

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Application for a Special Permit To Take Surfclams and Ocean Quahogs by Mechanical Means from the Waters of the Atlantic Ocean Pursuant to Article 13 of the Environmental Conservation Law ("ECL") and Part 43 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

**RULING OF THE CHIEF
ADMINISTRATIVE LAW
JUDGE**

DEC Case No.
OHMS-65409

September 21, 2010

- by -

SHELLFISH, INC.,

Applicant.

Appearances of Counsel:

- J. Lee Snead, for applicant Shellfish, Inc.
- Alison H. Crocker, Deputy Commissioner and General Counsel (Mark D. Sanza of counsel), for staff of the Department of Environmental Conservation

Applicant Shellfish, Inc., seeks a special permit to harvest surfclams and ocean quahogs from the Atlantic Ocean for the fishing vessel, the F/V Tiny Giant. Staff of the Department of Environmental Conservation ("Department") denied the application on eligibility grounds.

Shellfish, Inc., has filed a petition seeking to administratively appeal from Department staff's denial of its application. For the reasons that follow, Shellfish's petition is dismissed.

PROCEEDINGS

Shellfish, Inc., is the lessee of the fishing vessel F/V Tiny Giant. In February 2010, Shellfish filed an application for a 2010 surfclam/ocean quahog Atlantic Ocean permit, together with supporting documentation.

In a letter dated February 12, 2010, staff of the Department's Bureau of Marine Resources denied the application on the ground that the F/V Tiny Giant did not meet the vessel eligibility requirements for participation in the Atlantic Ocean limited entry surfclam fishery as identified in section 43-3.4(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Therefore, a permit to harvest surfclams by mechanical means in the Atlantic Ocean could not be issued to Shellfish, as lessee of the F/V Tiny Giant, pursuant to 6 NYCRR 43-2.4 (see Letter from Debra A. Barnes to J. Lee Snead [2-12-10], Petition, Exh 1).

Specifically, Department staff concluded that the F/V Tiny Giant failed to meet the eligibility requirements of 6 NYCRR 43-3.4(a), which provides that vessels eligible to participate in the Atlantic Ocean surfclam fishery are limited to only those vessels that were used in a directed fishery to harvest surfclams by mechanical means from certified waters of the State's Atlantic Ocean between January 1, 1993, and August 25, 1993, both dates inclusive, or those vessels that replaced such vessels pursuant to 6 NYCRR 43-3.5. According to the Department's records, the F/V Tiny Giant was not a qualifying vessel under section 43-3.4(a).

In addition, staff noted that pursuant to 6 NYCRR 43-2.4(g), only those persons who were issued a surfclam/ocean quahog Atlantic Ocean permit in the previous year are eligible to be issued a permit for the current year, provided that the vessel meets the eligibility requirements set forth in 6 NYCRR subpart 43-3. Staff concluded that because Shellfish, Inc., did not hold a surfclam/ocean quahog Atlantic Ocean permit for the F/V Tiny Giant for the previous year, and because the F/V Tiny Giant did not meet the eligibility requirements set forth in subpart 43-3, the application submitted by Shellfish for the F/V Tiny Giant was denied.

By petition dated February 17, 2010, Shellfish filed with the Commissioner a petition seeking to administratively appeal from Department staff determination denying its permit application. In support of its appeal, Shellfish cites State Administrative Procedure Act ("SAPA") article 4.

By letter dated April 1, 2010, Assistant Commissioner Louis A. Alexander referred the matter to the undersigned Administrative Law Judge ("ALJ") and authorized Department staff to file a response to Shellfish's petition. Specifically, the Assistant Commissioner directed staff to address whether the petition provided a basis to challenge the permit denial determination, and whether the Department was required to provide Shellfish with an adjudicatory hearing to raise its challenge. The Assistant Commissioner further provided that no further submissions were authorized.¹

Department staff filed its response on April 9, 2010. In its response, Department staff argues that no administrative process, including an adjudicatory hearing pursuant to 6 NYCRR part 624 ("Part 624"), is available to challenge staff's denial of a surfclam/ocean quahog Atlantic Ocean permit. Accordingly, staff asserts that Shellfish's petition should be denied and the present proceeding dismissed.

