



On June 3, 2013, GARFO sent Appellant the QD at issue in this case.<sup>4</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 (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 Appellant's Federal lobster permit in any fishing year from 2004 to 2008.<sup>5</sup> GARFO noted Appellant had the right to appeal the QD.

On July 16, 2013, Appellant requested a 30-day extension of the filing deadline to appeal the denial of his FLA1P.<sup>6</sup> On July 16, 2013, GARFO granted Appellant his request for an extension and indicated he had until August 17, 2013, to submit a written appeal.<sup>7</sup>

On August 14, 2013, Appellant appealed the QD.<sup>8</sup> In his appeal, Appellant argues he is eligible for a FLA1P. On August 28, 2013, NAO sent Appellant a letter notifying him that the office had received his appeal and requesting that any additional documentation or information in support of his appeal be submitted to NAO by September 18, 2013.<sup>9</sup> On September 18, 2013, Appellant provided NAO with additional arguments and supporting documentation regarding his eligibility for a FLA1P.<sup>10</sup>

On September 23, 2013, NAO sent Appellant a Notice Scheduling Hearing.<sup>11</sup> On December 27, 2013, at his scheduled hearing, Appellant testified, among other things, that (1) he has a valid permit, which he placed in CPH due to his permanent disability; (2) in 2004, he purchased 300 unregistered trap tags through the State of Maine; (3) the Regulation has nothing to do with preservation and sustainability of the species, but instead constitutes a taking of his right to fish and access the ocean without compensation; (4) the Regulation had a cumulative significant economic impact on his small business; (5) the Regulation violated his equal right to access Area 1; and (6) the Regulation violates many of the national standards of the Magnuson-Stevens Act.<sup>12</sup> On January 7, 2014, Appellant provided to NAO a written summary of the arguments presented at his hearing.<sup>13</sup>

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<sup>4</sup> Denial Letter Tab, QD, dated June 3, 2013.

<sup>5</sup> Denial Letter Tab, QD, dated June 3, 2013.

<sup>6</sup> Notice to Submit Evidence Tab, Letter from Appellant, dated July 8, 2013, received July 16, 2013.

<sup>7</sup> Notice to Submit Evidence Tab, Email from Peter Burns, dated July 16, 2013.

<sup>8</sup> Pleadings Tab, Appellant's appeal letter, received August 14, 2013.

<sup>9</sup> Appeals Correspondence Tab, Letter from NAO to Appellant, dated August 28, 2013.

<sup>10</sup> Pleadings Tab, Argument and Supporting Documentation, dated September 18, 2013.

<sup>11</sup> Pleadings Tab, Notice Scheduling Hearing, dated September 23, 2013.

<sup>12</sup> Audio Recording of December 27, 2013, scheduled hearing.

<sup>13</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

## 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?

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

## FINDINGS OF FACT

1. On May 20, 2003, GARFO issued a Federal lobster permit to Appellant for Vessel.<sup>14</sup>
2. Sometime in or after 2003, Appellant applied to have his Federal lobster permit placed in CPH status.<sup>15</sup>
3. In 2004, Appellant purchased trap tags not assigned to any specific vessel, and not associated with his Federal lobster permit.<sup>16</sup>
4. On February 27, 2004, GARFO granted Appellant's application to have his Federal lobster permit placed in CPH status.<sup>17</sup>
5. Appellant's Federal lobster permit remained in CPH status during the 2008 fishing year.<sup>18</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

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<sup>14</sup> Application Tab, Federal Fisheries Permit, issued May 20, 2003.

<sup>15</sup> Pleadings Tab, Letter to Appellant re: Request for Northeast Vessel Permit information, dated July 25, 2013.

<sup>16</sup> Audio Recording of December 27, 2013, scheduled hearing.

<sup>17</sup> Pleadings Tab, Letter to Appellant re: Request for Vessel Permit Information, dated September 5, 2013.

