



On August 12, 2013, NAO sent Appellant a letter notifying him that the office had received his appeal and requesting any additional documentation or information in support of his appeal be submitted to NAO by September 2, 2013.<sup>6</sup> NAO did not receive additional material supporting Appellant's claim.

On September 23, 2013, and again on October 25, 2013, NAO sent Appellant a Notice Scheduling a Hearing.<sup>7</sup> On December 13, 2013, Appellant testified at his scheduled hearing that the fact his permit remained in CPH status during the 2008 fishing year should have no bearing on his qualification for a FLA1P.<sup>8</sup> Appellant also challenged the validity of the Regulation and requested compensation for the value of his Federal lobster permit.<sup>9</sup>

### ISSUE

The broad issue in this case is whether Appellant is eligible for a FLA1P under the Regulation. To resolve that issue, I must answer the following:

Did Appellant's Federal lobster permit have an Area 1 trap designation during the 2008 fishing year (May 1, 2008, through April 30, 2009)?

If the answer to this question is "no," Appellant is not eligible for a FLA1P, and I must uphold the QD.

### FINDINGS OF FACT

1. On November 29, 2005, Appellant applied to have his Federal lobster permit placed in CPH status.<sup>10</sup>
2. On December 1, 2005, GARFO granted Appellant's application to have his Federal lobster permit placed in CPH status.<sup>11</sup>
3. Appellant's Federal lobster permit remained in CPH status during the 2008 fishing year.<sup>12</sup>

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<sup>6</sup> Appeals Correspondence Tab, Letter from NAO to Appellant dated August 12, 2012.

<sup>7</sup> Hearing Tab, Notice Scheduling Hearing, dated September 23, 2013; Notice Scheduling Hearing, dated October 25, 2013.

<sup>8</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>9</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>10</sup> Pleadings Tab, Application for Vessel Replacement, Upgrade, and Confirmation of Permit History, dated November 15, 2005, and received November 29, 2013.

<sup>11</sup> Denial Letter Tab, Confirmation of Permit History, dated December 1, 2005.

<sup>12</sup> Denial Letter Tab, QD, dated April 15, 2013; Audio Recording of December 13, 2013, scheduled hearing.

## PRINCIPLES OF LAW

To qualify for a FLA1P, an applicant must satisfy the eligibility criteria listed in the Regulation. This criteria requires an applicant establish that (1) the applicant has a valid and current Federal lobster permit as of the date of the application, (2) the applicant's Federal lobster permit had an Area 1 trap designation at some time during the 2008 fishing year, and (3) at least one Area 1 trap tag was purchased to fish with traps under the applicant's Federal lobster permit in any one fishing year from 2004 to 2008.<sup>13</sup>

An applicant may establish his or her Federal lobster permit's 2008 Area 1 trap designation by providing NMFS with either a copy of the vessel's Federal lobster permit for the 2008 fishing year, or, alternatively, data that will enable NMFS to identify his or her Federal lobster permit in its database.<sup>14</sup> Such data must include, at a minimum, the applicant's name and address, vessel name, and Federal lobster permit number.<sup>15</sup>

If NMFS denies an applicant's request for a FLA1P, the Regulation provides that the applicant may file an administrative appeal within 45 days of the date listed on the denial notice.<sup>16</sup> The sole ground for such an appeal shall be that NMFS made a clerical mistake in concluding the appellant's vessel did not meet the eligibility criteria. If an appellant fails to clearly and convincingly prove that an error occurred, the appeal must be denied.<sup>17</sup>

## ANALYSIS

### **Did Appellant's Federal lobster permit have an Area 1 trap designation during the 2008 fishing year (May 1, 2008, through April 30, 2009)?**

Under the Regulation, to qualify for a FLA1P Appellant must establish that he possesses a valid and current Federal lobster permit that had an Area 1 trap designation at some time during the 2008 fishing year.<sup>18</sup> As proof of the Federal lobster permit's 2008 Area 1 trap designation, Appellant must provide either a copy of Vessel's Federal lobster permit for the 2008 fishing year, or data that will allow NMFS to identify the Federal lobster permit in its database.<sup>19</sup>

The record indicates that Appellant holds a valid Federal lobster permit. However, the record does not reflect that Appellant's Federal lobster permit had an Area 1 designation at any point during the 2008 fishing year. Instead, the record demonstrates

<sup>13</sup> 50 C.F.R. § 697.4(a)(7)(vi)(A)(1-3); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>14</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>15</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>16</sup> 50 C.F.R. § 697.4(a)(7)(vi)(D); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>17</sup> 50 C.F.R. § 697.4(a)(7)(vi)(D)(1); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>18</sup> 50 C.F.R. § 697.4(a)(7)(vi)(A)(2).

<sup>19</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

Appellant's Federal lobster permit remained in CPH status throughout the entire 2008 fishing year. Appellant's Federal lobster permit has not been an active Area 1 trap permit since he placed it in CPH status.

