2d 284, 286 (6th Cir. 1984) (further citation omitted). "Deprivation of that entitlement, as in the failure to obtain a license renewal, requires a procedure adhering to due-process guarantees, because the continued possession of a license may become essential in the pursuit of a livelihood." Id. (citing Bell v. Burson, 402 U.S. 535, 539 (1971)) (further citation omitted); see also Tillinghast, 456 A.2d at 785 (establishing that the "rights of a licensee are generally protected by due process[]" (citing Bell, 402 U.S. 535 (1971)) (further citation omitted)). The United States Supreme Court has similarly determined,

> Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. . . . This is but an application of the general proposition that relevant constitutional restraints limit state

> power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."

Bell v. Burson, 402 U.S. at 539 (citations omitted).

In Leone, our Supreme Court held that an applicant for a license to rent motorized bicycles and tricycles, who was unable to renew her license, was entitled to a hearing when she was placed on a waiting list. The Supreme Court sustained a preliminary injunction enjoining the Town of New Shoreham from interfering with her business. The Court in Leone concluded that the applicant "could remain on the waiting list indefinitely. Her position therefore is tantamount to denial of her renewal application. That denial entitles her to a hearing that accords with due process." Leone, 534 A.2d at 874.

Our Supreme Court has specifically addressed denial of a renewal application. In Tillinghast, the Supreme Court expounded on the Town of Gloucester's refusal to renew a campground owners' license to operate a campground on the grounds that the owners had not complied with zoning safeguards and had failed to cooperate with town officials:

> Refusing to renew a license has similar effects on a going business as the revocation of a license. When one makes an investment in a business, as the [applicants] have, one expects to be able to continue to operate it. To deny this privilege arbitrarily would work an injustice upon the business owner.

456 A.2d at 784. In quashing the town's denial of the renewal application, our Supreme Court concluded,

> Since continuous possession of the license may be vital to an individual's livelihood, it seems only fair that we subscribe to the sentiments expressed in Konstantopoulos v. Town of Whately, 384 Mass. 123, 424 N.E.2d 210 (1981), where the court ruled that a municipality should notify a licensee "with reasonable particularity" of the charges he will be called on to meet at any hearing concerning his continued retention of a license.

> We concede that it would be unreasonable to expect the town council to inform the licensee of the identity of everyone who would speak at a public hearing and what charges he or she may level. However, we do believe that the licensee should be informed that this type of testimony can be expected at a meeting; and if the town itself plans to present evidence adverse to the licensee's interests, the licensee should be apprised of the situation.

Id. at 785; see also 28 Prospect Hill St., Inc. v. Gaines, 461 A.2d 923, 925 (R.I. 1983) (citing Tillinghast, 456 A.2d at 784-85) (stating that a "licensee . . . has a property interest in its business and its continuation which entitles it to the benefits of due process, and a municipality should notify a licensee with reasonable particularity of the charges it will be called upon to meet at any hearing concerning its continued retention of a license[]."

In Gaines, our Supreme Court upheld the decision of the State Liquor Control Administrator which affirmed the decision of a local licensing board that required all Class B liquor establishments to close by 1 a.m. on Saturdays, Sundays, and the nights before legal Rhode Island holidays. In discussing what process was due, our Supreme Court stated:

> In acting pursuant to the delegated power to establish the hours during which alcoholic beverages could be sold within the city of Newport, the licensing board was acting in a legislative capacity, and since its decision was to apply equally to all Class B licensees, there is no necessity that each of the licensees be afforded a notice and hearing before the board could opt for the 1 a.m. closing time.

461 A.2d at 927 (citing Walsh v. Dominy, 53 A.D.2d 1063, 1064, 386 N.Y.S.2d 136, 138-39 (1976); City of Pompano Beach v. Big Daddy's, Inc., 375 So.2d 281, 282 (Fla. 1979)).

In Guarino v. Department of Social Welfare, 12 R.I. 583, 410 A.2d 425 (1980), although not a decision regarding a license, our Supreme Court determined that the review provided by the Administrative Procedures Act satisfied the demands of due process. In Guarino, a terminated employee of the Department of Social Welfare of the State of Rhode Island argued that the State's failure to provide him a pre-termination hearing violated his due process rights. Id. at

585, 410 A.2d at 426. The employee's post-termination appeal had been denied by the Personnel Appeal Board and the Superior Court. Id. Our Supreme Court held:

> In the case at bar, the procedures for review of the dismissal of a state employee "for the good of the service" bear a sufficient similarity to the procedures that were considered adequate in [Arnett v. Kennedy, 416 U.S. 134 (1974)] to satisfy the requirements of due process. Indeed, Rhode Island provides not only for administrative review but for judicial review by the Superior Court as well, with further discretionary review by [our Supreme Court].
>
> Thus we are of the opinion that the Superior Court was correct in rejecting petitioner's challenge to the procedural safeguards set forth in § 36-3-10, as supplemented by the provisions of the Administrative Procedures Act, chapter 35 of title 42.