<sup>18</sup> Audio Recording of December 27, 2013, scheduled hearing.

traps under the applicant's Federal lobster permit in any one fishing year from 2004 to 2008.<sup>19</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 data that will enable NMFS to identify his or her Federal lobster permit in its database.<sup>20</sup> Such data must include, at a minimum, the applicant's name and address, vessel name, and Federal lobster permit number.<sup>21</sup>

As proof of purchasing an Area 1 trap tag in any year between 2004 and 2008, an applicant must supply documentary evidence showing the purchase of the tag.<sup>22</sup> This documentation must originate from either the trap tag vendor supplying the tag, or the state or federal agency.<sup>23</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>24</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>25</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>26</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>27</sup>

The record establishes 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 season. Instead, the record demonstrates Appellant's Federal lobster permit remained in CPH status throughout the

<sup>19</sup> 50 C.F.R. § 697.4(a)(7)(vi)(A)(1-3); 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 C.F.R. § 697.4(a)(7)(vi)(B)(2); 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 CFR § 697.4(a)(7)(vi)(B)(3); 77 Fed. Reg. 32420-01, 32431 (2012).

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

<sup>25</sup> 50 C.F.R. § 697.4(a)(7)(vi)(D)(1); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>26</sup> 50 C.F.R. § 697.4(a)(7)(vi)(A)(2).

<sup>27</sup> 50 C.F.R. § 697.4(a)(7)(vi)(B)(2); 77 Fed. Reg. 32420-01, 32431 (2012).

entire 2008 fishing season. 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>28</sup>

In reaching my decision, I have carefully reviewed the entire record, including Appellant's arguments. Appellant contends he has a valid Federal lobster permit, which he actively fished under through 2003.<sup>29</sup> Appellant states that in 1996, he suffered a ██████████. According to Appellant, he placed his permit in CPH in 2004 when his permanent disability prevented him from fishing. Appellant avers that since that time he has been holding his permit in anticipation that his family members would be able to use it.

I understand why Appellant placed his Federal lobster permit in CPH status, and his desire to give his permit to his family. However, a Federal lobster permit in CPH does not satisfy the requirement that a permittee have an active Area 1 trap designation at some time during the 2008 fishing year. As the Area 1 program office, GARFO 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 Regulation, I find this interpretation reasonable.

Further, to the extent Appellant may be arguing his physical disability should exempt him from this requirement, the Regulation bars me from considering hardship as a basis for appeal.

**Did Appellant purchase at least one Area 1 lobster trap tag for his Federal lobster 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>30</sup> Proof of

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<sup>28</sup> 77 Fed. Reg. 32420-01, 32430 (2012).

<sup>29</sup> Audio Recording of December 27, 2013, scheduled hearing.

<sup>30</sup> 50 CFR § 697.4(a)(7)(vi)(A)(3); 77 Fed. Reg. 32420-01, 32431 (2012).

purchase of the trap tag must originate from either the trap tag vendor supplying the tag, or the state or federal agency.<sup>31</sup>

Appellant maintains that in 2004, he held 300 unregistered trap tags issued through the State of Maine.<sup>32</sup> According to Appellant, he could not have purchased Federal tags while his Federal lobster permit was in CPH, but he could have applied his Maine trap tags to his Federal lobster permit. In support of his claim, Appellant provided NAO with a printout of his Maine license history.<sup>33</sup>

The record shows that Appellant purchased 300 trap tags through the State of Maine in 2004.<sup>34</sup> However, these tags were unregistered and, therefore, not associated with Appellant's vessel or his Federal lobster permit. Unfortunately, the Regulation requires the purchase of at least one Area 1 trap tag to fish with traps under Appellant's Federal lobster permit in any one fishing year from 2004 to 2008. Because Appellant did not purchase these permits under, or apply these permits to, his Federal lobster permit, they will not satisfy the trap tag requirement found in the Regulation.<sup>35</sup>

Appellant also raises additional arguments challenging the validity of the Regulation, as well as the regulatory process itself. In support of his arguments, Appellant submitted copies of the following documents: (1) NMFS' Environmental Assessment, Final Regulatory Impact Review and Final Regulatory Flexibility Analysis of a Limited Access Program for the Lobster Trap Fishery in Federal Lobster Management Area 1; (2) NMFS' Final Regulatory Flexibility Analysis for the Final Rule Defining "Harm" in the Definition of "Take" in the ESA; (3) NMFS' Guidelines for Assessment of the Social Impact of Fishery Management Actions; and (4) the Atlantic States Marine Fisheries Commission's (ASMFC) Addendum XV to Amendment 3 to the Interstate Fishery Management Plan for American Lobster Limited Entry for Federal Waters of LCMA 1.<sup>36</sup>

Appellant first argues the permit criteria found in the Regulation constitutes a "taking of his individual rights to fishing and access to the ocean to fish" without compensation.<sup>37</sup> Appellant maintains the Regulation has eliminated nearly one-half of the existing Area 1 permits regardless of their history. In addition to his Area 1 permit, Appellant states that fishery regulations have led to his lobster traps being reduced from 2000 to 800; his multispecies permit being restricted to 10% boat length and 10% horsepower with 0 days at sea; the loss of his scallop and quahog permits, as well as his right to Area 3 lobsters; and now the loss of his right to transfer his non-trap permit to trap fishing in Area 1.

