

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of

[REDACTED]

Appellant

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Appeal Nos. 22-0002
22-0008

DECISION

STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS) Office of Management and Budget and is located in NOAA's headquarters in Silver Spring, Maryland. The Director of NMFS' Office of Sustainable Fisheries may affirm, reverse, modify, or remand this decision.¹

[REDACTED] (Appellant) filed the appeals under review. Appellant requests review of his Individual Bluefin Quota (IBQ) share and the resultant allocation for Appellant's fishing vessel (F/V), [REDACTED] (Vessel), which is associated with Atlantic Tuna Longline category permit number [REDACTED] (Permit).

On May 21, 2019, NMFS published a Notice of Intent announcing "the start of a public process for determining the scope of significant issues related to the management of Atlantic bluefin tuna . . . and addressing issues identified by considering modification of bluefin regulations."² Two years later, on May 21, 2021, NMFS published a proposed rule that would "make several changes to the [IBQ] Program, including the distribution of IBQ shares to only active vessels, [and] implementation of a cap on IBQ shares that may be held by an entity."³ NMFS then provided a summary of the proposed amendment to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (FMP), i.e., Amendment 13, and requested "comments on the proposed measures, alternatives, and analyses described in th[e] proposed rule."⁴

On October 3, 2022, following an extended comment period, NMFS published a final rule implementing changes to the changes to the bluefin fishery under Amendment 13 to the 2006

¹ 15 C.F.R. § 906.17(c)(1) (2022).

² 84 Fed. Reg. 23020 (May 21, 2019).

³ 86 Fed. Reg. 27686 (May 21, 2021).

⁴ *Id.* pp. 27687 – 27694.

FMP (Regulation).⁵ The Regulation was codified at 50 C.F.R. § 635.15, and became effective January 1, 2023.⁶

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 Attached to the email was Appellant's Initial Administrative Determination (IAD 1).⁸ In IAD 1, HMS informed Appellant that it had determined that Vessel had reported [REDACTED] total pelagic longline sets between November 1, 2019, and October 31, 2022, and "had a valid permit at the time of this fishing activity."⁹ IAD 1 further indicated that of Vessel's [REDACTED] total pelagic sets, HMS had determined that [REDACTED] were considered eligible sets [REDACTED] eligible Gulf of Mexico (GOM) sets and [REDACTED] eligible Atlantic (ATL) sets in 2019; [REDACTED] eligible GOM sets and [REDACTED] eligible ATL sets in 2020; [REDACTED] eligible GOM sets and [REDACTED] eligible ATL sets in 2021; and [REDACTED] eligible GOM sets and [REDACTED] eligible ATL sets in 2022.¹⁰ IAD 1 specified that Vessel's 2023 IBQ share was [REDACTED] percent of the Longline category quota, which equated to [REDACTED] pounds of IBQ allocation.¹¹ HMS further indicated that the regional designation for Vessel's share was comprised of [REDACTED] percent ATL shares and [REDACTED] percent GOM shares, "which equates to [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ."¹²

On December 15, 2022, Appellant filed an appeal of IAD 1.¹³ In his appeal letter, Appellant asserts that according to his records, IAD 1 was "anything but accurate."¹⁴ Specifically, Appellant indicates that although he has not been able to check his 2020 and 2021 logbook records, his 2022 logbook records indicate that Vessel had [REDACTED] eligible ATL sets; not the [REDACTED] eligible ATL sets reflected in IAD 1.¹⁵ Appellant adds that the error in calculating his 2022 eligible sets has caused him to question the accuracy of the 2019, 2020, and 2021 eligible set totals listed in IAD 1.¹⁶

Subsequently, on December 20, 2022, HMS sent an email to Appellant titled "Updated 2023 IBQ allocation determination letter."¹⁷ In this email, HMS states:

Due to a calculation error associated with the 25 mt Northeast Distant Area set aside, your Individual Bluefin Quota (IBQ) allocation has been corrected. The 2002 ICCAT recommendation

⁵ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁶ See 50 C.F.R. § 635.15 (2023).