Id. at 588, 410 A.2d at 427-428.[6]

In the license context, however, the United States Supreme Court has determined that a pre-deprivation hearing is necessary. In Bell, the Supreme Court examined Georgia's Motor Vehicle Safety Responsibility Act, which provides that the motor vehicle registration and driver's license of an uninsured motorist involved in an accident could be suspended unless the motorist posted security to cover the damages claimed by aggrieved parties. 402 U.S. at 535-36. The administrative hearing conducted prior to a suspension did not permit the consideration of the motorist's fault or liability. Id. at 536. The Court in Bell thus concluded that because the statutory scheme made liability an important factor in the State's deprivation of motorists' licenses, due process required consideration of motorists' liability in a pre-deprivation hearing. Id. at 541. Further,

> While "(m)any controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to

[6] Section 36-3-10 of the Rhode Island General Laws provides for appeals to the Personnel Appeal Board.

> terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" before the termination becomes effective.
>
> We hold, then, that under Georgia's present statutory scheme, before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident.

Id. at 542 (citations omitted) (footnote omitted).

As the case law above demonstrates, therefore, it is well established that a license is a property interest. As such, Goldberg has a property interest in his multipurpose commercial fishing license. This Court thus must determine whether the restriction on that license imposed by DEM that reduced the number of lobster traps that he could use from 800 to three constitutes a deprivation of property, requiring due process protection.

Some courts have found that changes in the terms or the scope of a fishing license do not amount to deprivations of a constitutionally protected property right. See Burns Harbor Fish Co. v. Ralston, 800 F. Supp. 722, 730 (S.D. Ind. 1992) (although fishing license was a protectable property interest, restriction on means of fishing did not deprive fishermen of their licenses); LeClair v. Natural Res. Bd., 483 N.W.2d 278, 283-85 (Wis. Ct. App. 1992) (fishermen did not have a protected property interest in the indefinite continuation of their quota); see also New York State Trawlers Ass'n v. Jorling, 16 F.3d 1303, 1311 (2d Cir. 1994) ("the scope of the license . . . [is] not guaranteed by the Due Process Clause"). Nonetheless, both the United States Supreme Court and the Rhode Island Supreme Court have determined that license revocation, license suspension, failure to renew a license, and placement of an applicant on a waiting list all amount to deprivations of property entitling the license holder to notice and an opportunity to be heard. See Bell, 402 U.S. at 539; Leone, 534 A.2d at 874; Tillinghast, 456 A.2d at 874. Such

decisions recognize that it is not the license itself, but rather the fact that "continuous possession of the license may be vital to an individual's livelihood" which warrants constitutional protection. Tillinghast, 456 A.2d at 785; see Bell, 402 U.S. at 539. While in this case Goldberg nominally still possesses a license, Mark Gibson and Thomas Angell of DEM both conceded that a license which allows a fisherman to deploy only three lobster traps is not commercially viable. See Tr. at 62, May 1, 2007; Tr. at 95, Mar. 5, 2007. Accordingly, this Court finds that the severe restriction placed upon Goldberg's license is a deprivation warranting due process protection. To find otherwise would be to elevate form over substance. See Leone, 534 A.2d at 875 (finding a deprivation where town's action was "tantamount to denial" of license).

Goldberg generally asserts that he was deprived of his constitutional right to procedural due process by the DEM's failure to give him notice before implementing its regulatory scheme and reducing his allocation. The record in this case clearly indicates, however, that lobstermen were afforded an opportunity to be heard before implementation of the regulatory scheme. The regulation at issue went through a comprehensive notice and comment process before its promulgation. In particular, the Lobster Advisory Panel held a heavily attended public hearing at which it received comments from both highly active and part-time lobstermen concerning the proposed regulation. See Tr. at 18-26, May 17, 2007. The Marine Fisheries Council was then provided with a summary of the public's comments and the Lobster Advisory Panel's report. See Tr. at 20, May 17, 2007. After implementing the scheme, Goldberg was afforded an opportunity to contest the accuracy of his individual allocation in the form of a three-day hearing where he was represented by counsel, allowed to call and examine witnesses, and permitted to submit evidence.

Goldberg does not specifically elaborate as to what further process he believes he was constitutionally due. Instead, he maintains that had he received notice in 2001 that his future fishing rights were to be based on his fishing performance in 2001 to 2003, he would have fished at least twenty lobster traps during those years. Both as a matter of fact and as a matter of law, this Court cannot agree with Goldberg's suggestion that DEM violated his constitutional rights by failing to give him an opportunity to alter his behavior in such a fashion.

