

Department of Environmental Management

Administrative Adjudication Division

State of Rhode Island

RE: MICHAEL MARCHETTI, D/B/A CAPTAIN ROBERT'S

AAD No. 98-001/F&WA

Denial of Application

November 23, 1998

DECISION AND ORDER

This matter is before the hearing officer for decision on the appeal of Michael Marchetti d/b/a F/V Captain Robert ("Applicant") of a denial of his fish trap license application issued by Director Andrew H. McLeod on January 22, 1998.

The Applicant seeks to install a fish trap at Site 364, an area off the shore of Newport, Rhode Island. An initial Application For Renewal of Fish Trap License was filed with the Division of Fish and Wildlife of the Department of Environmental Management on May 16, 1997. Fish trap licenses are governed by R.I.Gen.Laws § 20-5-1 *et. seq.* and the Rules and Regulations adopted pursuant thereto. The Applicant sought a license for several fish trap locations including Site 364. The Rhode Island Marine Fisheries Council ("Council") held a public hearing on December 4, 1997 concerning the Application. After taking public comment, the Council recommended approval of Site 364 to the Director by a 6-2 vote with limitations on the length of the trap and the time of year that the trap may be used. Mr. Marchetti subsequently amended his application for Site 364 to reflect a length limitation of four hundred feet (400') consistent with the recommendation of the Council.

By letter dated January 22, 1998, the Director of the Department of Environmental Management issued a decision denying the Application. As grounds therefore, the Director determined that the proposed fish trap would pose an impediment to navigation, especially to recreational vessels during hours of darkness, and would similarly obstruct access by commercial and recreational fishing vessels. Additionally, the Director determined that the proposed fish trap would adversely affect several overfished species that frequent the area. The Applicant is before AAD on his appeal of the above-referenced denial filed with AAD on February 3, 1998.

An administrative hearing was held at the offices of the Administrative Adjudication Division for Environmental Matters on July 15, 1998. The Applicant Michael Marchetti was present and was represented by Attorney Robert Hardman. The Division of Fish and Wildlife was represented by Attorney Gary Powers.

A Notice of Administrative Hearing and Prehearing Conference was issued to counsel on June 15, 1998 establishing a prehearing conference date of July 1, 1998 and a hearing date of July 15, 1998 and July 16, 1998. A prehearing conference was held on July 1, 1998 and was followed on July 2, 1998 with a Prehearing Conference Record issued by the hearing officer which pursuant to R.I.Gen.Laws § 42-17-7-5 governed the conduct of the administrative hearing. A number of

intervening motions, objections, and orders followed, all of which are part of the administrative record and/or the transcript of the proceedings.

At hearing, Applicant's proposed exhibits numbered Applicant's 1 through Applicant's 18 were agreed to by counsel as full exhibits¹. The Applicant presented two witnesses, Michael Marchetti, owner of the fishing vessel Captain Robert and the Applicant in this matter, and Paul Younes.

Michael Marchetti testified concerning his broad and lengthy experience in the fishing industry in the state of Rhode Island. His testimony concerned the specific application at issue and described in detail the proposed fish trap at Site 364 and its associated gear including the measures he would take to provide high visibility of the trap for passing mariners and the manner in which fish are harvested and/or returned to the water. On cross examination, Mr. Marchetti acknowledged that he did not include the specific details concerning the marking of the proposed fish trap in his Application and indicated that the form provided by the Division did not ask for that information. Similarly, he did not indicate, nor did the form require, that he was seeking to use the fish trap during a limited period of time, specifically, April 10th through June 14th of each calendar year.

