

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 22-0009

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 appeal 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; and [REDACTED] eligible GOM and ATL sets in 2021 and 2022.¹⁰ IAD 1 specified that that Vessel's 2023 IBQ share was [REDACTED] percent of the Longline category quota, which equated to [REDACTED] pounds of IBQ allocation.¹¹ IAD 1 further indicated that the regional designation for Vessel's share was comprised of [REDACTED] percent ATL and [REDACTED] percent GOM shares, "which equates to [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ."¹²

Subsequently, on December 20, 2022, HMS sent an email to Appellant titled "Updated 2023 IBQ allocation determination letter."¹³ 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 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.¹⁴

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

¹⁴ *Id.*

Attached to this email was Appellant's "corrected 2023 IBQ allocation determination letter" (IAD 2).¹⁵ Like IAD 1, IAD 2 indicated that Vessel had reported █████ total pelagic longline sets between November 1, 2019, and October 31, 2022, and stated that Vessel's 2023 IBQ share was █████ percent of the Longline category quota.^{16, 17} However, IAD 2 adjusted Vessel's IBQ allocation from █████ pounds of ATL IBQ to █████ pounds of ATL IBQ.¹⁸ IAD 2 further indicated that Vessel's IBQ share is comprised of █████ percent ATL shares and █████ percent GOM shares, "which equates to █████ pounds of ATL IBQ and █████ pounds of GOM IBQ."¹⁹ IAD 2 reflected no change, however, in the distribution of Vessel's total eligible sets during the qualifying period.²⁰

On December 28, 2022, Appellant filed a written appeal of IAD 2.²¹ In his appeal, Appellant asserts that IAD 2 contained an "obvious error" in that it stated Vessel had "█████ eligible sets" during 2021 and 2022.²² To that end, Appellant maintains he "fished hard in 2021 and 2022," and insists that this "oversight" will "adversely affect[] [his] business and [him] personally" because "once the next year rolls around, [he] will have nothing."²³ In support of his claim, Appellant provided the following information:

The following are set numbers in my **LOGBOOKS from 2021 and 2022. Table 1** of my IBQ letter shows **ZERO** eligible sets for both of these years. **These set numbers are all eligible sets.** NMFS has the "originals" from these set form LOGBOOKS.

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¹⁵ IAD Tab, IAD 2 (Dec. 20, 2022).

¹⁶ Id.

¹⁷ On April 13, 2023, HMS informed NAO that it had queried the Vessel Monitoring System (VMS) data used to calculate IAD 1 and IAD 2 on November 3, 2022. See Appeals Communications Tab, Email from HMS to NAO titled "VMS dataset query date" (Apr. 13, 2023).

¹⁸ IAD Tab, IAD 2 (Dec. 20, 2022).

¹⁹ Id.

²⁰ Id.

²¹ Appeal Tab, Appeal Letter (dated and received Dec. 28, 2023).

²² Id.

²³ Id.

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On January 9, 2023, NAO sent Appellant a letter acknowledging receipt of his appeal and requesting that Appellant submit any additional material concerning his appeal by January 19, 2023.²⁵ Appellant submitted no additional material at that time. Thereafter, on January 31, 2019, I issued to Appellant a notice scheduling a videoconference hearing for February 16, 2023, at 11:00 a.m. (Eastern).²⁶

On January 25, 2023, HMS informed NAO that Vessel’s pelagic longline set totals had been adversely affected by a Faria vessel monitoring system (VMS) “unit error.”²⁷ On April 11, 2023, HMS provided NAO with revised eligible set counts for Vessel.²⁸ This new VMS data indicated that Vessel’s revised number of eligible pelagic longline sets equaled ■—■ 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 2022.²⁹

On February 16, 2023, Appellant appeared for his scheduled hearing.³⁰ At his hearing, Appellant testified that his main concern was that IAD 2 failed to accurately document Vessel’s eligible sets in 2020 through 2022.³¹ Specifically, Appellant testified that his logbook records reflect that Vessel deployed a total of ■ eligible ATL sets during the qualifying period—■ in 2019; ■ in 2020; ■ in 2021; and ■ in 2022.³² Appellant explained that he believed that the IAD 2 numbers were incorrect because his Faria VMS unit failed to update past 2020, which resulted in the VMS unit reporting Vessel’s 2021 and 2022 sets as 2020 sets.³³ Appellant added that after three failed attempts to update his previous VMS unit, he invested approximately \$■ in purchasing a new unit to ensure similar errors do not occur in the future.³⁴

