

Grounds for Appeal for Area 2 Limited Access Program 2014

Appeal of denial of permit. Any applicant having first applied for initial qualification into the Area 2 trap fishery pursuant to this section, but having been denied access, may appeal to the Regional Administrator within 45 days of the date indicated on the notice of denial. Any such appeal must be in writing. Appeals may be submitted in the following three situations:

1. Clerical error. The grounds for administrative appeal shall be that the Regional Administrator erred clerically in concluding that the vessel did not meet the criteria in paragraph (a)(7)(viii) of this section. Errors arising from oversight or omission such as ministerial, mathematical, or typographical mistakes would form the basis of such an appeal. Alleged errors in substance or judgment do not form a sufficient basis of appeal under this paragraph. The appeal must set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error. If the appealing applicant does not clearly and convincingly prove that an error occurred, the appeal must be denied.

2. Medical or military hardship appeal. The grounds for a hardship appeal shall be limited to those situations in which medical incapacity or military service prevented a Federal lobster permit holder from fishing for lobster in 2001, 2002, and 2003. If the Federal lobster permit holder is able to prove such a hardship, then the individual shall be granted the additional years of 1999 and 2000 from which to provide documentary proof in order to qualify and fish for traps in Area 2. In order to pursue a Hardship Appeal, the applicant must establish the following by a preponderance of the evidence:

- a. Proof of medical incapacity or military service. To prove incapacity, the applicant must provide medical documentation from a medical provider, or military service documentation from the military, that establishes that the applicant was incapable of lobster fishing in 2001, 2002, and 2003. An applicant may provide their state's qualification and allocation appeals decision to satisfy the documentary requirements of this section. The Regional Administrator shall accept a state's appeals decision as prima facie evidence of the appeal's Federal decision. The Regional Administrator shall presume that the state decision is appropriate, but that presumption is rebuttable and the Regional Administrator may choose to disallow the use of the state decision if the state decision was incorrect or based on factors other than those set forth in this section.
- b. Proof of Area 2 trap fishing in 1999 and 2000. To prove a history of Area 2 lobster trap fishing in 1999 and/or 2000, the applicant must provide documentary proof as outlined in the enclosed Limited Access Program Small Entity Compliance Guide.

Director's appeal. A state's marine fisheries agency may appeal on behalf of one of its state permit holders. The only grounds for a Director's Appeal shall be that the Regional Administrator's decision on a dual permit holder's Federal permit has created a detrimental incongruence with the state's earlier decision on that permit holder's state permit. In order to pursue a Director's Appeal, the state must establish the following by a preponderance of the evidence:

- a. Proof of an incongruence. The state must establish that the individual has a state lobster permit, which the state has qualified for access with traps into Area 2, as well as a Federal lobster permit, which the Regional Administrator has denied access or restricted the permit's trap allocation into Area 2. The state must establish that the incongruent permits were linked during the year or years used in the initial application such that the fishing history used in Federal and state permit decisions was the same.
- b. Proof of detriment. The state must provide a letter supporting the granting of trap access for the Federal permit holder. In the support letter, the state must explain how the incongruence in this instance is detrimental to the Area 2 lobster fishery and why granting the appeal is, on balance, in the best interests of the fishery overall. A showing of detriment to the individual permit holder is not grounds for this appeal and will not be considered relevant to the decision.

Appellate timing and review. All appeals must be submitted to the Regional Administrator in writing and reviewed as follows:

Clerical appeals timing. Applicants must submit Clerical Appeals no later than 45 days after the date on the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 45 days of the date of the Notice of Denial will preclude any further appeal. The appellant may notify the Regional Administrator in writing of his or her intent to appeal within the 45 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 45-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadlines stated herein will not be accepted.

Medical or military appeals timing. Applicants must submit Medical or Military Appeals no later than 45 days after the date on the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 45 days of the date of the Notice of Denial will preclude any further appeal. The appellant may notify the Regional Administrator in writing of his or her intent to appeal within the 45 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 45-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadlines stated herein will not be accepted.

Director's appeals timing. State Directors must submit Director's Appeals on behalf of their constituents no later than 180 days after the date of the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 180 days of the date of the Notice of Denial will preclude any further appeal. The Director may notify the Regional Administrator in writing of his or her intent to appeal within the 180 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 180-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadline will not be accepted.

Agency response. Upon receipt of a complete written appeal with supporting documentation in the time frame allowable, the Regional Administrator will then appoint an appeals officer who will review the appellate documentation. After completing a review of the appeal, the appeals officer will make findings and a recommendation, which shall be advisory only, to the Regional Administrator, who shall make the final agency decision whether to qualify the applicant.

Status of vessels pending appeal. The Regional Administrator may authorize a vessel to fish with traps in Area 2 during an appeal. The Regional Administrator may do so by issuing a letter authorizing the appellant to fish up to 800 traps in Area 2 during the pendency of the appeal. The Regional Administrator's letter must be present onboard the vessel while it is engaged in such fishing in order for the vessel to be authorized. If the appeal is ultimately denied, the Regional Administrator's letter authorizing fishing during the appeal will become invalid 5 days after receipt of the notice of appellate denial or 15 days after the date on the notice of appellate denial, whichever occurs first.