

⁶ See 50 C.F.R. § 635.15.

On December 13, 2022, NMFS' Office of Sustainable Fisheries Highly Migratory Species Division (HMS) sent an email to Appellant titled "2023 IBQ Allocation Determination."⁷ On December 20, 2022, HMS sent an email to Appellant titled "Updated 2023 IBQ allocation determination letter."⁸ In the letter, HMS notified Appellant that "Due to a calculation error associated with the 25 mt Northeast Distant Area set aside, your Individual Bluefin Quota (IBQ) allocation has been corrected." Attached to the email was Appellant's corrected Initial Administrative Determination (IAD).⁹ In the IAD, HMS stated that NMFS' records indicated that from November 1, 2019 to October 31, 2022, Vessel reported pelagic longline sets and had a valid permit during this time.^{10, 11} The IAD further indicated that of Vessel's total pelagic sets, were eligible sets. Specifically, the IAD indicated that Vessel had eligible Gulf of Mexico (GOM) sets between November 1, 2019 and October 31, 2022 (Qualifying Period), and ATL sets during this time (sets in 2019, sets in 2020, sets in 2021, and sets in 2022).¹² The IAD also stated that the 2023 IBQ share for Permit is percent of the Longline category, which is equivalent to pounds of IBQ allocation.¹³ The IAD further stated that the regional designation of the share is comprised of percent ATL shares and percent GOM shares, which equates to pounds of ATL IBQ and pounds of GOM IBQ.¹⁴ HMS noted Appellant had the right to appeal the IAD.¹⁵

On December 21, 2022, Appellant appealed the IAD.^{16, 17} In his appeal letter, Appellant requested that his "IBQ determination be re-evaluated based on logbook data," and indicated that "the eligible sets documented are lower than the actual effort."¹⁸

On January 10, 2023, NAO sent a letter to Appellant notifying him that the office had received his appeal, and requesting that he submit any additional documentation or information in support of the appeal to NAO by January 20, 2023.¹⁹ Appellant provided no additional documentation or information.

On January 26, 2023, NAO sent a letter to Appellant scheduling a hearing on February 7, 2023.²⁰ The letter stated that Appellant may submit additional evidence in advance of the hearing to NAO.²¹ On February 7, 2023, prior to his scheduled hearing, Appellant sent to NAO his 2020, 2021, and 2022 logbook records for Vessel, as well as a spreadsheet summarizing his logbook

⁷ IAD Tab, email from HMS to Appellant titled "2023 IBQ Allocation Determination," dated December 13, 2022.

⁸ IAD Tab, letter from HMS to Appellant, dated December 20, 2022.

⁹ IAD Tab, corrected IAD.

¹⁰ Id.

¹¹ On April 13, 2023, HMS informed NAO that it had queried the Vessel Monitoring System (VMS) data used to calculate the IAD on November 3, 2022. See Appeals Communications Tab, Email from HMS to NAO titled "VMS dataset query date" (Apr. 13, 2023).

¹² IAD Tab, corrected IAD.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Appeal Tab, Appellant's appeal letter, dated and received December 21, 2022.

¹⁷ On December 23, 2022, Appellant clarified that his appeal related to the corrected IAD issued on December 20, 2022. Appeals Communication Tab, email from Appellant to NAO, dated and received December 23, 2022.

¹⁸ Id.

¹⁹ Appeal Communication Tab, Letter from NAO to Appellant, dated January 10, 2023.

²⁰ Appeal Communication Tab, Notice Scheduling Hearing, dated January 26, 2023.

²¹ Id.

records.²² The logbooks and spreadsheet indicated that Vessel had ATL sets during the Qualifying Period (sets in 2019, sets in 2020, sets in 2021, and sets in 2022).²³

On February 7, 2023, Appellant testified during his scheduled hearing that he reported to NMFS on logbooks that Vessel had ATL sets during the Qualifying Period.²⁴ At the conclusion of the hearing, I informed Appellant that I would be holding the record open until February 14, 2023, during which time Appellant could submit any additional evidence in support of his appeal.²⁵ Appellant submitted no additional evidence.

On February 16, 2023, NAO contacted HMS to request its interpretation of the Regulation regarding what forms of data may be used to determine eligible pelagic longline sets.^{26, 27} On February 24, 2023, HMS responded with the following interpretation of the Regulation:

NAO Question: Has HMS interpreted the above sections of 50 C.F.R. § 635.15 regarding what forms of data may be used to determine the number of pelagic longline sets legally made by each permitted, eligible vessel? If so, please provide your interpretation and supporting rationale.