As a factual matter, there was some indication in the record that lobstermen received individualized notice, as early as December 2000, that their future fishing rights would be based on their past performance in the lobster fishery. Mark Gibson testified that he wrote and mailed a letter dated December 28, 2000 to all commercial fishing license holders in which he "advised that there could be changes in their license status, particularly insofar as a harvester's or commercial license holder's future access and participation in the fishery may be governed by their past performance." (Tr. at 17-19, May 17, 2007.) Gibson further testified that license holders were informed in their license renewal notices that "their ability to participate in the lobster fishery in future years may be dependent on fishing performance pending Atlantic States Marine Fisheries Commission Action," but could not recall the exact date of the renewal notices.[7] (Tr. at 59, May 17, 2007.)

Furthermore, as a matter of law, our Supreme Court's decision in Gaines belies any assertion that DEM was constitutionally obligated to provide Goldberg with individualized notice or a hearing prior to the regulation's implementation. In Gaines, the Court made clear that when the liquor licensing board acted in a legislative capacity, pursuant to a delegated power, it was not required to give each license holder notice and an opportunity to be heard prior to

[7] Goldberg maintains that the first notice he received regarding the reduction of his trap allocation was the notice of Area 2 LTA dated January 16, 2007. See Tr. at 36, Mar. 5, 2007.

making a decision that would apply equally to all licensees. See 461 A.2d at 927 (citations omitted).

Like the licensing board in Gaines, DEM acted in a legislative capacity when it enacted Rule 15.14.2, which applies equally to all multipurpose commercial fishing licenses. Therefore, Goldberg was not constitutionally entitled to notice and a hearing prior to the adoption of Rule 15.14.2. The legitimacy of such a regulation can be examined under substantive due process and equal protection principles.

B

Substantive Due Process and Equal Protection

Article 1, section 2 of the Rhode Island Constitution provides, in part, "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws." The Fourteenth Amendment to the United States Constitution states, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Goldberg argues that, in violation of these provisions, the DEM arbitrarily and capriciously deprived him of his right to fish commercially for lobster. In conjunction with this argument, he claims that his rights under article 1, section 17 of the Rhode Island Constitution have been violated. Article 1, section 17 provides:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and

> enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

(Emphasis added). Additionally, he asserts that DEM's scheme is suspect because it strips the rights of some commercial fishermen while leaving others' rights intact.

Our Supreme Court recently explained the principles of substantive due process:

> The due process clause of the federal constitution (and the parallel provision of our state constitution) "provides heightened protection against government interference with certain fundamental rights and liberty interests." . . . The jurisprudence of substantive due process recognizes that there are certain rights so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." . . . Such rights are more fundamental and profound than the several liberty interests that have been deemed sufficient to trigger the requirements of procedural due process. Consequently, the fundamental rights protected by substantive due process are substantially shielded from adverse state actions regardless of the procedures used by the state.
>
> The United States Supreme Court has recognized that the above-referenced fundamental rights include those guaranteed by the Bill of Rights as well as certain liberty and privacy interests implicit in the due process clause and in the penumbra of constitutional rights.

State v. Germane, 971 A.2d 555, 583 (R.I. 2009) (citations omitted) (footnotes omitted). If a fundamental right is at issue, then the government's action is subject to strict scrutiny. Riley v. Rhode Island Dept. of Envtl. Mgmt., 941 A.2d 198, 205-06 (R.I. 2008). When no fundamental right is at stake, substantive due process guards against arbitrary and capricious government

action. Id. at 207 (citing Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 10 (R.I. 2005)). More specifically,

> To prevail on a substantive due process claim, a successful plaintiff must show either that the statute in question violates a constitutionally protected liberty or property interest or "that the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"

Cherenzia v. Lynch, 847 A.2d 818, 826 (R.I. 2004) (quoting Brunelle v. Town of South Kingstown, 700 A.2d 1075, 1084 (R.I. 1997)) (further citation omitted).

In terms of equal protection, our Supreme Court has established that not all legislative classifications are impermissible. Id. at 823 (citing Kennedy v. State, 654 A.2d 708, 712 (R.I. 1995)). When a statute infringes on a fundamental right or creates a suspect classification, the statute must be examined with strict scrutiny. Id. (citing Kennedy, 654 A.2d at 712); see also 2 Ronald D. Rotunda et al., Treatise on Constitutional Law: Substance and Procedure, § 15.4(d) at 777 (4th ed. 2007) (stating that "[i]f the law limits the ability of all persons to exercise a fundamental right it will be tested under due process. If the law restricts . . . the ability of a class of persons to exercise a fundamental right, it will be tested under equal protection[]").

