

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

In re Application of

[REDACTED]

Appellant

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Appeal Nos. 22-0005
22-0010

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 bluefin fishery under Amendment 13 to the 2006 FMP

¹ 15 C.F.R. § 906.17(c)(1) (2023).

² 84 Fed. Reg. 23020 (May 21, 2019).

³ 86 Fed. Reg. 27686 (May 21, 2021).

⁴ *Id.* pp. 27687 – 27694.

(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 longline 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 sets and [REDACTED] eligible ATL sets in 2021 and 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 and [REDACTED] percent GOM shares, "which equates to [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ."¹²

On December 21, 2022, Appellant filed an appeal challenging IAD 1's determination of Vessel's eligible pelagic longline sets and 2023 IBQ share.¹³ However, on December 20, 2022, HMS sent an email to Appellant titled "Updated 2023 IBQ allocation determination letter."¹⁴ 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.¹⁵

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.

¹¹ Id.

¹² Id.

¹³ Appeal Tab, Appeal Letter 1 (dated Dec. 19, 2022; received Dec. 21, 2022).

¹⁴ IAD Tab, email from HMS to Appellant titled "Updated 2023 IBQ allocation determination letter" (Dec. 20, 2022).

¹⁵ Id.

Attached to this email was Appellant's corrected 2023 IBQ allocation determination letter (IAD 2).¹⁶ IAD 2 contained the same number of total pelagic longline sets and breakdown of eligible sets for the same 36-month period as IAD 1.¹⁷ However, while Vessel's 2023 IBQ share remained [REDACTED] percent of the Longline category quota in IAD 2, the corrected share now equated to [REDACTED] pounds of IBQ allocation.^{18, 19} HMS 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."²⁰

On January 10, 2023, Appellant filed an appeal of IAD 2 along with a motion to rescind his appeal of IAD 1.²¹ In his appeal, Appellant asserts that Vessel deployed [REDACTED] additional pelagic longline sets in October 2022, which "were reported via the E-trips electronic reporting method and with the [Vessel Monitoring System] (VMS) daily set reporting requirements."²² In addition, Appellant states that he was "unable to physically perform the job for twenty-four months due to [REDACTED]," and "was only able to secure a qualified relief captain for one trip in [REDACTED]"²³ Appellant avers that if he had not suffered this [REDACTED] "[his] effort in the fishery would have been several times what it was."²⁴

Appellant also maintains that his effort in the pelagic longline fishery was reduced by his "involve[ment] in other fisheries, primarily bottom longline [REDACTED]"²⁵ Appellant explains that his increased involvement in these other fisheries was driven by "the need to stay away from the timeframe when Bluefin Tuna are more prevalent in the waters that [Appellant] primarily fish[es]."²⁶ To that end, Appellant states, "I fail to understand why I should be punished for redirecting some effort and trying to stay away from Bluefin interaction."²⁷ Appellant adds that Vessel's 2023 IBQ allocation of [REDACTED] of IBQ "is insufficient for him and his crew "to make any kind of living."²⁸

Lastly, Appellant contends that NMFS failed to provide "clear notice prior to passing" the Regulation.²⁹ According to Appellant, "[n]o indication was ever made that vessels would be effectively shut out of the fishery for limited participation in the last three years, especially considering the Covid-19 pandemic."³⁰

¹⁶ IAD Tab, IAD 2.

¹⁷ Id.

¹⁸ Id.

¹⁹ 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 Appeal Communications Tab, Email from HMS to NAO titled "VMS dataset query date" (Apr. 13, 2023).

²⁰ IAD Tab, IAD 2.

²¹ Appeal Tab, Appeal Letter 2 (dated and received Jan. 10, 2023).

²² Id. p. 1.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id. p. 2.

²⁹ Id.

³⁰ Id.

On January 10, 2023, NAO sent Appellant a letter acknowledging receipt of his appeal and requesting Appellant submit any additional material concerning his appeal by January 20, 2023.³¹ Appellant submitted no additional material. Thereafter, on January 31, 2023, I issued to Appellant a notice scheduling a videoconference hearing for February 17, 2023, at 11:00 a.m. (Eastern).³²

On January 25, 2023, HMS informed NAO that Vessel’s pelagic longline set totals had been adversely affected by a “Faria VMS unit error.”³³ On April 11, 2023, HMS provided NAO with corrected eligible set counts for Vessel.³⁴ This corrected VMS data indicated that Vessel’s total number of eligible pelagic longline sets equaled ■ ATL sets—■ in 2019, ■ in 2020, ■ in 2021, and ■ in 2022.³⁵

On February 17, 2023, Appellant appeared for his scheduled hearing.³⁶ At his hearing, Appellant testified that Vessel had ■ additional eligible ATL sets in 2022 that were not reflected in IAD 2.³⁷ According to Appellant, Vessel made these sets on ■ of 2022.³⁸ Appellant testified that he originally reported these additional sets using his onboard VMS and the Standard Atlantic Fisheries Information System (SAFIS) eTrips mobile application (eTrips).³⁹ Appellant averred, however, that that he spoke on the telephone with NMFS Southeast Fisheries Science Center (SEFSC) employee ■, who informed Appellant that the ■ sets from 2022 were not included in SEFSC’s logbook records due to a communication error between SEFSC and eTrips.⁴⁰ Appellant recalled that after speaking with ■ about the communication error, SEFSC provided him with paper logbook forms to complete and mail back to SEFSC, which Appellant stated he did.⁴¹ Appellant noted that the logbook forms SEFSC provided were for calendar year 2023, and that SEFSC advised him to use the 2023 forms to record his 2022 sets.⁴²

In addition, Appellant testified that NMFS failed to provide proper notice prior to enacting the Regulation.⁴³ In fact, Appellant averred that he did not learn about the new bluefin tuna allocation scheme until he received IAD 1.⁴⁴ Appellant added that the Regulation has created a “semi-directed fishery” that rewards the fishermen that target bluefin tuna by giving them more IBQ while punishing others who try to avoid bluefin interactions by taking away their IBQ.⁴⁵

³¹ Appeal Communications Tab, Acknowledgement Letter (Jan. 10, 2023).

³² Decisions, Orders, Notices Tab, Notice Scheduling Hearing (Jan. 31, 2023).

³³ Appeal Communications Tab, email from HMS to NAO titled “PLL Vessels with Faria Units” (Jan. 25, 2023).

³⁴ Appeal Communications Tab, email from HMS to NAO titled “Re: A13 bluefin tuna math_faria adjusted” (Apr. 11, 2023).

³⁵ Appeal Communications Tab, Faria Vessel Adjusted Set Breakdown.

³⁶ Appeal Tab, Audio Recording of Scheduled Hearing (Feb. 17, 2023).

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id. Appellant did not specify on what date he spoke to ■. Id.

⁴¹ Id.

⁴² Id. Appellant stated that he did not obtain logbook forms in 2022 because he relied solely on VMS and eTrips to report his 2022 fishing activity. Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

At the conclusion of the hearing, I informed Appellant that I would hold the record open until February 24, 2023, during which time Appellant could submit any additional evidence for me to consider.⁴⁶ On February 17, 2023, Appellant submitted additional evidence to NAO.⁴⁷ This evidence included a “tally sheet” dated ██████████, 2022, and “2023 Atlantic Highly Migratory Species Logbook” set forms dated ██████████ of 2023.⁴⁸ Attached to this evidence was a note from Appellant stating, “Please note that these sets were made in 2022, they will be on 2023 set forms because no 2022 set forms were available to me.”⁴⁹

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.^{50, 51} 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 legally made by each permitted, eligible vessel? If so, please provide your interpretation and supporting rationale.

⁴⁶ Id.

⁴⁷ Appeal Communications Tab, email titled “22-0010 Set Data from Appellant” (Feb. 17, 2023).

⁴⁸ Appeal Communications Tab, 22-0010 ██████████ Set Data from Appellant, pp. 2-6.

⁴⁹ Id. p. 1.

⁵⁰ 15 C.F.R. § 906.10(e) (2023).

⁵¹ Appeal Communications Tab, email from HMS to NAO titled “Re: Interpretation of Regulation” (Feb. 24, 2023).

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.⁵²

Subsequently, on March 1, 2023, NAO contacted the NMFS SEFSC Commercial Fisheries Monitoring Branch (CFMB) to request Vessel's logbook data for eligible sets reported during the qualifying period.⁵³ On May 30, 2023, SEFSC CFMB provided NAO with clarification on Vessel's logbook data, finalizing the data for Vessel.⁵⁴

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.⁵⁵ This logbook data reflects that as of November 15, 2022, Vessel deployed █ eligible GOM sets and █ eligible ATL sets during the qualifying period—█ in 2019; █ in 2020; and █ in 2021 and 2022.⁵⁶

⁵² Id.

⁵³ Appeal Communications Tab, email from NAO to SEFSC CFMB titled "Re: Logbook Summary Data" (March 1, 2023).

⁵⁴ Appeal Communications Tab, email from SEFSC CFMB to NAO titled "Re: Logbook Data Discrepancy" (May 30, 2023).

⁵⁵ Appeal Communications Tab, SEFSC Logbook Data as of November 15 2022 for FV █ 22-0010.

⁵⁶ Id.

On June 22, 2023, NAO contacted ██████████ with SEFSC to corroborate Appellant's account of events regarding his 2022 eTrips reporting.⁵⁷ At this time, NAO informed ██████████ that Appellant had reported speaking to her "regarding missing 2022 logbooks," and that Appellant claimed that ██████████ had sent him "blank logbook forms for use in recording 2022 sets."⁵⁸ NAO further notified ██████████ that Appellant asserted that he had returned the completed logbook forms to SEFSC, but NAO had been unable to locate the logbook forms in the SRS database.⁵⁹ NAO noted that "[t]he issue might be because these blank forms were 2023 forms instead of 2022 forms," and requested that ██████████, "provide the ██████████ 2023 logbooks [Appellant] completed for 2022 sets."⁶⁰

That same day, ██████████ responded that:

I did spend some time talking with the owner of ██████████ last year. To my knowledge, that vessel did not mis-report any of the dates for fishing trips. That vessel reported ██████████ pelagic longline trips in 2022, which were reported via the eTrips app, which is probably why you're not seeing them.

...

... I can share a spreadsheet that way. In looking through the data, it seems like the owner misinterpreted some of the questions about logging each set, so I can try to help you interpret those numbers if you'd like.

The owner did not report any paper logbooks to our program in 2022.⁶¹

Subsequently, on June 23, 2022, ██████████ provided to NAO a spreadsheet of the fishing trips that Appellant reported in 2022 using eTrips.⁶² Regarding the spreadsheet, ██████████ stated:

Each row represents a species that was caught, not a trip or set. Each unique "Effort Sequence" is supposed to represent a single set. But, based on his estimated fishing hours per set (██████████) it would seem that the reporter did not understand that he was supposed to log at least 1 set per 24 hours during a pelagic longline trip. Here at the logbook office, we did not penalize him for this mistake, as he was one of the first reporters to use this new phone application, and we're all still working out the kinks. However,

⁵⁷ Appeal Communications Tab, email from NAO to SEFSC CFMB title "██████████ Logbooks for 2022" (June 22, 2023).

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

you can probably in[t]uit that there were multiple sets on each fishing trip.⁶³

The spreadsheet provided by [REDACTED] reflects that Appellant reported [REDACTED] pelagic longline fishing trips in 2022 using SAFIS eTrips.⁶⁴ Only [REDACTED] of these trips, however, occurred during the qualifying period of November 1, 2019, to October 31, 2022.⁶⁵ This trip was an 80-hour pelagic longline fishing trip that lasted from [REDACTED] to [REDACTED] of 2022.⁶⁶ The spreadsheet reflects that the Vessel Trip Report (VTR) number for this fishing activity was [REDACTED].⁶⁷ Notably, the spreadsheet does not show the date or quantity of any qualifying sets Vessel made during this fishing trip.⁶⁸

On July 6, 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.^{69, 70}

I further informed Appellant that HMS had 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.”⁷¹

⁶³ Id.

⁶⁴ Appeal Communications Tab, [REDACTED] Pelagic LL trips eTrips.

⁶⁵ Id.

⁶⁶ Id. The spreadsheet indicates that Appellant used eTrips to report [REDACTED] additional fishing trips in 2022 that occurred outside the qualifying period—a [REDACTED]-hour fishing trip from [REDACTED] to [REDACTED] of 2022; and a [REDACTED]-hour fishing trip from [REDACTED] to [REDACTED] of 2022. Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ 15 C.F.R. § 906.12(b) (2023).

⁷⁰ Decisions, Orders, