

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 13-0084

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 Limited Access Permit (FLA1P) for Lobster Conservation Management Area 1 (Area 1) associated with his Federal lobster permit for his fishing vessel [REDACTED] (Vessel). On October 29, 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 January 8, 2013, GARFO sent Appellant an Incomplete Application Notice for American Lobster Area 1 Qualification (Notice).<sup>3</sup> In the Notice, GARFO informed Appellant that (1) his application for a FLA1P was missing proof of an Area 1 designation on his Federal lobster permit during the 2008 fishing year; (2) NMFS records indicate his Federal lobster permit remained in Confirmation of Permit History (CPH) status during the entire 2008 fishing year, and, therefore, did not have an Area 1 designation; and (3) to qualify for the Area 1 Limited Access Program, a Federal lobster permit must have had an Area 1 designation during the 2008 fishing year. The Notice advised Appellant to contact GARFO by January 25, 2013, if he had the missing documentation, or believed GARFO was incorrect in its assessment that documents were missing. On January 21, 2013, Appellant sent a letter to GARFO stating he

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<sup>1</sup> Application Tab, Application for FLA1P, signed October 29, 2012, and received November 2, 2012.

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

<sup>3</sup> Notice to Submit Evidence Tab, Incomplete Application Notice for American Lobster Area 1 Qualification, dated January 8, 2013.

placed his lobster permit in Confirmation of Permit History (CPH) with the understanding he would be able to reactivate it at a future date.<sup>4</sup>

On April 15, 2013, GARFO sent Appellant the QD at issue in this case.<sup>5</sup> In the QD, GARFO denied Appellant a permit to fish for lobster with traps in Area 1. GARFO denied Appellant's application for a FLA1P after determining that (1) his Federal lobster permit was not issued an Area 1 lobster permit in the 2008 fishing year, or remained in CPH status during the entire 2008 fishing year; and (2) NMFS did not have proof that at least one Area 1 lobster trap tag was purchased for his Federal lobster permit in any fishing year from 2004 to 2008. GARFO noted Appellant had the right to appeal the QD.

On May 31, 2013, Appellant appealed the QD.<sup>6</sup> In his appeal letter, Appellant indicated he intended to discuss the QD with legal counsel.<sup>7</sup>

On August 12, 2013, NAO sent Appellant a letter notifying him the office had received his appeal and requesting he submit any additional documentation or information in support of his appeal to NAO by September 2, 2013.<sup>8</sup> NAO did not receive additional material supporting Appellant's claim.

On September 23, 2013, and October 29, 2013, NAO sent Appellant a Notice Scheduling Hearing.<sup>9</sup> Subsequently, on November 20, 2013, NAO sent Appellant a Notice of Rescheduled Hearing.<sup>10</sup> On December 17, 2013, Appellant testified at his scheduled hearing that he kept his permit in CPH status because he believed it was a way to store his fishing history until he was ready to reattach it to a vessel.<sup>11</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)?

Did Appellant purchase at least one Area 1 lobster trap tag for his Federal lobster permit in any fishing year from 2004 to 2008?

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<sup>4</sup> Notice to Submit Evidence Tab, Appellant's Response to GARFO's Incomplete Application Notice, dated January 21, 2013, and received January 28, 2013.

<sup>5</sup> Denial Letter Tab, QD, dated April 15, 2013.

<sup>6</sup> Pleadings Tab, Appellant's Appeal Letter, received May 31, 2013.

<sup>7</sup> Pleadings Tab, Appellant's Appeal Letter, received May 31, 2013.

<sup>8</sup> Appeals Correspondence Tab, Letter from NAO to Appellant dated August 12, 2013.

<sup>9</sup> Hearing Tab, Notice Scheduling Hearing, dated September 23, 2013; Hearing Tab, Notice Scheduling Hearing, dated October 29, 2013.

<sup>10</sup> Hearing Tab, Notice of Rescheduled Hearing, dated November 20, 2013.

<sup>11</sup> Audio Recording of December 17, 2013, scheduled hearing.

If the answer to either of these questions is “no,” Appellant is not eligible for a FLA1P, and I must uphold the QD.

### FINDINGS OF FACT

1. On August 23, 1995, GARFO issued a Federal lobster permit to Appellant for Vessel.<sup>12</sup>
2. Sometime in or after 1995, Appellant applied to have his Federal lobster permit placed in CPH status.<sup>13</sup>
3. On August 26, 1998, GARFO granted Appellant’s application to have his Federal lobster permit placed in CPH status.<sup>14</sup>
4. Appellant’s Federal lobster permit remained in CPH status during the 2008 fishing year.<sup>15</sup>
5. In or around 2008, Appellant purchased 800 Area 1 lobster trap tags for his Federal lobster permit associated with his fishing vessel ██████████.<sup>16</sup>
6. NMFS records do not show that Appellant purchased at least one Area 1 trap tag for his Federal lobster permit associated with Vessel in any fishing year from 2004 to 2008.<sup>17</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>18</sup>

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<sup>12</sup> Notice to Submit Evidence Tab, Vessel Renewal Application, dated August 23, 1995.

<sup>13</sup> Application Tab, Confirmation of Permit History, dated August 26, 2008.

<sup>14</sup> Application Tab, Application for FLA1P, signed October 29, 2012, and received November 2, 2012.

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

<sup>16</sup> Application Tab, Photocopy of Appellant’s State of Maine License, issued March 7, 2008.

<sup>17</sup> Denial Letter Tab, QD, dated April 15, 2013.

<sup>18</sup> 50 CFR § 697.4(a)(7)(vi)(A)(1-3); 77 Fed. Reg. 32420-01, 32431 (2012).

