

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL APPEALS OFFICE

In re Application of

[REDACTED]

Appellant

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Appeal No. 13-0083

DECISION

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STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget, and is located in NOAA's headquarters in Silver Spring, Maryland. The Regional Administrator (RA) of NMFS' Greater Atlantic Regional Fisheries Office (GARFO) (formerly NMFS' Northeast Regional Office) may affirm, reverse, modify, or remand this decision.

This appeal concerns Appellant's application for a Federal Lobster Area 1 Limited Access Permit (FLA1P) associated with his Federal lobster permit for his fishing vessel [REDACTED] (Vessel). On October 31, 2012, Appellant applied for a FLA1P pursuant to the Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery (Regulation).<sup>1</sup> Appellant filed the application with the GARFO RA, who is responsible for determining whether an applicant will receive a FLA1P.<sup>2</sup>

On April 15, 2013, GARFO sent Appellant the QD at issue in this case.<sup>3</sup> In the QD, GARFO denied Appellant a permit to fish for lobster with traps in the federal waters of Lobster Conservation Management Area 1 (Area 1). GARFO denied Appellant's application for a FLA1P after determining his Federal lobster permit remained in Confirmation of Permit History (CPH) status during the entire 2008 fishing year. GARFO noted that Appellant had the right to appeal the QD.

On May 9, 2013, Appellant appealed the QD.<sup>4</sup> In his appeal, Appellant stated he fished only in state waters during 2008, but maintained his Federal lobster permit in CPH status.<sup>5</sup> In support of his appeal, Appellant enclosed copies of the CPH issued by NMFS, his 2008 exclusive economic zone (EEZ) trap tag, the Certificate of

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<sup>1</sup> Application Tab, Application for FLA1P, signed and received October 31, 2012.

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

<sup>3</sup> Denial Letter Tab, QD, dated April 15, 2013.

<sup>4</sup> Pleadings Tab, Appellant's appeal letter, dated April 28, 2013, and received May 09, 2013.

<sup>5</sup> Pleadings Tab, Appellant's appeal letter, dated April 28, 2013, and received May 09, 2013.

Documentation for the fishing vessel ██████████ (Vessel II), and his Federal fisheries permit number ██████████.<sup>6</sup>

On August 12, 2013, NAO sent Appellant a letter notifying him that it had received his appeal and requested that he submit any additional documentation or information in support of his appeal to NAO by September 2, 2013.<sup>7</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 Hearing.<sup>8</sup> On December 11, 2013, Appellant testified at his scheduled hearing that he spent decades fishing in state waters off the coast of Marblehead, Massachusetts.<sup>9</sup> During this time, Appellant qualified for and possessed both a Massachusetts Coastal Lobster Permit (CLP) and a FLA1P for Vessel. However, at some point in or after 2002, Appellant replaced Vessel—retaining his CLP and placing his FLA1P in CPH status. Appellant has since relocated to ██████████ Massachusetts, and now wishes to fish with traps in Area 1. On December 13, 2013, Appellant's attorney sent NAO a written summary of the arguments presented at the hearing.<sup>10</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 this answer to this question is "no," Appellant is not eligible for a FLA1P, and I must uphold the QD.

## FINDINGS OF FACT

1. Sometime in or after 2002, Appellant replaced Vessel with Vessel II.<sup>11</sup>
2. Sometime in or after 2002, Appellant transferred his CLP from Vessel to Vessel II.<sup>12</sup>

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<sup>6</sup> Pleadings Tab, Appellant's appeal letter, dated April 28, 2013, and received May 09, 2013.

<sup>7</sup> Appeals Correspondence Tab, Letter from NAO to Appellant dated April 21, 2011.

<sup>8</sup> Hearing Tab, Notice Scheduling Hearing, dated September 23, 2013; Hearing Tab, Notice Scheduling a Hearing, dated October 25, 2013.

<sup>9</sup> Pleadings Tab, Applicant's Statement, dated and received December 13, 2013.

<sup>10</sup> Pleadings Tab, Applicant's Statement, dated and received December 13, 2013.

<sup>11</sup> Audio Recording of December 11, 2013, scheduled hearing; Pleadings Tab, Applicant's Statement, dated and received December 13, 2013.

<sup>12</sup> Audio Recording of December 11, 2013, scheduled hearing; Pleadings Tab, Applicant's Statement, dated and received December 13, 2013.

3. Sometime in or after 2002, Appellant applied to have his Federal lobster permit placed in CPH status.<sup>13</sup>
4. GARFO granted Appellant's application to have his Federal lobster permit placed in CPH status.<sup>14</sup>
5. Appellant's Federal lobster permit remained in CPH status during the 2008 fishing year.<sup>15</sup>

## 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>16</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>17</sup> Such data must include, at a minimum, the applicant's name and address, vessel name, and Federal lobster permit number.<sup>18</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>19</sup> The sole ground for such an appeal shall be that NMFS made a clerical mistake in concluding that the vessel did not meet the eligibility criteria. If Appellant fails to clearly and convincingly prove that an error occurred, the appeal must be denied.<sup>20</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)?**

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<sup>13</sup> Audio Recording of December 11, 2013, scheduled hearing; Pleadings Tab, Applicant's Statement, dated and received December 13, 2013.

<sup>14</sup> Pleadings Tab, Appellant's appeal letter, dated April 28, 2013, and received May 09, 2013.

<sup>15</sup> Notice to Submit Evidence Tab, Lobster Area 1 Qualification Review Profile, dated June 20, 2013.

<sup>16</sup> 50 C.F.R. § 697.4(a)(7)(vi)(A)(1-3); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>17</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>18</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

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

<sup>20</sup> 50 C.F.R. § 697.4(a)(7)(vi)(D)(1); 77 Fed. Reg. 32420-01, 32431 (2012).

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>21</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>22</sup>

The record demonstrates Appellant holds a valid Federal lobster permit and that he purchased a qualifying trap tag in 2008. However, it does not reflect that Appellant's permit had an Area 1 designation at any point during the 2008 fishing season. Appellant's Federal lobster permit has not been an active Area 1 trap permit since he placed it in CPH status. Although the trap tag vendor issued Appellant a 2008 EEZ trap tag, this alone is insufficient to establish his Federal lobster permit's Area 1 designation where the Federal lobster permit itself remained in CPH status throughout the entire 2008 fishing season.

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>23</sup>

In reaching my decision, I have carefully reviewed the entire record, including Appellant's arguments. Appellant argues that because "he continued to fish for lobster under this state permit in the state waters portion adjacent to Area 1, and was in fact issued trap tags including the federal (EEZ) portion of the area, he meets the requirements of the [R]egulation."<sup>24</sup> According to Appellant, the trap tag vendor could only have issued him the trap tag if NMFS included his vessel on its list of vessels eligible to fish in Area 1. In support of his position, Appellant supplied photographic evidence of his 2008 EEZ trap tag.<sup>25</sup>

Appellant also contends NMFS' denial of his FLA1P application was "inconsistent with both the language and intent of the [R]egulation."<sup>26</sup> Appellant avers the comments to the Final Rule reflect that although NMFS understood that it would preclude certain vessels whose permits were in CPH status, it did not intend "to deny future access to Area 1 vessels actively fishing state waters who also qualified for Area 1 permits, where

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<sup>21</sup> 50 C.F.R. § 697.4(a)(7)(vi)(A)(2).

<sup>22</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>23</sup> 77 Fed. Reg. 32420-01, 32430 (2012).

<sup>24</sup> Pleadings Tab, Applicant's Statement, dated and received December 13, 2013.

<sup>25</sup> Pleadings Tab, Appellant's appeal letter, dated April 28, 2013, and received May 09, 2013.

<sup>26</sup> Pleadings Tab, Applicant's Statement, dated and received December 13, 2013.

they made an election but did not hold a physical permit in 2008.”<sup>27</sup> According to Appellant, none of the permits mentioned in the comments “had Area 1 designations or purchased trap tags in the 2004 to 2008 time frame.”<sup>28</sup>

I have carefully considered Appellant’s arguments; however, I am not persuaded they provide a basis to reverse the QD. With respect to Appellant’s claim that he possessed a state license and a qualifying trap tag, that does not show he met the regulatory requirement of having an Area 1 trap designation for 2008. As Appellant concedes, he did not fish in Area 1 in 2008 and his Federal lobster permit remained in CPH status throughout the 2008 fishing year.<sup>29</sup>

Appellant is correct that the comments do not address his precise circumstances. They do, however, consider a similar situation in which a vessel purchased a qualifying trap tag in 2005 but maintained its Federal lobster permit in CPH status throughout the 2008 fishing season.<sup>30</sup> According to the comments, this vessel would not qualify for a FLA1P because “it is not the type of permit that this rule . . . strives to qualify, since the permit has not been an active Area 1 trap permit since 2005.”<sup>31</sup>

As the Area 1 program office, GARFO has interpreted the Final Rule to mean that any Federal lobster permit that remained in CPH status throughout the 2008 fishing season lacked the requisite Area 1 trap designation and does not qualify for a FLA1P. After reviewing the Final Rule, I find this interpretation reasonable. Appellant may have been actively fishing under his CLP in state waters during the 2008 fishing season; he was not, however, fishing under an active Federal lobster permit with an Area 1 trap designation.

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.

#### 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.

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<sup>27</sup> Pleadings Tab, Applicant Statement, dated and received December 13, 2013.

<sup>28</sup> Pleadings Tab, Applicant Statement, dated and received December 13, 2013.

<sup>29</sup> Pleadings Tab, Appellant’s appeal letter, dated April 28, 2013, received May 9, 2013.

<sup>30</sup> 77 Fed. Reg. 32420-01, 32430 (2012).

<sup>31</sup> 77 Fed. Reg. 32420-01, 32430 (2012).

ORDER

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



—  
Steven Goodman  
Administrative Judge

Date Issued: February 18, 2014