"It is well settled that under the equal protection clause, legislative classifications that do not affect a fundamental right or a suspect class such as race, alienage, or national origin, are examined under a 'minimal-scrutiny' analysis." Riley, 941 A.2d at 211; see also Cherenzia, 847 A.2d at 823 (citing Kennedy, 654 A.2d at 712) (establishing that economic or social regulations that do not infringe on a fundamental right or create a suspect classification are reviewed with minimal scrutiny). Minimal scrutiny for equal protection purposes is identical to minimal scrutiny pursuant to substantive due process principles in that the laws at issue "will be upheld so long as they bear a reasonable relationship to public health, safety, or welfare." Riley, 941 A.2d

at 211 (citing Kaveny, 875 A.2d at 11). "In addition to enacting laws that protect the public's health, safety and welfare, the General Assembly, pursuant to our Constitution, is charged with the duty to protect and conserve the fishery resources of the state." Cherenzia, 847 A.2d at 826.

Although Goldberg argues that the classifications of fishermen generated by Rule 15.14.2 are suspect, he fails to cite any authority for such a claim. As mentioned above, race, alienage, and national origin have been established as suspect classifications. See also Landmark Medical Center v. Gauthier, 635 A.2d 1145, 1152 (R.I. 1994) (establishing that "[u]nder an equal protection analysis, gender-based discrimination is subject to an intermediate level of scrutiny to determine whether it is substantially related to important governmental objectives[]") (citations omitted); 3 Ronald D. Rotunda et al., Treatise on Constitutional Law: Substance and Procedure, § 18.14 at 685 (4th ed. 2008) (stating that legitimacy classifications will be examined with greater scrutiny than general economic or social welfare legislation). Limiting the ability of certain commercial fishermen to use lobster traps in Area 2 waters does not create a suspect classification. See Cherenzia, 847 A.2d 818, 825 (establishing that "the fishermen who use SCUBA to harvest shellfish at . . . four designated ponds do not constitute a suspect classification as either [the Rhode Island Supreme] Court or the United States Supreme Court has defined that term[]") (citation omitted); Riley, 941 A.2d at 212 (stating that the appellant "is not eligible for the license he seeks, and although he may believe that all those ineligible for this license constitute a class, those who fall into this purported 'class' exist only as a consequence of their ineligibility and not because of any particular trait they share[]"). Because Goldberg fails to fit within a suspect classification, the type of scrutiny that must be applied to DEM's decision under substantive due process and equal protection principles will depend on whether a fundamental right is at stake. Cf. Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000) (establishing

that "[i]n the field of local permits, the nature of the government conduct (or misconduct) required to establish either a substantive due process or an equal protection claim is so similar as to compress the inquiries into one[]") (citation omitted).

Because Goldberg fails to offer a careful description of a fundamental liberty interest at stake, this Court need not examine further whether such a right has been violated. See Germane, 971 A.2d at 583 (noting that the record was "significantly devoid of a 'careful description' by appellant of a fundamental liberty interest of his that was allegedly violated[]") (citation omitted). Assuming, arguendo, that Goldberg's brief statement that his rights under article 1, section 17 of the Rhode Island Constitution have been violated qualifies as a careful description of such a fundamental liberty interest, this Court must determine which level of scrutiny to apply.

In Cherenzia v. Lynch, our Supreme Court noted that:

> the United States Supreme Court has not defined "with exactness" the scope of the liberty interests protected by the Fourteenth Amendment to the United States Constitution, but that such interests include freedom from bodily restraint, the right of the individual to contract, the right of the individual to engage in the common occupations of life, and "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."

Cherenzia, 847 A.2d at 823 (quoting Lynch v. Gontarz, 120 R.I. 149, 156, 386 A.2d 184, 188 (1978)). Further, the Court in Cherenzia stated that the "scope of the fundamental right protected in [article 1, section 17] is that all the inhabitants of the [S]tate 'shall continue to enjoy and freely exercise' equal access to the [S]tate's fishery resources." Id. at 823-24 (citing State v. Kofines, 33 R.I. 211, 239, 80 A. 432, 443 (1911)) (further citation omitted). Significantly, this "fundamental right" is not without its limits, however, as our Supreme Court:

> has held that art. 1, sec. 17 "was intended to be carried into effect by legislative regulation, such regulation having for its object to secure to the whole people the benefit of the constitutional declaration." In fact, "legislative restriction is indispensable to secure to the public the benefit of the . . . fishery" and effectuate the intended scope of the constitutional right. . . . Thus, the very nature and scope of the right to fish that art. 1, sec. 17 protects is not unqualified; rather, it anticipates that reasonable legislative regulation is necessary to properly effectuate that right.