DISCUSSION

Statutory and Regulatory Background

The Legislature has taken a variety of actions to protect the important surfclam and ocean quahog fishery in New York State and to assure its long-term economic viability (see, e.g., L 1994, ch 512, § 1). Among the legislative actions taken was the establishment in 1986 of a Surf Clam/Ocean Quahog Management Advisory Board charged with assisting the Department in the development and preparation of a comprehensive long-term management plan for the protection of surfclams and ocean

¹ After Department staff filed its April 9, 2010, response, Shellfish, Inc., requested that the ALJ grant it leave to file a reply. Department staff objected on the basis of Assistant Commissioner Alexander's April 1, 2010, directive. Based upon that directive, the undersigned ALJ denied Shellfish's request by email dated April 9, 2010. I also advised Shellfish that if it wished to appeal from my April 9, 2010, ruling, it could file a motion for leave to appeal. Shellfish did not file such a motion.

quahogs in New York waters (see ECL 13-0308[7][a], added by L 1986, ch 198, as amended by L 1994, ch 512).

In addition, the Legislature authorized the Department to adopt interim or emergency regulations pending the preparation of the comprehensive long-term management plan, and to adopt regulations consistent with the plan once completed (see ECL 13-0308[9]). The legislation authorized the Department to adopt various measures, including the establishment of daily catch limits for surfclams and ocean quahogs, requirements limiting the number of vessels that may participate in the fishery, and qualifications of applicants and vessels to participate in the fishery, among other provisions (see ECL 13-0309[12]).

As a result of an influx of fishing vessels seeking to harvest surfclams in the early 1990s, the Department originally adopted the section 43-3.4(a) vessel eligibility requirement as an emergency regulation in 1993 (see New York State Register, Sept. 15, 1993, at 9). Section 43-3.4(a) was later adopted as a final rule in 1999 (see New York State Register, April 21, 1999, at 4).

During the mid-2000s, the Department, working in cooperation with Surf Clam/Ocean Quahog Management Advisory Board, developed new management measures designed to ensure the long-term sustainability of the surfclam resource and industry. The measures were contained in Amendment 1 to the Fishery Management Plan ("FMP") for the Mechanical Harvest of the Atlantic Surfclam in NYS Waters of the Atlantic Ocean.

To implement the new management measures and harvest controls contained in Amendment 1 of the FMP, the Department adopted regulations in 2009 amending various provisions of 6 NYCRR subpart 43-2 governing the management of the surfclam and ocean quahog fishery in the New York portion of the Atlantic Ocean (see New York State Register, Oct. 7, 2009, at 16 [proposed rule making]; id., Dec. 23, 2009, at 11 [notice of adoption]). Among the amendments was the addition of a new subdivision 43-2.4(g) to the surfclam/ocean quahog Atlantic Ocean permit requirements. The new subdivision provides that:

"Only those persons who were issued a surfclam/ocean quahog Atlantic Ocean owner's permit in the previous year shall be eligible to

be issued such permit provided that the vessel meets the eligibility requirements set forth in Subpart 43-3 of the Part. This permit must be renewed annually in order to maintain eligibility to participate in the Atlantic Ocean fishery"

(6 NYCRR 43-2.4[g]). Other than the express reference to subpart 43-3 contained in subdivision 43-2.4(g), the 2009 amendments did not otherwise modify subpart 43-3's terms.

Arguments of the Parties

Notwithstanding the express reference to the subpart 43-3 vessel eligibility requirements contained in the 2009 amendments to the surfclam/ocean quahog Atlantic Ocean permit requirements, Shellfish argues that Department staff erred in applying the section 43-3.4(a) eligibility requirement to the F/V Tiny Giant. Relying on section 43-3.1, which provides that the purpose of subpart 43-3 was to conserve surfclam resources in the Atlantic Ocean "until such time as a surf clam management plan is adopted pursuant to section 13-0308 of the Environmental Conservation Law," Shellfish argues that the subpart 43-3 vessel eligibility requirements are no longer operative after the adoption of Amendment 1 to the FMP and the 2009 regulations implementing it.² Asserting that it and the F/V Tiny Giant otherwise satisfy the subpart 43-2 permit requirements, Shellfish seeks to administratively appeal from Department staff's determination denying its application for a surfclam/ocean quahog Atlantic Ocean permit.