Mr. Younes is a part-time instructor at the New England Maritime Institute in New Bedford, Massachusetts. Mr. Younes was questioned regarding his navigational education and experience and was ultimately offered by the applicant as an expert in navigation. After voir dire of the witness by the Division of Fish and Wildlife, the hearing officer determined that Mr. Younes' testimony would assist her, as the trier of fact, and qualified Mr. Younes as an expert in navigation. Mr. Younes testified that he is familiar with Site 364 and the waters in that vicinity. He indicated that the purpose of the red buoy (R6) in the area of the proposed fish trap is to warn of navigational hazards and to warn mariners to stay out of the area. He indicated that the chart of Narragansett Bay (marked as Applicant's 18) reflects a purple dashed line around the coast in the area of the proposed fish trap. This purple dashed line serves to warn mariners of the presence of fish traps in the area. Mr. Younes opined to a reasonable degree of scientific certainty that the proposed fish trap at Site 364 would not pose an impediment to navigation. Mr. Younes further opined to a reasonable degree of navigational certainty that the proposed fish trap at site 364 would not pose an impediment to navigation during the nighttime. Acknowledging that recreational vessels are less predictable than commercial vessels, Mr. Younes held his opinion that the proposed fish trap should not pose an impediment to such vessels nor should it affect commercial vessels which would stay well outside the area and would proceed up the middle of the channel. Mr. Younes' opinion remained firm on cross-examination. I found Mr. Younes' demeanor to be forthright and his testimony to be direct, candid and unwavering. I found Mr. Younes to be very credible and have accorded considerable weight to his testimony.

The Division of Fish and Wildlife presented the testimony of Michael Scanlon. Mr. Scanlon is employed by the Rhode Island Department of Environmental Management in the position of Boating Safety Program Coordinator. Counsel offered Mr. Scanlon as an expert. After objection from opposing counsel, the hearing officer declined, pursuant to R.I.GenLaws § 42-17.7-5, to allow Mr. Scanlon to testify in an expert capacity due to the failure of Division Counsel to appear for the prehearing conference or file a prehearing memorandum advising opposing counsel of his intention to call an expert witness.

Mr. Scanlon did testify in a lay capacity. Mr. Scanlon currently serves as the Boating Safety Program Coordinator for the Department of Environmental Management and formerly served in

the United States Coast Guard. Mr. Scanlon testified generically regarding fish traps stating that in his experience fish traps are always a nemesis. He stated that anytime a fish trap is placed in any area, a boat cannot go over the lines. He did acknowledge that the fish trap area is clearly marked on the Narragansett Bay Chart #13221. In his experience with fishing line accidents, recreational vessels have the necessary charts on board but in many cases they misread or misinterpret the chart. He further testified that for safety reasons, reasonable and prudent mariners take note of the aids to navigation including buoys and other devices.

FINDINGS OF FACT

After careful review of all documentary and testimonial evidence of record I find as fact the following:

1. Michael Marchetti is the owner and captain of the fishing vessel Captain Robert.
2. Michael Marchetti filed an Application For Renewal of Fish Trap License on May 16, 1997 which included, among others, Site 364.
3. On December 4, 1997 the Rhode Island Marine Fisheries Council held a public hearing to consider, *inter alia*, Mr. Marchetti's application.
4. After consideration of the testimony taken at the public hearing and after discussion between members, the Council voted 6-2 to recommend approval to the Director of Site 364 with the limitation that it be fished only from April 1st through June 30th of each year with a maximum net length of four hundred feet (400').
5. Michael Marchetti filed an amended application for a fish trap license with the Division of Fish and Wildlife on December 6, 1997 which was substantially similar to his earlier application regarding Site 364 but changed the length of the trap from 300' to 400' (the length recommended by the Rhode Island Marine Fisheries Council vote of December 4, 1997).
6. By letter dated January 22, 1998, Andrew H. McLeod, Director of the Department of Environmental Management denied the application citing as reasons therefore that the proposed fish trap would pose an impediment to navigation especially to recreational vessels during hours of darkness and would obstruct access by commercial and recreational fishing vessels, and second, that several overfished species which frequent the proposed location of the fish trap would be adversely impacted by the installation of the device.
7. The applicant filed an appeal with the Administrative Adjudication Division for Environmental Matters on February 3, 1998.
8. The Applicant seeks a fish trap license for an area known as site 364 off the coast of Newport, Rhode Island.
9. The Applicant presently holds a R.I. Multi-Purpose license which allows him to catch any species of fish in any manner consistent with statutes and regulations.
10. The Applicant has experience using fish traps, specifically Site 191 off Easton's Point in Sachuest Bay near what is known as Second Beach in Newport, Rhode Island.