As explained in the comments to the Final Rule:

If a Federal lobster permit was in CPH status during the entire 2008 fishing year, then it was inactive and the permit holder was not fishing under the permit. Consequently, the permit will not have an Area 1 designation for that year, will fail to satisfy that criterion, and would be considered ineligible for future participation in the Federal Area 1 lobster trap fishery.<sup>20</sup>

In reaching my decision, I have carefully reviewed the entire record, including Appellant's arguments. Appellant contends the fact his permit was in CPH status should have no bearing on his qualification for a FLA1P.<sup>21</sup> Unfortunately, a Federal lobster permit in CPH status does not satisfy the regulatory requirement for a FLA1P. Specifically, a Federal lobster permit in CPH status does not show that a permittee has an active Area 1 trap designation at some time during the 2008 fishing year. As the Area 1 program office, GARFO interpreted the Regulation to mean that any Federal lobster permit that remained in CPH status throughout the 2008 fishing year lacked the requisite Area 1 trap designation and does not qualify for a FLA1P. After reviewing the Final Rule, I find this interpretation reasonable.

Next, Appellant argues the Federal Government has no right to promulgate the qualifications found in the Regulation.<sup>22</sup> According to Appellant, it is immoral for the Federal Government "to pick and choose what the rules should be . . . [and] who can fish and who cannot."<sup>23</sup> Appellant contends that environmental groups are using their vast financial resources to influence the Federal Government. Appellant also states the Federal Government has too much power and has implemented a permitting scheme that is restricting trade and taking fish away from the fishermen in the quota system.<sup>24</sup> In addition, Appellant avows the regulatory actions taken by NMFS violate "[J]udge [K]essler's ruling about days at sea."<sup>25</sup>

Furthermore, Appellant maintains the interplay between the Federal and the Massachusetts regulatory schemes prevented him from taking his Federal lobster permit out of CPH.<sup>26</sup> Appellant argues that had he taken his Federal lobster permit out of CPH by transferring it to his new fishing vessel, ██████████, his Massachusetts

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<sup>20</sup> 77 Fed. Reg. 32420-01, 32430 (2012).

<sup>21</sup> Audio Recording of December 13, 2013, scheduled hearing; Pleadings Tab, Appellant's Appeal Letter, dated May 29, 2013, and received May 31, 2013.

<sup>22</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>23</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>24</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>25</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>26</sup> Audio Recording of December 13, 2013, scheduled hearing.

permits “would have been useless.”<sup>27</sup> Appellant further contends that had GARFO not forced him to combine his multispecies and lobster permits against his will, he would have been able to take his Federal lobster permit out of CPH and apply it to his current vessel without jeopardizing his Massachusetts permits.<sup>28</sup>

I empathize with Appellant’s situation, as well as his frustration with both the regulatory process and the interplay between federal and state regulatory schemes. However, the administrative appeals process is not the appropriate vehicle to resolve these challenges. Instead, the sole issue I am authorized to resolve in this appeal is whether NMFS correctly applied the Regulation to Appellant.

Finally, Appellant avers the Federal Government has no right to take away his right to fish in Area 1, but if it insists on doing so, it should adequately compensate him.<sup>29</sup> According to Appellant, the value of his Federal lobster permit is between \$10,000 and \$15,000, and the Federal Government should compensate him in the amount of \$15,000.<sup>30</sup>

I have carefully considered Appellant’s claim that the Federal Government should compensate him for his permit; however, the Regulation contains no provisions for compensation to applicants in Appellant’s or any other circumstance. As opposed to a court of law, in which equitable relief may be an available remedy when there is not a remedy at law, an administrative agency is not presumed to be vested with such authority. An administrative agency is only vested with such authority if explicitly delegated such powers by Congress. Appellant has provided no support for the proposition that an administrative agency can make law in the form of relief lying in equity. Without such evidence or legal authority within the Regulation to grant relief under equitable principles, I cannot grant Appellant’s request for compensation.

In summary, Appellant has not established the QD issued to him was inconsistent with the Regulation. In reaching my decision in this case, I carefully examined the entire record. I have reviewed Appellant’s concerns and understand the challenges he faces. However, I must uphold the QD because Appellant has not established he possessed an Area 1 trap designation associated with his Federal lobster permit at some time during the 2008 fishing year.

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<sup>27</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>28</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>29</sup> Audio Recording of December 13, 2013, scheduled hearing.

<sup>30</sup> Audio Recording of December 13, 2013, scheduled hearing.

### CONCLUSIONS OF LAW

Appellant is not eligible for a FLA1P because he did not prove by clear and convincing evidence that NMFS clerically erred in concluding that Vessel did not meet the participation requirements for a FLA1P associated with his Federal lobster permit.

The QD is consistent with the Regulation.

### ORDER

The QD dated April 15, 2013, is upheld. This Regional Administrator may affirm, reverse, modify, or remand this decision.



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Steven Goodman  
Administrative Judge

Date Issued: June 13, 2014