[HMS] Response: Regarding allocations made for the 2023 calendar year, NMFS determined that mandatory vessel monitoring system (VMS) set reports are the best available data to use to inform dynamic IBQ allocation. VMS set reports are required to be submitted within 12 hours of completing a pelagic longline set (50 CFR 635.69(e)(4)(i)), in order to determine vessel interactions with bluefin tuna and accurately manage Individual Bluefin Quota (IBQ) allocation. These reports have been mandatory since January 1, 2015, and are a management tool specifically implemented to determine dead discards and deduct that amount of quota from vessels' IBQ quota accounts. Since these reports were developed for and are integral to the IBQ program, and because NMFS receives the data within hours of fishing gear sets being made, VMS set reports are the preferred data to use for dynamic allocation. NMFS has made the determination that in 2023 VMS set reports are preferred over all other data sources.

NAO Question: More specifically, has HMS interpreted the above sections of 50 C.F.R. § 635.15 to mean that NMFS logbook data may not be used to determine the number of pelagic longline sets

²² Appeal Tab, Appellant's logbooks and spreadsheet, received February 6, 2023.

²³ Id.

²⁴ Appeal Tab, audio recording of February 7, 2023, scheduled hearing.

²⁵ Id.

²⁶ 15 C.F.R. § 906.10(e).

²⁷ Appeal Communication Tab, email from HMS to NAO titled "Re: Interpretation of Regulation," dated February 24, 2023.

legally made by each permitted, eligible vessel? If so, please provide your interpretation and supporting rationale.

Response: NMFS has not determined that logbook data may not be used for determining IBQ allocation. As described above, VMS set reports are the preferred data source. Currently, logbook data is not as timely as VMS set report data and permit holders frequently do not submit their logbooks on time, thus compounding the challenges of using logbook data for annual disbursements at this time. For example, VMS set report data is available within hours of completing a set, while logbook data may not be available for months.

The regulations were specifically written to allow the agency flexibility to continue to evaluate the best data available each year in order to allocate IBQ. This means that in the future other data sources could/may be used in accordance with the regulations, for example, if technological advances facilitate the implementation of electronic logbook reporting and logbook reports are received and processed in a more expedient time frame that could facilitate their use for informing dynamic IBQ allocation.

Here are a couple of side notes. First, by using VMS set reports for dynamic allocation, NMFS is creating additional incentive (in addition to regulatory incentive) for permit holders and vessel operators to accurately submit their VMS set reports in a timely fashion. Such incentive has the added benefit of further supporting the management of the overall IBQ program. Second, since the implementation of the VMS set report requirement in 2015, permit holders have had the ability to conduct their own cross-check of VMS set reports with their logbook submissions to correct late/missing records.²⁸

Subsequently, on March 1, 2023, NAO contacted the NMFS Southeast Fisheries Science Center (SEFSC) Commercial Fisheries Monitoring Branch (CFMB) to request Vessel's logbook data for eligible sets reported during the Qualifying Period.²⁹ On May 30, 2023, SEFSC CFMB provided NAO with clarification on Vessel's logbook data, finalizing the data for Vessel.³⁰ The logbook data indicated that as of November 4, 2022, Vessel had eligible GOM and eligible ATL sets during the Qualifying Period (sets in 2019, sets in 2020, sets in 2021, and sets in 2022).³¹

²⁸ Id.

²⁹ Appeal Communication Tab, email from NAO to SEFSC CFMB titled "Re: Logbook Summary Data," dated March 1, 2023.

³⁰ Appeal Communication Tab, email from SEFSC CFMB to NAO titled "Re: Logbook Data Discrepancy," dated May 30, 2023.

³¹ Id.

On March 27, 2023, NAO issued to Appellant a Request for Evidence (RFE), requesting that Appellant provide evidence that logbook records, and not VMS data, should be used to determine Appellant's IBQ share given the provided interpretation of the Regulation by HMS.³² ³³ NAO indicated in its RFE that Appellant must provide the requested evidence by April 6, 2023.³⁴ NAO did not receive any evidence from Appellant in response to the RFE.

I have determined that the information in the record is sufficient to render a decision. I therefore close the record and render this decision. In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.³⁵

ISSUES

The legal issue in this case is whether Vessel is eligible for additional 2023 IBQ share and resultant allocation.

FINDINGS OF FACT

1. Appellant's IAD indicates that Vessel had eligible ATL sets during the Qualifying Period (sets in 2019, sets in 2020, sets in 2021, and sets in 2022).³⁶
2. Appellant's logbook records supplied by Appellant indicate that Vessel had ATL sets during the Qualifying Period (sets in 2019, sets in 2020, sets in 2021, and sets in 2022).³⁷
3. Appellant testified during his hearing that he had ATL sets during the Qualifying Period.³⁸
4. NMFS SEFSC CFMB logbook data as of November 4, 2022, indicate that Vessel had eligible ATL sets during the Qualifying Period (sets in 2019, sets in 2020, sets in 2021, and sets in 2022).³⁹

PRINCIPLES OF LAW

ATL permit holders who fished at least one set during a recent 36-month period using pelagic longline gear are eligible to receive annual IBQ share.⁴⁰ "The 36 month time period is a rolling period that changes annually, and is selected by NMFS based on the availability of recent data and time required by NMFS to conduct determinations."⁴¹

³² 15 C.F.R. § 906.12(b).