⁷ IAD Tab, email from HMS to Appellant titled "2023 IBQ Allocation Determination" (Dec. 13, 2022).

⁸ IAD Tab, IAD 1.

⁹ Id.

¹⁰ Id. IAD 1 explained that "Only one set per calendar day is counted toward a vessel's total number of pelagic longline sets, and only if a vessel was issued a valid Atlantic Tunas Longline category LAP when the set occurred."

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Appeal Tab, Appeal Letter (dated and received Dec. 15, 2022).

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁷ IAD Tab, email from HMS to Appellant titled "Updated 2023 IBQ allocation determination letter" (Dec. 20, 2022).

included an annual 25 mt set-aside quota to account for bycatch of bluefin tuna in an area as the Northeast Distant Area. This set-aside quota is *in addition* to the overall incidental longline quota. The previous IBQ allocation determination letter emailed on 12/15/2022 was incorrect as it was calculated on the overall incidental longline quota, minus the 25mt. Thus, this has been corrected and the entire 209.3 mt has been allocated in accordance with Amendment 13 to the 2006 Consolidated Atlantic HMS Fishery Management Plan.¹⁸

Attached to this email was Appellant's corrected 2023 IBQ allocation determination letter (IAD 2).¹⁹ IAD 2 contained the same number of total pelagic longline sets and breakdown of eligible set for the same 36-month period as IAD 1. Additionally, while Vessel's 2023 IBQ share remained [REDACTED] percent of the Longline category quota in IAD 2, the corrected share equated to [REDACTED] pounds of IBQ allocation.²⁰ HMS further indicated that the regional designation for Vessel's share was comprised of [REDACTED] percent ATL shares and [REDACTED] percent GOM shares, "which equates to [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ."²¹ ²²

On December 24, 2022, Appellant filed an appeal of IAD 2 and a motion to rescind his appeal of IAD 1.²³ In his new appeal, Appellant reasserts his previous argument that Vessel had [REDACTED] eligible ATL sets in 2022, not the [REDACTED] sets indicated in IAD 2.²⁴ Regarding Vessel's 2020 and 2021 eligible sets, Appellant states:

As for the two previous years or 2020 and 2021, [I] have so far been unable to find my old logbooks and [I] can only imagine what deficiencies [I] will find when [I] do. I was listed as having [REDACTED] sets on 2020 and [REDACTED] on 2021. Since the vessel goes when the weather allows, [I] seriously doubt that the previous years were all that different than this.²⁵

Appellant further states that "[i]t would seem pretty simple to obviously use the set forms which are required to get a permit renewed rather than rely on one of the most problematic units on our vessels or the VMS."²⁶

On January 9, 2023, NAO sent Appellant a letter acknowledging receipt of his appeal and requesting Appellant submit any additional material concerning his appeal by January 19, 2023.²⁷ Appellant submitted no additional material. Thereafter, on January 31, 2023, I issued to

¹⁸ *Id.* (emphasis in original).

¹⁹ IAD Tab, IAD 2 (Dec. 20, 2022).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Appeal Tab, Appeal Letter (dated and received Dec. 24, 2022).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Appeal Communications Tab, Acknowledgement Letter (Jan. 9, 2023).

Appellant a notice scheduling a videoconference hearing for February 15, 2023, at 11:00 a.m. (Eastern).²⁸

On February 15, 2023, Appellant appeared for his scheduled hearing.²⁹ At his hearing, Appellant testified that he did not dispute the eligible sets allotted in IAD 2 for 2019, 2020, or 2021. However, Appellant “wholeheartedly” disputed the 2022 eligible sets allotted to Vessel in IAD 2. According to Appellant, his logbook records show that Vessel deployed ████████ eligible sets in 2022 instead of the ██████ sets allotted in IAD 2. Appellant averred that any discrepancy between his logbook records and the VMS data used by HMS to calculate Vessel’s 2022 eligible sets is a result of a clerical error, and not because Vessel did not fish those sets.

