

different treatment of catch associated with whiting trips from non-whiting trips. In determining catch history, as described in the regulations . . . , non-whiting species that are caught in conjunction with a whiting trip are not included in our calculations. For example, you estimate that you harvested 1,167 lbs of yellowtail rockfish in 2003. Our records show that these landings were associated with the harvest of whiting. Therefore, our IFQ history table . . . shows a zero harvest of yellowtail rockfish.

NMFS SFD sees no need to make any change in your catch history in response to your request for corrections. As a result of this decision, NMFS SFD has made an initial administrative determination that your application has been approved with revised QS/IBQ allocation amounts, [as designated on the permit].⁶

NMFS SFD issued a permit to Appellants for QS for a number of species and IBQ for Pacific halibut.⁷

In a subsequent letter to Appellants, NMFS SFD explained that Pacific halibut IBQ "is based on the amount of your target species QS, your logbook data that shows the areas you fished, and the observer bycatch ratios for those areas."⁸ NMFS SFD explained that Appellants' Pacific halibut was down largely based on logbook data the agency used steps 21, 22, 25 and 26 in the formula used to calculate IBQ. If logbook data was unavailable, as in the case of 2003-2006 logbook data for targeted species for step 22, then fleet average target species catch was used.

ISSUES

The issue is whether Appellants have shown that NMFS SFD erred in calculating their Pacific halibut IBQ. To resolve that issue, I will determine whether Appellants have met their burden of proving that NMFS SFD erred in its application of the QS and IBQ allocation formula.

FINDINGS OF FACT (FOF)

1. Appellants' 2011 Pacific Coast Trawl Quota Share Permit allows a Pacific halibut IBQ of .163.⁹

⁶ IAD dated January 10, 2011.

⁷ 2011 Pacific Coast Trawl Quota Share Permit.

⁸ Letter from NMFS SFD to Appellants (by email dated Feb. 24, 2011).

⁹ Appellants' 2011 Pacific Coast Trawl Quota Share Permit.

2. To determine Appellants' QS, NMFS used a twenty-six step consecutive mathematical formula, the last step of which determined Appellants' Pacific halibut IBQ.¹⁰
3. In steps one to eight of the mathematical formula referred to in FOF 2, NMFS calculated the pounds of certain fish species landed for ten years.

PRINCIPLES OF LAW

The Shorebased Individual Fish Quota (IFQ)¹¹ program was established by regulations implementing the Pacific Coast Groundfish Fishery Management Plan.¹² One facet of the IFQ program is permits designating the IBQ for Pacific halibut.¹³

To determine Pacific halibut IBQ, NMFS follows a twenty-six step, consecutive mathematical formula involving historical catch data for applicants.¹⁴ Included within the data used is data for "whiting trips" and "nonwhiting trips." A whiting trip is a "fishing trip where greater than or equal to 50 percent by weight of all fish reported on the state landing receipt is whiting."¹⁵ A "nonwhiting trip" means a fishing trip where less than 50 percent by weight of all fish reported on the state landing receipt is whiting.¹⁶

Appeals of permits are limited in the applicable regulations to seven bases of error:

1. Errors in NMFS's use or application of data, including:
2. Errors in NMFS's use or application of landings data from PacFIN;
3. Errors in NMFS's application of the QS and IBQ allocation formula;
4. Errors in identification of the permit owner, permit combinations, or vessel registration as listed in NMFS's permit database;
5. Errors in identification of ownership information for the first receiver or the processor that processed the fish;

¹⁰ See December 29, 2010 Workbook, including IFQ Species QS Calculations (Steps 1-8), Group 2 Species QS Calculations (Steps 9-14), Group 3 Species QS Calculations (Steps 15-20), Halibut IBQ Calculations (Steps 21-26).

¹¹ IFQ "means a Federal permit to harvest a quantity of fish, expressed as a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person. An IFQ is a harvest privilege that may be revoked at any time in accordance with the Magnuson-Stevens Act, IFQ species for the Shorebased IFQ Program are listed at § 660.140, subpart D." 50 C.F.R. § 660.111(2)(iii).

¹² See 50 C.F.R. §§ 660.10(a) and 660.140 et seq.

¹³ See 50 C.F.R. § 660.140(d).

¹⁴ See 50 C.F.R. § 660.140(d)(8). See also December 29, 2010 Workbook, including IFQ Species QS Calculations (Steps 1-8), Group 2 Species QS Calculations (Steps 9-14), Group 3 Species QS Calculations (Steps 15-20), Halibut IBQ Calculations (Steps 21-26).

¹⁵ See 50 C.F.R. § 660.140(b)(8).

¹⁶ See 50 C.F.R. § 660.140(b)(8).