11. A fish trap is attached to the shore or rocks with a running line from the frame the full distance of the leader line. It is generally supported by barrels and moored to the bottom with anchors.
12. The fish trap proposed for Site 364 has a leader line of three hundred twenty feet (320') with trap dimensions of approximately eighty feet (80') by forty feet (40') for a total trap length of four hundred feet (400').
13. Site 364 is located off an area known as Perry's Cove, south of Castle Hill Lighthouse and north of Breton Point State Park.
14. The shoreline in the area of site 364 is rocky, with ledge and the rocks extend approximately forty feet (40') offshore with submerged rocks to the south of the site with an entire ledge of rocks and shoals including Butterball Rock.
15. No other fish traps are located within three thousand feet (3000') of site 364.
16. The depth of the water at site 364 runs from fourteen feet (14') onshore to about twenty four feet (24') at the outside end.
17. The proposed fish trap runs from the surface of the water to the bottom and the twine leads the fish into a maze of funnels and ultimately traps the fish.
18. Fish traps are generally tended to daily but can average one to three days depending on weather conditions and other circumstances.
19. In order to harvest the catch, the fish trap is raised to the surface of the water with the parlor end up until it forms a bag bunt. The fish are then taken out with a dip net onto a cull board to sort the fish by hand.
20. The catch is sorted by hand on the cull board and undersized and/or protected species are returned immediately to the water.
21. A series of channel markers denotes the channel for marine vessels.
22. R6 is an illuminated red buoy with a bell and is one of the series of channel markers located in the general vicinity of Site 364.
23. R6 marks the presence of Butterball Rock, which is approximately 200 feet away, and serves to caution mariners of rocks and the dangers inside the channel marker.
24. The purpose of a red buoy is to warn of navigational hazards and to warn mariners to stay out of that area. It also serves to mark the beginning of the channel.
25. The distance from the outside of the proposed fish trap at site 364 to R6 would be approximately one thousand two hundred feet (1200').
26. Applicant seeks to operate the fish trap at Site 364 for approximately two months per year, from April 10th through June 14th of each year.
27. Approximately twenty seven (27) licensed fish trap sites are located south or southeast of Site 364.

28. Approximately twelve (12) licensed fish traps are located just outside the vicinity of Site 364.
29. Commercial vessels operate inside the channel and would not likely stray to the area of Site 364.
30. Recreational vessels sometimes travel outside the channel and along the shore in the area of Site 364.
31. The navigational chart of Narragansett Bay #13221 marks an area around the Newport shoreline including Site 364 as a Fish Trap Area in order to warn mariners of possible fish traps and associated gear such as floating barrels.
32. The navigational chart of Narragansett Bay #13221 does not mark the location of specific licensed fish traps but places mariners on notice that fish traps are placed in the area cautioning them to act prudently.
33. A reasonable and prudent mariner takes notice of buoys and other aids to navigation for safety purposes.
34. Most accidents involving recreational vessels and fishing lines or traps result from a misinterpretation or misreading of the navigational charts.
35. The current standard for marking fish traps includes the use of floating barrels. Additional safeguards include the use of radar poles and reflective tape to provide greater visibility.
36. The proposed fish trap would be marked with floating barrels and with radar poles on the outer edge of the trap to warn vessels of the inside twine.
37. Specifically, Applicant proposes to mark site 364 with radar poles at the west and southwest corners. The radar poles would extend between five and twelve feet up from the surface of the water and would be marked with reflective tape. An orange nylon flag would fly from the top of the poles for high visibility.