In response, Department staff argues that no administrative procedure is available for Shellfish to raise its challenge. Although the applicable regulations provide procedures for administratively challenging the revocation of a surfclam/ocean quahog Atlantic Ocean permit (see 6 NYCRR 43-2.6[j]; 6 NYCRR part 175), staff contends that neither the relevant ECL provisions nor the Department's regulations provide for an adjudicatory hearing or other administrative proceeding to challenge the denial of an application for a new

² In an unrelated case involving Shellfish, Inc., the Appellate Division, Second Department, has recently rejected this argument and held that the subpart 43-3 vessel eligibility requirements are still operative (see Matter of Shellfish, Inc., v New York State Dept. of Env'tl. Conservation, __ AD3d __, __, 2010 NY Slip Op 06598, *3 [2d Dept 2010]).

surfclam/ocean quahog permit. In addition, staff asserts that the Department's permit hearing procedures at Part 624 do not apply to the denial of surfclam/ocean quahog Atlantic Ocean permits. Staff also asserts that SAPA § 401(2) does not require an adjudicatory hearing because Shellfish's application was for a new permit, not a permit renewal.

Analysis

In support of its petition, Shellfish cites SAPA article 4 in support of its request for administrative review of Department staff's denial determination.³ Under SAPA article 4, administrative adjudicatory proceedings consistent with SAPA article 3 are required "when licensing is required by law to be preceded by notice and opportunity for hearing For purposes of [SAPA], statutes providing an opportunity for hearing shall be deemed to include statutes providing an opportunity to be heard" (SAPA § 401[1]). Thus, when the statute or regulation authorizing the Department's licensing action requires a hearing on notice to the applicant, SAPA's provisions for adjudicatory proceedings apply (see Matter of Asman v Ambach, 64 NY2d 989, 990 [1985] [hearing required where recent amendments to statute provided that licensee may present evidence or sworn testimony, that a stenographic record of the hearing must be made, and the review committee's decision must be limited to the record]; cf. Matter of Mary M. v Clark, 100 AD2d 41, 43 [3d Dept 1984] [no statute or regulation required proceeding on record]; Matter of Vector East Realty Corp. v Abrams, 89 AD2d 453, 456 [1st Dept 1982], appeal withdrawn 58 NY2d 973 [1983] [eligibility determination did not require a hearing under SAPA where statute contained no requirement of a record or a hearing]).

The Department's regulations implementing SAPA article 3's requirements are found at 6 NYCRR part 622 (Uniform Enforcement Hearing Procedures [Part 622]) and 6 NYCRR part 624

³ Shellfish specifically cites SAPA § 401(2), which provides that when a licensee has made a timely application for the renewal of a license or a new license for a continuing activity, the existing license does not expire until the application has been finally determined by the agency. As noted by Department staff, Shellfish has not applied for a license renewal, or a new license to replace a previously issued license. Nonetheless, by citing SAPA § 401, I understand that Shellfish is basing its claimed right to administrative review of staff permit determination on SAPA.

(Permit Hearing Procedures [Part 624]). Where permit determinations based upon alleged violations of the ECL, its implementing regulations, or an order, permit, license or other entitlement issued by the Department, are required by law to be preceded by an adjudicatory hearing, the enforcement hearing procedures in Part 622 are applied (see 6 NYCRR 622.1[a]). This includes Department initiated permit modifications, suspensions and revocations based upon alleged violations that are required by law to be preceded by an adjudicatory hearing (see Matter of Zoccolillo, Ruling of the Chief Administrative Law Judge, Jan. 30, 2009, at 6-7).

Part 624 applies to all other permit determinations that are not enforcement in nature, and that are required by law to be preceded by an adjudicatory hearing (see 6 NYCRR 624.1[a]; 6 NYCRR 624.2[a]). As Department staff notes, Part 624 expressly applies to permit determinations, including permit denials, made by Department staff on permits governed by the Uniform Procedures Act (ECL article 70 [UPA]) and its implementing regulation (6 NYCRR part 621) (see 6 NYCRR 624.1[a][1]-[5]). However, Part 624 also applies to any Departmental permit, license, or other entitlement not governed by the UPA, but for which an adjudicatory hearing is required by law (see 6 NYCRR 624.1[a][6]).

The threshold determination to be made, therefore, is whether an adjudicatory hearing is required by law to precede Department staff's denial of Shellfish's application for a surfclam/ocean quahog Atlantic Ocean permit. As Shellfish acknowledges, review of the statutory provisions governing commercial shellfish diggers permits generally and surfclam/ocean quahog Atlantic Ocean permit specifically, however, fails to reveal any requirement that an adjudicatory hearing be held prior to the denial of such a permit (see ECL 13-0308; ECL 13-0309; ECL 13-0311; ECL 13-0325). ECL 13-0311(3) requires a hearing on notice if the Department seeks to suspend or cancel a commercial shellfish digger's permit. However, the statute does not provide for a hearing on notice when the Department determines to deny a commercial shellfish digger's permit in the first instance.