³³ Appeals Communication Tab, Request for Evidence, dated March 27, 2023.

³⁴ Id.

³⁵ 15 C.F.R. § 906.11(a)(1) § 906.15(a).

³⁶ IAD tab, corrected IAD.

³⁷ Appeal Tab, audio recording of February 7, 2013, scheduled hearing.

³⁸ Appeal Tab, Appellant's logbooks and spreadsheet, received February 6, 2023.

³⁹ IAD Tab, NMFS logbooks for Vessel from the Southeast Fisheries Science Center database.

⁴⁰ 50 C.F.R. § 635.15(b)(1).

⁴¹ 50 C.F.R. § 635.15(c).

NMFS will use “[t]he best available data...such as VMS data...[or] logbook, [electronic monitoring], or permit data,...to accurately determine a vessel’s eligibility status and shares.”⁴²

“NMFS will only count one set per calendar day toward a vessel’s total number of pelagic longline sets, and will only count a set if a vessel was issued a valid Atlantic Tunas Longline category LAP when the set occurred.”⁴³

“NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.”⁴⁴

ANALYSIS

Is Vessel eligible for additional 2023 IBQ share and resultant allocation?

The IAD states that Vessel reported a total of eligible ATL sets during the Qualifying Period. Appellant, however argues in his appeal that “the eligible sets documented are lower than the actual effort,” and maintains the logbook data should be used to determine his eligible ATL sets and IBQ.

NAO’s Rules of Procedure instruct that I “give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the [IAD].” HMS interpreted the Regulation to mean that VMS set reports were “the best available data to use to inform dynamic IBQ allocation,” and that “in 2023 VMS set reports are preferred over all other data sources.” HMS explained that it made this determination because VMS set reports “were developed for and are integral to the IBQ program, and because NMFS receives the data within hours of fishing gear sets being made.” HMS noted several times in its interpretation the importance of the timelessness of vessel data and that, while vessel logbook data is “not as timely” as VMS data, it had not determined that logbook data could not be used for determining IBQ allocation.

Appellant’s IAD and the SEFSC CFMB summary logbook data, however, stand in stark contradiction to one another in that the SEFSC CFMB summary logbook data allots Vessel significantly more eligible pelagic longline sets than the IAD. I note that this contrast exists despite both VMS and SEFSC CFMB data using approximately the same query reporting date (November 3, 2022 for VMS data, and November 4, 2022 for SEFSC CFMD logbook data). Further, Appellant’s logbook records supplied by Appellant, as well as Appellant’s testimony during his hearing, precisely match SEFSC CFMB logbook data indicating that Vessel had eligible ATL sets during the Qualifying Period. Given the evidence, I find HMS’ determination that “[VMS] set reports are the best available data” to use to determine Vessel’s IBQ allocation to be unreasonable in regard to Vessel’s Qualifying Period eligible sets determination. Although HMS has determined that the VMS set report data is more timely than logbook data, the substantial variation between the IAD and the SEFSC CFMB logbook data sets raises significant

⁴² *Id.*

⁴³ 50 C.F.R. § 635.15(c)(1).

⁴⁴ 15 C.F.R. § 906.15.

concerns about the accuracy and reliability of using VMS data to calculate Vessel's eligible pelagic longline sets and 2023 IBQ allocation.


CONCLUSIONS OF LAW

Appellant has established by a preponderance of the evidence that the IAD is inconsistent with the Regulation because the evidence supports that the IAD did not correctly assess and distribute Vessel's eligible pelagic longline sets when determining Vessel's 2023 IBQ share and resultant allocation.

ORDER

The IAD, issued on December 20, 2022, is **VACATED**. NAO directs HMS to issue Vessel a total of eligible ATL pelagic longline sets (sets in 2019, sets in 2020, sets in 2021, and sets in 2022). NAO further directs HMS to recalculate Vessel's 2023 IBQ share and the resultant allocation.

Appellant may submit a Motion for Reconsideration.⁴⁵ Any Motion for Reconsideration must be transmitted by fax to NAO no later than July 9, 2023. A Motion for Reconsideration must be in writing and contain a detailed statement of one or more specific material matters of fact or law that the administrative judge overlooked or misunderstood.



Steven Goodman
Chief Administrative Judge

Date Issued: June 29, 2023

⁴⁵ 15 C.F.R. § 906.16.