Id. at 824 (quoting State v. Cozzens, 2 R.I. 561, 563 (1850)). In Cherenzia, the Court considered whether a statute, R.I. Gen. Laws § 20-6-30, that prohibited any person from harvesting shellfish using SCUBA gear at four coastal ponds, infringed upon the fundamental right of the inhabitants of Rhode Island to have equal access to the rights of fishery. Our Supreme Court concluded:

> the provisions of § 20-6-30 do not infringe on the fishermen's fundamental right of equal access to the state's resources because no fundamental constitutional right exists for inhabitants of this state to harvest shellfish from specific bodies of water by using a specific method of fishing. On the contrary, we have interpreted art. 1, sec. 17 to mean that "fishing must be carried on for the ultimate benefit of the people of the state and not merely for the profit and emolument of the fishermen engaged in the business."

Id. (quoting Opinion to the Senate, 87 R.I. 37, 38-39, 137 A.2d 525, 526 (1958)) (emphasis added).

Further, our Supreme Court considered whether the fishermen's occupation has been infringed upon:

> In addition . . . prohibiting only one method of harvesting shellfish (that is, via SCUBA) from only four specified ponds in the state does not deny these fishermen their livelihood or occupation because they all may still harvest shellfish—even with the assistance of SCUBA—in areas other than the four salt ponds in question. In addition, the fishermen concede that alternative, albeit less efficient, means of harvesting shellfish are still available for them to use at the specified four coastal ponds that are subject to the SCUBA ban. Therefore, the provisions of § 20-6-30 violate no fundamental constitutional "rights of fishery" by prohibiting the

> harvesting of shellfish just by one particular method in such limited fishing areas.

Id.

In Riley, our Supreme Court considered whether § 20-2.1-5, which limited the issuance of new principal-effort and multipurpose fishing licenses while providing for the renewal of licenses issued prior to December 31, 2002, was unconstitutional. It held that a fisherman who had been denied a principal-effort license had not had his fundamental right to pursue a lawful calling violated because he had obtained a license to fish commercially. Riley, 941 A.2d at 206. Specifically, our Supreme Court explained that it could not:

> agree that [the appellant] has a fundamental right to have the specific license he seeks, which would allow him to take more valuable species of fish. [It did] not believe that this is an unreasonable regulation on [the appellant's] ability to be a commercial fisherman because he still is able to harvest more than a hundred species of sea creatures, even though he is unable to pursue those that are the most profitable, except in a recreational manner. [The appellant] may still fish commercially within the licensing scheme and applicable restrictions that the statute requires.

Id. (citing Cherenzia, 847 A.2d at 824).

Regarding the right of fishery, the Court in Riley noted its "long-standing view that the right of fishery in Rhode Island belongs to the general public, and to no particular individual." Id. at 208 (citations omitted). Further, the Court commented on the General Assembly's plenary power to regulate fishing:

> Therefore the whole subject of fisheries, floating and shell-fish, and all kinds of shell-fish, whether oysters, clams, quahaugs, mussels, scallops, lobsters, crabs, or fiddlers, or however they may be known and designated and wherever situate within the public domain of the state of Rhode Island, are under the fostering care of the General Assembly. It is for the Legislature to make such laws, regulating and governing the subject of lobster-culture, oyster-culture, clam culture or any other kind of pisciculture, as they may deem expedient. They may regulate the public or private fisheries.

> They may even prohibit free fishing for a time and for such times as in their judgment it is for the best interest of the state so to do. They may withhold from the public use such natural oyster beds, clam beds, scallop beds or other fish beds as they may deem desirable. They may make a close time within which no person may take shell-fish or other fish, and generally they have complete dominion over fisheries and fish as well as all kinds of game. We find no limitation, in the Constitution, of the power of the General Assembly to legislate in this regard, and they may delegate the administration of their regulations to such officers or boards as they may see fit.

Id. at 209 (quoting Opinion to the Senate, 87 R.I. at 39-40, 137 A.2d at 526 (further citation omitted)). In discussing the General Assembly's plenary power, our Supreme Court recounted that it has continued to uphold private leasing of public grounds to the exclusion of others, permitting the General Assembly to determine that it "is in the best interest of the whole of the public." Id. at 210. Although the Court in Cherenzia described the right of fishery as one of "equal access," the Court in Riley cautioned against reading "equal access" literally:

> Reading "equal access" literally would run counter to our holdings that no fundamental right is implicated when the General Assembly enacts legislation for the "good of the whole," even when it has been at the expense of a few . . . . This Court never has held that a fundamental right of fishery has been implicated and applied strict scrutiny to such regulations. As a result, this Court has applied a rational-basis analysis when testing the constitutionality of fishing regulations and statutes . . . . We see no reason to depart from that precedent now.

Id. at 210-11 (citations omitted) (footnote omitted).

Under Riley and Cherenzia, therefore, no fundamental right is at stake in the case at bar. Goldberg's right of fishery has not been infringed upon because no fundamental right exists for inhabitants of Rhode Island to fish lobster from specific bodies of water using a specific method—namely, lobster traps. See Cherenzia, 847 A.2d at 824. Because equal access to the

fishery cannot be considered literally, our General Assembly possesses the plenary power to grant varying degrees of access to the lobster fishery. See Riley, 941 A.2d at 210-11.