CONCLUSIONS OF LAW

Based on the documentary and testimonial evidence of record and the applicable statutes and regulations I conclude the following as a matter of law:

1. The Administrative Adjudication Division has jurisdiction over Michael Marchetti and over the subject matter of this appeal.
2. The Applicant, Michael Marchetti, filed a valid appeal of a license denial for a fish trap at Site 364 in Newport, Rhode Island.
3. The commercial fishing license moratorium prohibiting the issuance of new fish trap licenses, R.I.Gen.Laws § 20-2-1.1, expired on July 1, 1998 and is therefore inapplicable to this proceeding.
4. The Applicant bears the burden of proving by a preponderance of the evidence that the proposed fish trap at site 364 will not pose an impediment to navigation during daylight and nighttime hours; will not obstruct commercial and recreational access to the area; and will not adversely impact overfished species in the area of site 364.

5. The Applicant has met his burden of proof by demonstrating by a preponderance of the evidence that the proposed fish trap at site 364 will not pose an impediment to navigation during hours of daylight or darkness.

6. The Applicant has met his burden of proof by demonstrating by a preponderance of the evidence that the proposed fish trap at site 364 will not obstruct access by commercial and recreational fishing vessels.

7. The Applicant has met his burden of proof by demonstrating by a preponderance of the evidence that the proposed fish trap will not adversely affect overfished species in the area of site 364.

WHEREFORE, it is hereby

ORDERED

1. That the appeal of Michael Marchetti from a denial of a fish trap license for Site 364 is **SUSTAINED**.

2. The Division of Fish and Wildlife shall forthwith issue a fish trap license for Site 364 to the Applicant Michael Marchetti.

3. The license shall be restricted to the time period April 1 through and including June 30 of each calendar year.

4. The fish trap and any associated gear may be present at the site only during the time period referenced above.

5. Site 364 shall be prominently marked with radar poles at the west and southwest corners, extending between five and twelve feet up from the surface of the water and marked with reflective tape. Applicant shall fly an orange nylon flag from the top of each pole for high visibility. Entered as a Recommended Final Decision and Order this 15th day of September, 1998.

Kathleen M. Lanphear
Chief Hearing Officer

Entered as a Final Agency Decision and order this 23rd day of November, 1998.

Andrew H. McLeod
Director

APPENDIX A

APP. 1 FULL	Copy of Request for Hearing dated February 3, 1998.
APP. 2 FULL	Copy of Application for Renewal of Fish Trap License dated May 6, 1997.
APP. 3 FULL	Copy of Application for Renewal of Fish Trap License dated

December 6, 1997.

APP. 4 FULL	Copy of Rhode Island Marine Fisheries Council minutes 12/4/97.
APP. 5 FULL	Copy of denial letter signed by Andrew H. McLeod, Director DEM dated 1/22/98.
APP. 6 FULL	Photograph “Danger Keep Off Rocks” sign (close up)
APP. 7 FULL	Photograph “Danger Keep Off Rocks” sign (wide angle view)
APP. 8 FULL	Photograph—Rock ledge/channel buoy
APP. 9 FULL	Photograph—rock ledge
APP. 10 FULL	Photograph—“Danger Keep Off Rocks” sign (wide angle view)
APP. 11 FULL	Photograph—rock ledge/shore
APP. 12 FULL	Photograph—water view of ledge
APP. 13 FULL	Photograph—water view of ledge
APP. 14 FULL	Photograph—water view of ledge
APP. 15 FULL	Photograph—water view of ledge
APP. 16 FULL	Photograph—rock ledge (close up)
APP. 17 FULL	Curriculum Vitae—Clifford Goudy (withdrawn)
APP. 18 FULL	Chart of Narragansett Bay #13221, 51st Edition, September 20, 1997, Published Washington, D.C., U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service Coast Survey.

Footnotes

- 1 A list of exhibits is attached hereto as Appendix A. Exhibit 17 was withdrawn at the hearing but remains marked for ease in numbering.