Similarly, although the Department's regulations provide for a hearing to challenge the proposed revocation of a previously issued surfclam/ocean quahog Atlantic Ocean permit (see 6 NYCRR 43-2.4[j]; 6 NYCRR 175.5[c], [d][2]), the

Department's regulations do not provide for a hearing to challenge the denial of an application for a new permit. Thus, the governing statutes and regulations do not require a hearing to challenge the denial of Shellfish's application for a surfclam/ocean quahog Atlantic Ocean permit.

An administrative hearing prior to agency action may also be required by due process, even when a statute or regulation does not otherwise expressly require a hearing (see Matter of Mary M., 100 AD2d at 43; Matter of Vector East Realty Corp., 89 AD2d at 456-457). Where the exercise of a statutory power adversely affects property rights, the requirement of notice and hearing may be implied, even where the statute is silent (see Hecht v Monaghan, 307 NY 461, 468 [1954]).

In this case, no property right is implicated. Under the common law, clams in their natural state are classified as ferae naturae subject to the rule of capture. That is, clams are not privately owned until reduced to possession (see People v Morrison, 194 NY 175, 177 [1909]; People v Grucci, 194 Misc 2d 16, 18 [App Term, 2d Dept 2002], appeal withdrawn 99 NY2d 576 [2003]). Clams may be privately owned when they are legally reclaimed from nature and transplanted to a bed where none grew naturally, and the bed is so marked out by stakes so as to show that they are in the possession of a private owner (see id.). Prior to being reduced to private possession, however, clams are held by the State in its sovereign capacity, and are subject to the State's broad police power to preserve and regulate the resource (see People v Grucci, 194 Misc 2d at 18; Hughes v Oklahoma, 441 US 322, 334-335 [1979]).⁴

Here, nothing in the submission indicates that Shellfish had legally reduced clams to its private possession. Accordingly, Shellfish had no property interest in clams that

⁴ ECL 11-0105 provides that "[t]he State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership" (see also ECL 11-0103[9] [defining "shellfish" to include "all kinds of clams"]). One federal court has held that this statute does not provide New York with a true possessory ownership interest in wild clams (see United States v Long Cove Seafood, Inc., 582 F2d 159, 164-165 [2d Cir 1978]). Rather, the State ownership of wildlife must be understood as "no more than the 19th century legal fiction expressing the importance to its people that a State have power to preserve and regulate the exploitation of an important resource'" (id. [quoting Douglas v Seacoast Prods., Inc., 431 US 265, 284 [1977]; see also Hughes v Oklahoma, 441 US 322, 334-335 [1979]).

was adversely affected by the Department's determination to deny its application for a permit to harvest clams.

Nor does Shellfish have a property interest in a new surfclam/ocean quahog Atlantic Ocean permit. To have a property interest in a governmental benefit, such as a commercial fishing license, the person must have a legitimate claim of entitlement to the benefit (see Board of Regents of State Colleges v Roth, 408 US 564, 576-577 [1972]). Here, however, the Department has not suspended or revoked a previously issued commercial license upon which Shellfish has relied (see id.). Nor has the Department denied an application by Shellfish for a permit to replace for the current year a permit held for the prior year. Rather, as an applicant for a new permit, Shellfish lacks the requisite claim of entitlement to the permit that would require a hearing prior to the Department's permit determination. Accordingly, because Shellfish has no property interest in wild clams or a new surfclam/ocean quahog Atlantic Ocean permit, due process does not require an administrative hearing to challenge the Department's denial of its permit application.

In sum, because neither the governing statutes or regulations, nor due process require an administrative hearing on notice to challenge the denial of Shellfish's application for a surfclam/ocean quahog Atlantic Ocean permit, the Department is not required to provide an adjudicatory hearing under SAPA article 4. Thus, neither Part 622 nor Part 624 is available to Shellfish, Inc., to challenge the Department's determination to deny the permit. Accordingly, Shellfish's petition should be dismissed.

RULING

The petition of applicant Shellfish, Inc., seeking to administratively appeal from Department staff's February 12, 2010, letter denying Shellfish's application for a surfclam/ocean quahog Atlantic Ocean permit is dismissed upon the ground that no procedure is available to administratively challenge that determination.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: September 21, 2010
Albany, New York