At the conclusion of the hearing, I informed Appellant that I would be holding the record open until March 3, 2023, during which time Appellant could submit any additional evidence for me to consider.³⁵ Appellant submitted no additional evidence at that time. However, on April 3, 2023, Appellant submitted a letter containing “a summation of the points . . . important to [Appellant’s] appeal.”^{36, 37} In his letter, Appellant states:

²⁴ Id. (emphasis in original).

²⁵ Appeal Communications Tab, Acknowledgement Letter (Jan. 9, 2023).

²⁶ Decisions, Orders, Notices Tab, Notice Scheduling Hearing (Jan. 31, 2023).

²⁷ Appeal Communications Tab, email from HMS to NAO titled “PLL Vessels with Faria Units” (Jan. 25, 2023).

²⁸ Appeal Communications Tab, email from HMS to NAO titled “Re: A13 bluefin tuna math_ faria adjusted” (Apr. 11, 2023).

²⁹ Appeal Communications Tab, Faria Vessel Adjusted Set Breakdown.

³⁰ Hearing Tab, Audio Recording of Scheduled Hearing (Feb. 16, 2023).

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Appeal Communications Tab, Supplemental Appeal Letter (dated Apr. 2, 2023; received Apr. 3, 2023).

³⁷ Although untimely, I admitted Appellant’s letter into evidence pursuant to NAO’s Rules of Procedure. See 15 C.F.R. § 906.10(b) (2022).

1. If this calculation is not corrected, I will be out of business next year when the new calculation is performed.
2. It is obvious that I was “reporting”, evidenced by NMFS having me down for [REDACTED] sets during the assigned period.
3. The Federal Registry states that in 87 FR 59966 October 3, 2022 that best available data does include logbooks as well as VMS reports.
4. My logbook records indicate:
 - a. 2019 Nov-Dec [REDACTED] sets
 - b. 2020 [REDACTED] sets
 - c. 2021 [REDACTED] sets
 - d. 2022 [REDACTED] sets

◆ TOTAL [REDACTED] sets
5. I reiterate that the **proper assignment of these sets to the corresponding year** is critical.
6. Upon discovering that the issue was with the VMS system, I immediately invested in a brand new VMS system so from February 10, 2023 we will hopefully not have any more VMS issues.³⁸

Appellant closed his letter by stating that he “w[ould] be happy to send any additional evidence . . . necessary” for me to render my decision.³⁹

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.^{40, 41} 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

³⁸ Appeal Communications Tab, Supplemental Appeal Letter (dated Apr. 2, 2023; received Apr. 3, 2023) (emphasis in original).

³⁹ Id.

⁴⁰ 15 C.F.R. § 906.10(e) (2022).

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

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 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.⁴²

⁴² Id.

Subsequently, on April 7, 2023, I issued to Appellant a Request for Evidence notifying him that in regard to the 2023 IBQ allocation, HMS had apprised NAO that:

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.^{43, 44}

I further informed Appellant that HMS had also indicated that “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.”⁴⁵

Given this information, I requested that Appellant produce “[e]vidence indicating that logbook records, and not VMS data, are the best available information to determine Appellant’s IBQ allocation . . . [which] may include Appellant’s copies of logbook records submitted to NMFS between November 1, 2019, and October 31, 2022” by April 17, 2023.⁴⁶ Appellant submitted no additional evidence.

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.⁴⁷ On May 26, 2023, NAO extracted Vessel’s Logbook Data from the SEFSC Southeast Reporting System (SRS) to evaluate Appellant’s eligible sets based on the logbook numbers and dates provided in Appellant’s appeal letter.⁴⁸ The SRS logbook data reflects that as of November 4, 2022, Vessel deployed a total of [REDACTED] qualifying eligible GOM sets and [REDACTED] eligible ATL sets during the qualifying period—[REDACTED] in

⁴³ 15 C.F.R. § 906.12(b) (2022).