Goldberg's fundamental right to a lawful calling also has not been infringed upon. At the March 5, 2007 hearing, Goldberg testified that his full-time occupation is a lawyer, not a commercial fisherman. (Tr. at 26, Mar. 5, 2007.) Also, Gibson testified that "the multipurpose license doesn't preclude other activities and doesn't require that [fishermen] deploy pots." (Tr. at 62, May 1, 2007.) Gibson explained that Rule 15.14.2 does not restrict catching lobsters using mobile gear or auto trolls, diving, or gill nets. (Tr. at 75-76, May 1, 2007.) Goldberg's access to other means of fishing ensures that no fundamental right is implicated. See Cherenzia, 847 A.2d at 824 (establishing that access to alternative means of harvesting shellfish defeated claim of infringement of right to an occupation). As our Supreme Court stated in Riley, Goldberg "may still fish commercially within the licensing scheme and applicable restrictions that the [regulation] requires." See Riley, 941 A.2d at 206.

With no fundamental right at stake, this Court must consider Rule 15.14.2 under minimal scrutiny. See id. at 210-11. Under this analysis, if this Court can conceive of any reasonable basis to justify the DEM's treatment of Goldberg, Goldberg's substantive due process and equal protection rights have not been violated. See Cherenzia, 847 A.2d at 825. Our Supreme Court found such a reasonable basis for § 20-6-30 in Cherenzia:

> Article 1, section 17, of the constitution charges the Legislature with the "duty" to conserve and protect the state's fishery resources by providing "adequate resource planning for the control and regulation of the use of the natural resources." Because the fishery resources of the state must be preserved and protected for use by all the inhabitants of the state—and not just for the profit of commercial fishermen—a statutory provision that eliminates only one particular method by which those fishermen and all others may harvest shellfish from four designated coastal ponds ensures that the shellfish in those ponds remain available to both commercial

> and non-commercial fishermen "in equal measure."... Slowing down the rate at which the shellfish in these limited areas can be harvested by eliminating the most efficient method for doing so also may tend to lessen the likelihood that all fishermen in these areas will confront depleted stocks of fish. The provisions of § 20-6-30, therefore, are not "'wholly irrelevant" to the achievement of the state's objective to protect the resources of the state so that they can be enjoyed by all the inhabitants of the state who wish to access them.

Id. (citations omitted) (emphasis added).

Our Supreme Court also was not convinced that the General Assembly was powerless to enact § 20-6-30 because the fishermen were already subject to size and daily catch limits implemented to sustain the shellfish resource. The Supreme Court responded:

> This contention, however, overlooks the fact that the duty of the Legislature is to preserve the state fishery resources for all the inhabitants of the state, even those who seek, for example, merely to harvest shellfish for their own personal recreation and consumption. This constitutional responsibility may include not only regulating size and daily catch limits, but also regulating the methods by which fishing may occur.... The DEM report, cited by the fishermen, acknowledged that harvesting shellfish, with the assistance of SCUBA, is "selective and efficient." Therefore, eliminating the use of this relatively more effective harvesting method is a reasonable means of preserving this shellfish population for access in the designated coastal ponds by both commercial and non-commercial fishermen alike.... In any event, the General Assembly reasonably could have concluded that the provisions of § 20-6-30 would tend to advance this legitimate state interest in effectively adhering to size and catch limitations.

Id. at 825-26 (emphasis added). The Court held, "[b]ecause a substantial relationship exists between the anti-SCUBA legislation in question and the Legislature's ... constitutional duty to protect and conserve [fishery] resources, the challenged statute is sufficient to meet this minimal-scrutiny test." Id. at 826.

Similarly, the Court in Riley determined that § 20-2.1-5 satisfied minimal scrutiny because "the requirement of possessing a license from the previous year has a real and

substantial relationship to a legitimate governmental goal of limiting the number of licenses available to take restricted species. . . . [I]t is not unreasonable to give priority to fishermen, according to who already depended on this limited resource for their livelihood." Riley, 941 A.2d at 207. Further, the Court determined that the goals of conservation and viability of the fishing industry are legitimate. Id. at 212. Our Supreme Court stated, "The Assembly has proper concern for the economic viability of the industry as a whole, and in particular, for those individuals who have the most at stake within it." Id. at 213. Like the fishermen in Cherenzia, the appellant in Riley contended that regulations limiting the poundage of each species harvested were sufficient to preserve the fishery resources. Our Supreme Court remained unconvinced by that argument:

> [L]imiting access to different species via limited licensing is related directly to the goals of maintaining the viability of those stocks and the fishing trade that depends upon them. This not only benefits the trade, but also it is for the well-being of all the people of the state. It is certainly natural that the most desirable species face the greatest threat from overfishing and depletion. Therefore, we hold that the objectives of this scheme are legitimate and in accordance with the General Assembly's constitutional duty of preserving marine fisheries, and that limiting the entry of new licenses is a rational way to achieve those goals.