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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> Pleadings Tab, Appellant's appeal letter, received August 14, 2013; Audio Recording of December 27, 2013, scheduled hearing.

<sup>33</sup> Pleadings Tab, Appellant's appeal letter, received August 14, 2013.

<sup>34</sup> Application Tab, Email from ██████████, dated October 11, 2012.

<sup>35</sup> 50 CFR § 697.4(a)(7)(vi)(A)(3); 77 Fed. Reg. 32420-01, 32431 (2012).

<sup>36</sup> Pleadings Tab, Supporting Documentation, received September 18, 2013.

<sup>37</sup> Audio Recording of December 27, 2013, scheduled hearing.

Next, Appellant avers the Regulation has caused a significant economic impact on small entities.<sup>38</sup> Appellant argues NMFS did not adhere to the guidelines for assessing the social impacts of fishery management actions. Specifically, Appellant avows the implementation of trap reductions in Area 1 and his exclusion from Area 3 have resulted in personal losses of ██████████ per year. Appellant further maintains NMFS did not conduct a proper study on the economic impact the Regulation would have on small entities in the lobster fishery. In particular, Appellant contends NMFS improperly determined the Regulation would only affect 12% of the Area 1 trap fishers. As a result, the Regulation is now eliminating competition in the lobster fishery and hindering individuals' rights to a free enterprise small entity system. Appellant also questions the definition of what a significant impact is on a small entity.

In order to prevent this impact on small entities, Appellant argues NMFS should have followed the recommendation by the ASMFC. According to Appellant, NMFS “deceptive[ly] add[ed] [the] year 2008 . . . after recommendation by ASMFC to qualify any year of 2004-2008.”<sup>39</sup> Appellant maintains this “deceptive maneuver” resulted in 2008 being the only year someone could qualify for a FLA1P.<sup>40</sup> Appellant states, ASMFC’s recommendation would have “stopped other area entries into area 1 without affecting existing area1 [Gulf of Maine] (GOM) small entities.”<sup>41</sup>

Appellant also contends the Regulation violates his equal rights to access the Area 1 lobster fishery by denying him future access to Area 1 while allowing others continued participation.<sup>42</sup> The Regulation, Appellant argues, does not concern preservation and sustainability of the species, but, instead, denies some fishermen their right to fish. Appellant maintains that as a result, historical participants in the Area 1 fishery are having their rights and culture stripped away without reliable proof of sustainability or scientific evidence of overfishing. Appellant further contends “those that want to capitalize on selling their permits” are now persecuting these historical participants.<sup>43</sup> Appellant provided a summary of his historical participation. Appellant stated he has fished lobster in the GOM since 1978.<sup>44</sup> Before trap reduction, Appellant fished 2000 traps and landed 35,000 to 60,000 pounds of lobster per year. However, “after trap reduction in Area 1 and elimination of Area 3,” Appellant landed only 20,000 to 23,000 pounds of lobster per year.<sup>45</sup>

Lastly, Appellant challenges the regulatory development process. According to Appellant, “[t]here was no representation for GOM area 1 fishers with no state license” on the ASMFC.<sup>46</sup> Appellant also asserts there is not consistency in NMFS’ various permitting schemes. Appellant avers eligibility for a multi-species permit hinges on days

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<sup>38</sup> Audio Recording of December 27, 2013, scheduled hearing.

<sup>39</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>40</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>41</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>42</sup> Audio Recording of December 27, 2013, scheduled hearing.

<sup>43</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>44</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>45</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>46</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

at sea, Area 3 eligibility requires 25,000 pounds of landings, and Area 1 eligibility necessitates the purchase of a single trap tag in 2008. However, purchase of a trap tag, Appellant maintains, does not prove a fisherman is actively fishing. Additionally, Appellant appears to challenge NMFS' decision to implement a longer eligibility period in lieu of adding a disability exemption.