At the conclusion of the hearing, I informed Appellant that I would be holding the record open until March 15, 2023, during which time Appellant could submit any additional evidence for me to consider.³⁰ 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.³¹ 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.

²⁸ Decisions, Orders, Notices Tab, Notice Scheduling Hearing (Jan. 31, 2023).

²⁹ Hearing Tab, Audio Recording of Scheduled Hearing (Feb. 15, 2023).

³⁰ Id.

³¹ Appeal Communications Tab, email from HMS to NAO titled “Re: Interpretation of Regulation” (Feb. 24, 2023).

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 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.³²

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.³³ On May 30, 2023, SEFSC CFMB provided NAO with clarification on Vessel's logbook data, finalizing the data for Vessel.³⁴ This logbook data reflects that as of November 4, 2022, Vessel deployed a total of [REDACTED] eligible sets during the

³² Id.

³³ Appeal Communications Tab, email from NAO to SEFSC CFMB titled "Re: Logbook Summary Data" (March 1, 2023).

³⁴ Appeal Communications Tab, email from SEFSC CFMB to NAO titled "Re: Logbook Data Discrepancy" (May 30, 2023).

qualifying period—██████ eligible GOM sets and ██████ eligible ATL sets in 2019; ██████ eligible GOM sets and ██████ eligible ATL sets in 2020; ██████ eligible GOM sets and ██████ eligible ATL sets in 2021; and ██████ eligible GOM sets and ██████ eligible ATL sets in 2022.^{35, 36}

Having carefully reviewed Appellant’s written materials and testimony, as well as the information contained in the record, I have determined there is sufficient evidence to adjudicate this appeal. I therefore close the record and render this decision.³⁷

ISSUE

The legal issue in this case is whether IAD 2 correctly assessed Vessel’s eligible pelagic longline sets when determining Vessel’s 2023 IBQ share and resultant allocation.

FINDINGS OF FACT

1. On May 21, 2021, NMFS published a proposed rule to modify Atlantic Highly Migratory Species bluefin tuna management measures applicable to bluefin fisheries.³⁸
2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.³⁹
3. The Regulation was codified at 50 C.F.R. § 635.15.⁴⁰
4. HMS concluded that mandatory VMS set reports were the best available data to use to determine Vessel’s 2023 IBQ share and resultant allocation.⁴¹
5. On December 20, 2022, HMS issued to Appellant IAD 2 indicating that Vessel reported ██████ eligible pelagic longline sets from November 1, 2019, to October 31, 2022; ██████ eligible GOM sets and ██████ eligible ATL sets in 2019; ██████ eligible GOM sets and ██████ eligible ATL sets in 2020; ██████ eligible GOM sets and ██████ eligible ATL sets in 2021; and ██████ eligible GOM sets and ██████ eligible ATL sets in 2022.⁴²
6. IAD 2 stated that Vessel’s 2023 IBQ share was ██████ percent of the Longline category quota, which equated to ██████ pounds of IBQ allocation.⁴³

³⁵ Appeal Communications Tab, SEFSC Logbook Data as of November 4 2022 for F/V ██████ 22-0008.

³⁶ HMS confirmed to NAO that the VMS dataset used to determine Vessel’s eligible pelagic longline sets was queried on November 3, 2022. Appeal Communications Tab, email from HMS to NAO titled “VMS dataset query date” (Apr. 13, 2023).

³⁷ 15 C.F.R. § 906.12(a) (2022).

³⁸ 86 Fed. Reg. 27686 (May 21, 2021).

³⁹ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁴⁰ 50 C.F.R. § 635.15 (2023).

⁴¹ Appeal Communications Tab, email from HMS to NAO titled “Re: Interpretation of Regulation” (Feb. 24, 2023).

⁴² IAD Tab, IAD 2.

⁴³ Id.