6. Errors in NMFS's use or application of ownership interest information, and;¹⁷
7. For appeals for whiting QS based on shoreside processing, errors because the shoreside processor or Pacific whiting shoreside first receiver to which a QS permit and whiting QS have been assigned was not in fact the first processor of the fish included in the qualifying landings history.¹⁸

ANALYSIS

On appeal, Appellants argue that their IBQ for Pacific halibut is wrong.¹⁹ They assert two arguments: first, the formula NMFS SFD used in calculating Appellants' IBQ is wrong; second, that the formula yields unfair results. As to the formula, Appellants explain that their Pacific halibut IBQ is not in proportion to their non-whiting QS. Appellants are concerned that NMFS SFD treated whiting and non-whiting the same way in calculating their Pacific halibut IBQ. They contend that catching whiting and non-whiting involves different gear. Appellants explain that whiting is caught midwater, targeting one species, but non-whiting mudsweeps, targeting multiple species.

Appellants also think it is unfair that vessels that have never fished non-whiting were allocated much more Pacific halibut IBQ than they were. Appellants think it is unfair that someone who has less history with non-whiting catch would receive a larger Pacific whiting IBQ. In reaching this decision, I have carefully considered Appellants' claims made on appeal and reviewed the entire file.

Of the seven bases for correcting a permit on appeal, identified in the Principles of Law section of this Recommended Decision, Appellants have not raised numbers 1 and 2 and 4 through 7. Reasons number 1 and 2 concern the application of data. Appellants do not question the application of data but rather the formula used by NMFS. Appellants say there "might" be something wrong with the logbook data but "the real error is in NMFS's application formula."²⁰ As to bases for appeal number 4 through 7, in their appeal Appellants do not express concern with ownership and first receiver status.

Rather, it appears Appellants' arguments may fit within reason number 3. Reason number 3 involves errors in NMFS's application of the QS and IBQ allocation formula. Appellants bear the burden of proving by a preponderance of the evidence that these alleged errors occurred.

Appellants argue that the formula per se is error. While Appellants may not like the result of the formula, they have not shown in this appeal why the formula is inconsistent with applicable regulations. Nor have Appellants presented or identified evidence that

¹⁷ See 50 C.F.R. § 660.140(b)(8)(vi) and (x).

¹⁸ See 50 C.F.R. § 660.140(b)(8)(x).

¹⁹ Appellants' appeal dated March 4, 2011.

²⁰ Appellants' appeal dated March 4, 2011.

would show how NMFS SFD applied the formula in a way that was inconsistent with applicable regulations. I also note that in response to Appellants' concerns about NMFS SFD's use of the formula, NMFS SFD provided an explanation in the IAD as to why Appellants' estimates of IBQ might be different from NMFS SFD's determination of his IBQ.²¹ Appellants requested further explanation.²² NMFS SFD provided a further, detailed, explanation of the basis for the calculation of the QS/IBQ allocation amounts on Appellant's QS permit.²³ In the face of that detailed response, Appellants have not submitted nor cited to evidence of record that contradicts NMFS SFD's explanation.

Appellants take issue with NMFS SFD's decision to, in Appellants' words, treat whiting and non-whiting the same way for the purposes of calculating QS and IBQ. In this regard, Appellants stated why they believe fishing from whiting is different from fishing from non-whiting. While not entirely clear, it appears Appellants are taking issue with the regulatory provision that designates trips with 50 percent or more of whiting as whiting trips.²⁴ In my opinion, Appellants are advocating that the regulations are not properly written or create unfairness. My function, however, is not to question the validity of substantive provisions of agency regulations. Rather, I am to determine whether the agency's action is consistent with applicable regulations. Since Appellants do not argue that NMFS SFD took action that is inconsistent with existing regulations, I do not see a basis for Appellants to prevail.

In reaching my decision, I considered Appellants' concern that others with less non-whiting history have permits with higher Pacific halibut IBQ than they. Appellants say this is unfair. Assuming for the sake of argument that is accurate, the argument is not one of the seven bases for appeal. In any event, Appellants' argument does not show NMFS SFD did not follow its regulations in issuing Appellants' permit. Again, based on the record before me and the limited arguments raised by Appellants, I see no error in the IAD.

CONCLUSIONS OF LAW

NMFS SFD followed its regulations when it calculated Appellants' Pacific halibut IBQ.

Appellants have not met their burden of proving that NMFS SFD erred in its application of the QS and IBQ allocation formula.

The IAD is consistent with applicable regulations.

²¹ IAD at 2, dated January 10, 2011.

²² Appellants' letter dated February 9, 2010 [sic].

²³ Letter from NMFS SFD to Appellants (by email dated Feb. 24, 2011) with five attachments including the December 2009 Halibut IBQ calculation that NMFS used to determine the QS/IBQ allocation amounts on Appellants' QS permit.

²⁴ See 50 C.F.R. § 660.140(b)(8). See also IAD.

[REDACTED]
Appeal No. 11-0073

This decision is a recommendation and not final unless approved by the Regional Administrator.

[REDACTED]
Eileen G. Jones
Chief Administrative Judge

Date: 07/21/2011