⁴⁴ Decisions, Orders, Notices Tab, Request for Evidence, p. 1 (Apr. 7, 2023).

⁴⁵ *Id.*

⁴⁶ *Id.* p.2.

⁴⁷ Appeal Communications Tab, email from NAO to SEFSC CFMB titled “Re: Logbook Summary Data” (Mar. 1, 2023).

⁴⁸ Appeal Communications Tab, SEFSC Logbook Data as of November 4 2022 for F/V [REDACTED] 22-0009.

2019; █████ in 2020; █████ in 2021; and █████ in 2022.⁴⁹ On May 30, 2023, SEFSC CFMB provided NAO with clarification on Vessel’s logbook data, finalizing the data for Vessel.⁵⁰

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.⁵¹

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.⁵²
2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.⁵³
3. The Regulation was codified at 50 C.F.R. § 635.15.⁵⁴
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.⁵⁵
5. On December 20, 2022, HMS issued to Appellant IAD 2 indicating that Vessel reported █████ eligible ATL sets from November 1, 2019, to October 31, 2022—█████ in 2019; █████ in 2020; and █████ in 2021 and 2022.⁵⁶
6. IAD 2 stated that Vessel’s 2023 IBQ share was █████ percent of the Longline category quota, which equated to █████ pounds of IBQ allocation.⁵⁷
7. Corrected Faria VMS data indicated that Vessel deployed a total of █████ eligible ATL sets from November 1, 2019, to October 31, 2022—█████ in 2019; █████ in 2020; █████ in 2021; and █████ in 2022.⁵⁸

⁴⁹ Id.

⁵⁰ Appeal Communications Tab, email from SEFSC CFMB to NAO titled “Re: Logbook Data Discrepancy” (May 30, 2023).

⁵¹ 15 C.F.R. § 906.12(a) (2022).

⁵² 86 Fed. Reg. 27686 (May 21, 2021).

⁵³ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁵⁴ 50 C.F.R. § 635.15 (2023)

⁵⁵ Appeal Communications Tab, email from HMS to NAO titled “Re: Interpretation of Regulation” (Feb. 24, 2023).

⁵⁶ IAD Tab, IAD 2.

⁵⁷ Id.

⁵⁸ Appeal Communications Tab, Faria Vessel Adjusted Set Breakdown.

8. NMFS SEFSC CFMB logbook data indicates that Vessel deployed a total of [REDACTED] eligible ATL sets from November 1, 2019, to October 31, 2022—[REDACTED] in 2019; [REDACTED] in 2020; [REDACTED] in 2021; and [REDACTED] in 2022.⁵⁹

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.”⁶⁰ 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 during the relevant 36-month period.⁶¹

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.⁶² 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.”⁶³

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.”⁶⁴ NMFS only counts one set per calendar day when calculating a vessel’s total number of pelagic longline sets.⁶⁵ In addition, NMFS will only count sets that occurred when a vessel was issued a valid Atlantic Tunas Longline category permit.⁶⁶

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.”⁶⁷ 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.⁶⁸

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

⁵⁹ Appeal Communications Tab, SEFSC Logbook Data as of May 26 2023 for F/V [REDACTED] 22-0009.

⁶⁰ 50 C.F.R. § 635.15(b)(1) (2023).

⁶¹ *Id.*

⁶² *Id.* § 635.15(c).

⁶³ *Id.*

⁶⁴ *Id.* § 635.15(c)(1).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* § 635.15(d).

⁶⁸ *Id.*

those shares and allocations, for the subsequent year.⁶⁹ ATL permit holders may appeal their IADs within 45 days after the date NMFS issues the IADs.⁷⁰ 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.⁷¹ Hardship factors, however, are not valid bases for permit holders to appeal their IADs.⁷²

“NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.”⁷³

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 a total of [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; and [REDACTED] in both 2021 and 2022. As explained below, however, a preponderance of the evidence establishes that IAD 2 failed to correctly assess and distribute Vessel's eligible pelagic longline sets during the qualifying period.