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>19</sup> Such data must include, at a minimum, the applicant's name and address, vessel name, and Federal lobster permit number.<sup>20</sup>

As proof of purchasing an Area 1 trap tag, an applicant must supply documentary evidence from any year between 2004 and 2008 showing the purchase of the tag.<sup>21</sup> This documentation must originate from either the trap tag vendor supplying the tag, or the state or federal agency.<sup>22</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>23</sup> The sole ground for such an appeal shall be that NMFS made a clerical mistake in concluding that the appellant's 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>24</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 active Area 1 trap designation at some time during the 2008 fishing year.<sup>25</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>26</sup>

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

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

<sup>20</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>21</sup> 50 CFR § 697.4(a)(7)(vi)(B)(3); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>22</sup> 50 CFR § 697.4(a)(7)(vi)(B)(3); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>23</sup> 50 C.F.R. § 697.4(a)(7)(vi)(D); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>24</sup> 50 C.F.R. § 697.4(a)(7)(vi)(D)(1); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>25</sup> 50 C.F.R. § 697.4(a)(7)(vi)(A)(2).

<sup>26</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

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>27</sup>

In reaching my decision, I have carefully reviewed the entire record, including Appellant's arguments. According to Appellant, placing his permit in CPH status would allow him to store his permit history until he was ready to put it on a vessel.<sup>28</sup> Appellant avers he did not take his Federal lobster permit out of CPH status because he also has a multi-species permit attached to it and did not want to do the record keeping associated with maintaining a multi-species permit attached to an Area 1 permit.<sup>29</sup>

Appellant further argues he placed his Federal lobster permit in CPH status before there were lobster management zones. Appellant states he does not believe NMFS notified him that he needed to designate a zone for his Federal lobster permit when it established these zones.

I have carefully considered Appellant's arguments; however, I am not persuaded they provide a basis to reverse the QD. Although Appellant maintained a valid Federal lobster permit in CPH, this does not satisfy the requirement that Appellant have 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.

Although Appellant placed his Federal lobster permit in CPH before the creation of Area 1, the Regulation contains no provision mandating NMFS notify persons with Federal lobster permits in CPH that they should designate zones for their permits after fishing zones are established, or at any other time.

Appellant also argues there was no indication lobster was being overfished and NMFS failed to notify him the rules would change.<sup>30</sup> While I empathize with Appellant's situation, the administrative appeals process is not the appropriate vehicle to resolve this challenge. Instead, the sole issue I am authorized to resolve in this appeal is whether NMFS correctly applied the Regulation to Appellant.

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<sup>27</sup> 77 Fed. Reg. 32420-01, 32430 (2012).

<sup>28</sup> Audio Recording of December 17, 2013, scheduled hearing.

<sup>29</sup> Audio Recording of December 17, 2013, scheduled hearing.

<sup>30</sup> Audio Recording of December 17, 2013, scheduled hearing.

**Did Appellant purchase at least one Area 1 lobster trap tag for his permit in any fishing year from 2004 to 2008?**

In addition to establishing that the involved Federal lobster permit had an active Area 1 trap designation during the 2008 fishing year, the Regulation requires that Appellant submit evidence showing at least one Area 1 trap tag was purchased to fish with traps under his Federal lobster permit in any one fishing year from 2004 to 2008.<sup>31</sup> Proof of purchase of the trap tag must originate from either the trap tag vendor supplying the tag, or the state or federal agency.<sup>32</sup>

Appellant contends he purchased 800 Federal lobster trap tags in 2008.<sup>33</sup> In support, Appellant submitted a copy of his “State of Maine lobster/crab license from 2008 showing an EEZ (federal exclusive economic zone) designation with 800 tags.”<sup>34</sup> Although the record shows Appellant held these Federal lobster trap tags in 2008, it does not reflect that these trap tags were associated with Vessel. Instead, the record shows Appellant purchased these trap tags for his fishing vessel ██████████.<sup>35</sup> Because Appellant did not purchase the 800 Federal lobster trap tags under, or apply them to, his Federal lobster permit for Vessel, they will not satisfy the trap tag requirement found in the Regulation.<sup>36</sup>

Appellant further avers NMFS failed to reimburse him after it took his permit away.<sup>37</sup> 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 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 equitable powers by Congress. Appellant has not provided any support for the proposition that an administrative agency can make law in the form of relief lying in equity. Because no legal authority exists within the Regulation to grant relief under equitable principles, I cannot order Appellant be compensated for any losses resulting from NMFS’ denial of his FLA1P application.

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 his arguments. However, I must uphold the QD because Appellant has not established both that his Federal lobster permit had an Area 1 trap designation at some time during the 2008 fishing year, and that at least one Area 1 trap tag was purchased to fish with traps under his Federal lobster permit for Vessel in any one fishing year from 2004 to 2008.

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<sup>31</sup> 50 CFR § 697.4(a)(7)(vi)(B)(3); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>32</sup> 50 CFR § 697.4(a)(7)(vi)(B)(3); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>33</sup> Application Tab, Letter from Appellant, received November 2, 2012.

<sup>34</sup> Application Tab, Photocopy of Appellant’s State of Maine License, issued March 7, 2008.

<sup>35</sup> Application Tab, Photocopy of Appellant’s State of Maine License, issued March 7, 2008.

<sup>36</sup> 50 CFR § 697.4(a)(7)(vi)(A)(3); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>37</sup> Audio Recording of December 17, 2013, scheduled hearing.

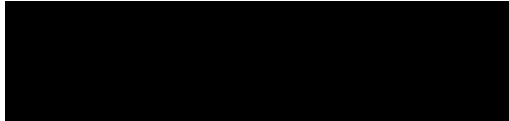
### CONCLUSIONS OF LAW

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 RA may affirm, reverse, modify, or remand this decision.



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Steven Goodman  
Administrative Judge

Date Issued: June 13, 2014