7. NMFS SEFSC CFMB logbook data as of November 4, 2022, indicates that Vessel deployed a total of [REDACTED] eligible pelagic longline sets from November 1, 2019, to October 23, 2022—[REDACTED] eligible ATL sets in 2019; [REDACTED] eligible ATL sets in 2020; [REDACTED] eligible ATL sets in 2021; and [REDACTED] eligible ATL sets in 2022.⁴⁴

PRINCIPLES OF LAW

The Regulation states that an Atlantic Tunas Longline category permit holder that has fished using pelagic longline gear on at least one set during a recent 36-month period “is eligible to receive an annual IBQ share . . . and is considered an IBQ shareholder.”⁴⁵ In order for an IBQ shareholder’s vessel to be deemed an eligible vessel, it must have been issued a valid Atlantic Tunas Longline category permit when the pelagic longline sets occurred.⁴⁶

The eligible 36-month 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 eligibility and share determinations.⁴⁷ When making these determinations, NMFS “will review the relevant 36 months of best available data,” which may consist of “a single data source such as VMS data, . . . [or] may include other available data such as logbook, [electronic monitoring], or permit data, in order to accurately determine a vessel's eligibility status and shares.”⁴⁸

NMFS calculates IBQ shares for each IBQ shareholder using “the total number of each eligible vessel's pelagic longline sets during the relevant 36 month period, and the relative amount (as a percentage) those pelagic longline sets represent compared to the total number of pelagic longline sets made by all IBQ shareholders' eligible vessels.”⁴⁹ NMFS only counts one set per calendar day when calculating a vessel’s total number of pelagic longline sets.⁵⁰ In addition, NMFS will only count sets that occurred when a vessel was issued a valid Atlantic Tunas Longline category permit.⁵¹

The Regulation defines a shareholder’s annual IBQ allocation as “the amount of [bluefin tuna] . . . in metric tons corresponding to [the] IBQ shareholder's share percentage, distributed to their vessel to account for incidental landings and dead discards of [bluefin tuna] during a specified calendar year.”⁵² NMFS calculates a shareholder’s IBQ allocation by multiplying the shareholder’s IBQ share percentage by the baseline Longline category quota for the subject year.⁵³

In the last quarter of each year, NMFS issues IADs to Atlantic Tunas Longline category permit holders notifying them of their IBQ shares and allocations, as well as the regional designations of

⁴⁴ Appeal Communications Tab, SEFSC Logbook Data as of November 4 2022 for F/V [REDACTED] 22-0008.

⁴⁵ 50 C.F.R. § 635.15(b)(1) (2023).

⁴⁶ *Id.*

⁴⁷ *Id.* § 635.15(c).

⁴⁸ *Id.*

⁴⁹ *Id.* § 635.15(c)(1).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* § 635.15(d).

⁵³ *Id.*

those shares and allocations, for the subsequent year.⁵⁴ ATL permit holders may appeal their IADs within 45 days after the date NMFS issues the IADs.⁵⁵ Permit holders may base their appeal on ownership of an active vessel with a valid ATL permit; IBQ share percentage; IBQ allocations; regional designations of their shares and allocations; or NMFS' determination of the pelagic longline sets legally made by the permitted vessel.⁵⁶ Hardship factors, however, are not valid bases for permit holders to appeal their IADs.⁵⁷

“NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.”⁵⁸

ANALYSIS

Does IAD 2 correctly assess Vessel's eligible sets when determining Vessel's 2023 IBQ share and resultant allocation?

The Regulation indicates that an Atlantic Tunas Longline category permit holder's vessel is eligible for IBQ share if that vessel fished at least one set during a recent 36-month period using pelagic longline gear, and was issued a valid Atlantic Tunas Longline category permit at the time the fishing activity occurred. IAD 2 states that Vessel reported [REDACTED] eligible pelagic longline sets during the qualifying period of November 1, 2019, to October 31, 2022, and possessed a valid permit at the time this fishing activity occurred. IAD 2 further indicates that Vessel's [REDACTED] eligible sets were comprised solely of ATL sets—[REDACTED] in 2019; [REDACTED] in 2020; [REDACTED] in 2021; and [REDACTED] in 2022. As explained below, however, a preponderance of the evidence establishes that IAD 2 failed to accurately assess Vessel's eligible pelagic longline sets during the qualifying period.