In his appeal, Appellant claims that the IAD contained an “obvious error” because it incorrectly calculated Vessel's eligible pelagic longline sets during the qualifying period, and because it inaccurately distributed Vessel's eligible sets across calendar years 2019, 2020, 2021, and 2022. Appellant attributes this error to a malfunctioning Faria VMS unit that failed to update past calendar year 2020, which resulted in Vessel's 2021 and 2022 sets being reported as 2020 sets. Appellant indicated that according to his logbook records, Vessel's eligible ATL sets totaled [REDACTED]—[REDACTED] in 2019; [REDACTED] in 2020; [REDACTED] in 2021; and [REDACTED] in 2022.⁷⁴ Appellant provided no logbook records or other evidence, however, to support these set totals.

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

⁶⁹ *Id.* § 635.15(e).

⁷⁰ *Id.* § 635.15(e)(1).

⁷¹ *Id.* § 635.15(e)(1)(i).





















⁷² *Id.*

⁷³ 15 C.F.R. § 906.15 (2022).

⁷⁴ Appellant did not claim that Vessel had eligible GOM sets during the qualifying period.

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.

As demonstrated above and in the table below, the corrected Faria VMS data and SEFSC CFMB logbook data contradict IAD 2 in that they each allot Vessel significantly more total eligible pelagic longline sets than IAD 2. In addition, both the corrected Faria VMS data and SEFSC CFMB logbook data indicate that Vessel had eligible sets in 2021 and 2022. However, the corrected Faria VMS data, queried on November 3, 2022, and SEFSC CFMB logbook data, queried using a cut-off date of November 4, 2022, vary in the total number of eligible sets awarded to Vessel and how those sets are distributed throughout the qualifying period.⁷⁵

	IAD 2	Corrected Faria VMS Data	SEFSC CFMB Logbook Data (as of November 4, 2022)	Appellant’s Claimed Eligible Sets
2019				
2020				
2021				
2022				
Total				

The corrected Faria VMS data provided by HMS establishes that IAD 2 is inconsistent with the Regulation in that it fails to accurately assess and distribute Vessel’s eligible pelagic longline sets during the qualifying period.

⁷⁵ Logbook records received by SEFSC CFMB after November 4, 2022, were not counted towards Vessel’s eligible set count.

Furthermore, the documented errors in the initial Faria VMS data set combined with the notable discrepancies between the corrected Faria VMS data and the logbook data extracted from the SEFSC CFMB SRS raise significant concerns about the accuracy and reliability of relying on Faria VMS data to calculate Vessel's eligible pelagic longline sets and 2023 IBQ allocation. In addition, the relative consistency between Appellant's claimed eligible sets and the logbook data that NAO retrieved from the SEFSC CFMB SRS stands in stark contrast to the inconsistency between the corrected Faria VMS data and the SEFSC CFMB SRS logbook data. As detailed above, Appellant's claimed eligible sets differ from SEFSC CFMB logbook data by [REDACTED] sets, while the corrected Faria VMS data differs from SEFSC CFMB logbook data by [REDACTED] sets. In light of this evidence, I find that HMS' determination that VMS set reports are the best available data to use to determine Vessel's eligible sets and 2023 IBQ allocation to be unreasonable.

Regarding Appellant's claimed eligible sets, however, I note that although Appellant's claimed sets are noticeably similar to those reflected in the SEFSC CFMB logbook data, Appellant did not submit sufficient evidence—such Appellant's copies of Vessel's logbook records—to establish that his set data is superior to that of SEFSC CFMB. In the absence of such evidence, I find SEFSC CFMB logbook data provides the most reliable accounting of Vessel's eligible sets during the qualifying period.

CONCLUSIONS OF LAW

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

ORDER

IAD 2, issued on December 20, 2022, is **VACATED**. HMS is directed to award Vessel a total of [REDACTED] eligible ATL pelagic longline set—[REDACTED] eligible sets for 2019, [REDACTED] eligible sets for 2020, [REDACTED] eligible sets for 2021, and [REDACTED] eligible 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.⁷⁶ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later than **July 10, 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.

J. Kirk Essmyer
Administrative Judge

Date Issued: June 29, 2023

⁷⁶ 15 C.F.R. § 906.16 (2014).