Appellant also argues it was speculative for ASMFC members to believe there would be new entries into Area 1.<sup>47</sup> Appellant contends the policy makers created three supposedly reasonable alternatives, but none the alternatives were satisfactory. Appellant states a better option that would have preserved all Area 1 fishermen with historical participation would have only required past history alone.

Appellant further contests information contained in NMFS' Environmental Assessment, Final Regulatory Impact Review and Final Regulatory Analysis.<sup>48</sup> Appellant first states that "[s]hoal water is the rookery of most species [and] NMFS should be taking into account all species caught and returned dead to the bottom."<sup>49</sup> Next, Appellant challenges NMFS determination that trap fishing gear has caused incidental death or injury to harbor seals. Appellant avers he has "never seen or heard of a seal death by lobster trap gear."<sup>50</sup>

Appellant also alleges the Regulation violates 7 of the 10 national standards (NS) found in the Magnuson-Stevens Act.<sup>51</sup> According to Appellant, the Regulation violates (i) NS 1, which requires fishery management plans (FMP) achieve optimum yield while preventing overfishing; (ii) NS 3, which requires FMPs manage individual stocks of fish as a unit throughout its range; (iii) NS 4, which prohibits FMPs from discriminating between residents of different states; (iv) NS 5, which requires consideration of economic factors and distributions in the context of relevant social, biological, and ecological objectives; (v) NS 6, requiring FMPs to take into account variations in fisheries and allow for contingencies; (vi) NS 8, requiring FMPs consider the importance of fishery resources to fishing communities; and (vii) NS 10, which requires FMPs promote the safety of human life at sea.<sup>52</sup>

In addition, Appellant appears to argue the Regulation violates multiple "court rulings."<sup>53</sup> Unfortunately, Appellant did not specify—and I have been unable to identify—the rulings to which he is referring.

Appellant states he has suffered "[c]umulative compound permit losses thru the years," and is now seeking "full reinstatement of [his] general category scallop 400# a day permit, area1 lobster permit, ocean quahog and area3 lobster permit."<sup>54</sup> Without these

<sup>47</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>48</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>49</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>50</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>51</sup> Audio Recording of December 27, 2013, scheduled hearing.

<sup>52</sup> 16 U.S.C. § 1851(a)(1), (3)-(6), (8), (10) (2007).

<sup>53</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>54</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

permits, Appellant contends he will be “put . . . out of the fishing business.”<sup>55</sup> In support, Appellant provided a summary of his permit losses in Area 1 and Area 3. These losses include: (1) a reduction in Area 1 traps from 2000 to 800; (2) restriction from Area 3, in which he historically fished 1,475 traps; (3) a reduction of his multi-species permit to 0 days at sea with permissible landings of 1 pound of codfish and 100 pounds of non-trap lobster; and (4) the termination of his general category scallop and ocean quahog permits.

I empathize with Appellant’s situation and his frustration with the regulatory process. 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. Additionally, I regret I am unable to entertain Appellant’s request for reinstatement of his scallop, quahog, and Area 3 permits. Nevertheless, nothing in this decision bars Appellant from seeking information from GARFO about reapplying for these permits.

Appellant contends the Regulation violates Executive Order 12630 because it amounts to “a taking of an instrument of value when attached to a vessel.”<sup>56</sup> Appellant avers, a FLA1P increases a vessel’s value by \$13,000 or more and is therefore a tangible commodity. To the extent Appellant may be seeking compensation for what he contends was the unjust taking of his right to access the Area 1 fishery, 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 such 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. 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 about preserving his Area 1 privileges for his family’s future use and understand the challenges he faces. However, I must uphold the QD because Appellant has not established both that he possessed an Area 1 trap designation associated with his Federal lobster permit at some time during the 2008 fishing year, and that he purchased at least one Area 1 trap tag under his Federal lobster permit in any fishing year from 2004 to 2008.

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<sup>55</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

<sup>56</sup> Pleadings Tab, Written Summary of Oral Arguments, received January 7, 2014.

## 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 June 3, 2013, is upheld. The Regional Administrator of the Greater Atlantic Regional Fisheries Office may affirm, reverse, modify, or remand this decision.



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Steven Goodman  
Administrative Judge

Date Issued: June 2, 2014