In this appeal, Appellant claims that IAD 2 erred in that it incorrectly calculated Vessel's total eligible pelagic longline sets during the qualifying period. Specifically, Appellant maintains that his logbook records indicate that Vessel deployed [REDACTED] eligible ATL sets in 2022, as opposed to the [REDACTED] eligible ATL sets that IAD 2 allotted Vessel for 2022. Notably, however, Appellant made no direct challenges to the eligible sets IAD 2 allotted Vessel for 2019, 2020, or 2021.

According to NAO's Rules of Procedure, I must “give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the [IAD].” HMS indicated in its February 24, 2023, email that it has 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.” Nonetheless, HMS noted 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.

⁵⁴ *Id.* § 635.15(e).

⁵⁵ *Id.* § 635.15(e)(1).

⁵⁶ *Id.* § 635.15(e)(1)(i).

⁵⁷ *Id.*

⁵⁸ 15 C.F.R. § 906.15 (2022).

As demonstrated above and in the table below, IAD 2 and the SEFSC CFMB summary logbook data stand in stark contradiction to one another in that the SEFSC CFMB summary logbook data allots Vessel significantly more eligible pelagic longline sets than IAD 2. Particularly concerning Appellant’s claim regarding Vessel’s 2022 eligible sets, SEFSC CFMB summary data supports Appellant’s assertion that Vessel deployed █ eligible ATL sets in 2022. In contrast, IAD 2 indicates that Vessel deployed only █ eligible ATL sets in 2022—a net difference of █ eligible pelagic longline sets.

	IAD 2	SEFSC CFMB Summary Logbook Data	Appellant’s Claimed Eligible Sets
2019	█ GOM; █ ATL	█ GOM; █ ATL	No Claim Asserted
2020	█ GOM; █ ATL	█ GOM; █ ATL	No Claim Asserted
2021	█ GOM; █ ATL	█ GOM; █ ATL	No Claim Asserted
2022	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL
Total	█	█	█

In light of the substantial discrepancy between IAD 2 and SEFSC CFMB logbook data, as well as the fact that SEFSC CFMB logbook data supports Appellant’s claims that Vessel had █ eligible ATL sets in 2022, 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 2022 eligible sets determination. Although HMS has determined that the VMS set report data is more timely than logbook data, the substantial variation between IAD 2 and the SEFSC CFMB logbook data sets raises significant concerns about the accuracy and reliability of using only VMS data to calculate Vessel’s eligible 2022 pelagic longline sets and 2023 IBQ allocation.

Concerning Vessel’s eligible pelagic longline sets for 2019, 2020, and 2021, however, I note that while IAD 2 and SEFSC CFMB logbook data are clearly divergent, Appellant provided no testimony or evidence indicating what Vessel’s eligible set counts should have been for those time periods. Without any such evidence, I must give deference to HMS’ determination that VMS set reports were the best available data to determine Vessel’s eligible pelagic longline sets in 2019, 2020, and 2021.

CONCLUSIONS OF LAW

IAD 2 is inconsistent with the Regulation because a preponderance of the evidence establishes that IAD 2 does not correctly assess Vessel’s eligible pelagic longline sets when determining Vessel’s 2023 IBQ share and resultant allocation.

ORDER

Appellant's motion to rescind his appeal filed on December 15, 2022, is **GRANTED**. IAD 2, dated December 20, 2022, is **VACATED**. NAO directs HMS to award Vessel [REDACTED] eligible ATL pelagic longline sets for 2022. NAO further directs HMS to recalculate Vessel's 2023 IBQ share and the resultant allocation.

Appellant may submit a Motion for Reconsideration.⁵⁹ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later than **June 19, 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.

[REDACTED]

J. Kirk Essmyer
Administrative Judge

Date Issued: June 9, 2023

⁵⁹ 15 C.F.R. § 906.16 (2022).