Id.

Regarding the case at bar, Rule 15.14.2-1 states that the "purpose of the program [is] to help achieve a healthy and sustainable lobster resource in Area 2 by capping effort at 2001-2003 levels, and establishing a mechanism for future adjustments in effort in response to changes in resource status." Similarly, Angell testified:

> The goal of the regulation and implementation of this plan was to . . . be in compliance with the management plan as put forth by the Atlantic States Marine Fisheries Commission. This plan was designed to cap the effort, lobster trap fishing effort that was occurring in lobster management area two at levels that existed

> during the 2003 time frame in order to control fishing mortality rates on the lobster resource.

(Tr. at 66, Mar. 5, 2007).

Further,

> The implementation of this particular management plan was done due to findings by the Atlantic States Marine Fisheries Commission Lobster Technical Committee through peer-reviewed stock assessments that the area two lobster fishery resource is being overfished and that the capping of trap effort in area two and presumably further reduction of trap effort in area two was an approved method by which fishing mortality on the lobster resource could be reduced over time.

(Tr. at 70-71, Mar. 5, 2007).

Gibson similarly testified that "Addendum 7—the so-called effort control plan—was designed to cap fishing effort of the amount of participation in the fishery at or near 2003 levels so as to afford the lobster resource an opportunity to recover." (Tr. at 13, May 1, 2007.) He further stated, "The lobster resource is overfished. Three successive stock assessments that have been peer reviewed in 1996, 2000, and 2006 found that the lobster resource in this area, in area two of the Rhode Island waters was overfished and overfishing was occurring." (Tr. at 127, Mar. 5, 2007.)

Rule 15.14.2's goal of preserving a sustainable lobster resource is consistent with article 1, section 17 of the Rhode Island Constitution which mandates that the General Assembly conserve and protect the State's fishery resources. Accordingly, conservation and viability of the lobster industry in Rhode Island is a legitimate goal under the minimal scrutiny standard. See Riley, 941 at 212. As our Supreme Court explained in Cherenzia, limiting the use of an effective method of fishing "may tend to lessen the likelihood that all fishermen in these areas will confront depleted stocks of [lobster]." See Cherenzia, 847 A.2d at 825. Thus, DEM's limitation on the use of lobster traps is a reasonable means of preserving the lobster population. See id. at

825-826. Tying that limitation to a fisherman's historical usage of his or her license is a reasonable means of determining how to limit the use of lobster traps. The 2001-2003 control period identified those fishermen who had the most at stake in the fishery—those who had remained active in the fishery. Thus, this Court concludes that Rule 15.14.2 satisfies the minimal-scrutiny test because a substantial relationship exists between Rule 15.14.2 and the legitimate goal of conserving and protecting Rhode Island's lobster fishery resources.

Accordingly, this Court must reject Appellant's substantive due process and equal protection claims. This Court's conclusion in this regard comports with the federal court's rejection of similar claims involving the very same regulation that occurred the year following the filing of this appeal. See R.I. Fisherman's Alliance v. D.E.M., 2008 WL 4467186 (D.R.I. 2008), aff'd, 585 F.3d 42 (1st Cir. 2009).

C

Section 20-2.1-2 of the Rhode Island General Laws

Goldberg's final argument is that a trap allocation to him of three pots violates the statutory mandate of § 20-2.1-2, which provides, in part:

> The purposes of this chapter are, through a system of licensure that is clear, predictable and adaptable to changing conditions, to:
>
> (4) Respect the interests of residents who fish under licenses issued by the state and wish to continue to fish commercially in a manner that is economically viable: provided, it is specifically not a purpose of this chapter to establish licensing procedures that eliminate the ability to fish commercially of any resident as of the date of enactment who validly holds commercial fishing license and who meets the application renewal requirements set forth herein.

Section 20-2.1-9 states that it "shall be the duty of the director [of DEM] to adopt, implement effective January 1, 2003, and maintain a commercial fisheries licensing system that shall incorporate and be consistent with the purposes of this chapter. . . ."

When a court "is confronted with a statute that contains clear and unambiguous language, [it] construe[s] the statute literally and accord[s] the terms their plain and ordinary meaning." Lynch v. Spirit Rent-a-Car, Inc., 965 A.2d 417, 425 (R.I. 2009) (citing Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008)). In accordance with the plain and unambiguous terms of § 20-2.1-2(4), Goldberg has offered no evidence that his ability to fish commercially has been eliminated. He still possesses a multipurpose license. Multipurpose licenses allow the holder to commercially fish in all fisheries sectors at the full harvest and gear levels. Section 20-2.1-5.[8] Goldberg testified that he would not be able to participate in the commercial lobster fishery with just three traps. (Tr. at 48, Mar. 5, 2007.) Gibson testified, however, that "the multipurpose license doesn't preclude other activities and doesn't require that [fishermen] deploy pots." (Tr. at 62, May 1, 2007.) Gibson explained that Rule 15.14.2 does not restrict catching lobsters using mobile gear or auto trolls, diving, or gill nets. (Tr. at 75-76, May 1, 2007.) He said that the "non-trap gear sector" is allowed to have 100 lobsters per day or 500 per multiday trip. (Tr. at 76, May 1, 2007.) Also, it is difficult for Goldberg to claim that he qualifies as one who wishes

[8] Section 20-2.1-3(9) provides:

> Full harvest and gear levels" means fishery-specific harvest and/or gear levels, established and regularly updated by the department by rule, which, in a manner consistent with the state or federally sanctioned management plans or programs that may be in effect, and to the extent possible given those plans and programs, provide a maximum level of participation for principal effort license holders in accordance with applicable endorsements and for all multipurpose license holders.

to continue to fish commercially in a manner that is economically viable because he was not fishing at all in 2002 when § 20-2.1-2(4) was enacted. See P.L. 2002, ch. 47, § 4; (State's Ex. 1.)

If § 20-2.1-2(4) is considered ambiguous, then this Court must "examine the statute in its entirety in order to discern the legislative intent and purpose behind it." Planned Environments Mgmt. Corp. v. Robert, 966 A.2d 117, 122 n.8 (R.I. 2009) (citing State v. LaRoche, 925 A.2d 885, 888 (R.I.2007)) (further citations omitted). Section 20-2.1-13 states that the "provisions of this chapter, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effectuate its purposes."[9] Section 20-2.1-2 offers other purposes animating Rhode Island's commercial fishing license scheme. Another purpose is to "[p]reserve, enhance, and allow for any necessary regeneration of the fisheries of the state, for the benefit of the people of the state, as an ecological asset and as a source of food and recreation." Section 20-2.1-2(1). Another purpose provided by the General Assembly is to "[p]reserve and enhance full-time commercial fishing, with a high degree of participation by owner operated vessels, as a way of life and as a significant industry in Rhode Island." Section 20-2.1-2(5). In light of these other explicit purposes, and considering the authority of the DEM director to regulate and restrict the use of fishing gear, see § 20-2.1-9(1)(v), this Court finds that DEM's treatment of Goldberg does not constitute a violation of § 20-2.1-2(4). This Court's conclusion in this regard is identical to that reached by the federal court a year after DEM's decision in this case. See Fisherman's Alliance v. D.E.M., 2008 WL 4467186 (D.R.I. 2008), aff'd, 585 F.3d 42 (1st Cir. 2009).

[9] Black's Law Dictionary defines "liberal construction" as an "interpretation that applies a writing in light of the situation presented and that tends to effectuate the spirit and purpose of the writing." Black's Law Dictionary 332 (8th ed. 2004).

IV

CONCLUSION

This Court is mindful that the regulation at issue in this case works an unfairness to Appellant by significantly limiting the use of his multipurpose commercial fishing license as a result of the lack of his historical use of the license for a period of time. Indeed, this Court can conceive of a regulatory scheme that would have been less harsh to Appellant and still would have served the interest of protecting the lobster resource from overfishing. For all of the reasons stated in this Decision, however, it cannot conclude that any such unfairness rises to the level of a constitutional violation or contravenes Rhode Island law. Appellant received all the process he was due, failed to prove his due process and equal protection claims, failed to establish any other violation of state law and failed to prove any other grounds to overturn the administrative decision of DEM. While there are other ways that DEM could have limited lobstermen's licenses to protect overfishing that would not have impacted Appellant in this way, this Court cannot say that its legislative decision in this regard, however unwise, lacked a rational basis. Other schemes may have affected other lobstermen in ways that they thought were unfair. Such are the vicissitudes of the legislative process. As a result, Appellant's appeal is denied and the decision of DEM is approved.

Counsel shall confer and submit to this Court forthwith for entry an agreed upon form of Order and Judgment that is consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Thomas Goldberg v. Department of Environmental Management, et al.
CASE NO:	PC 07-4046
COURT:	Providence County Superior Court
DATE DECISION FILED:	September 3, 2013
JUSTICE/MAGISTRATE:	Savage, J.
ATTORNEYS:	
For Plaintiff:	Robert D. Goldberg, Esq.
For Defendant:	Peter F. Kilmartin, Attorney General; Gary Powers, Esq.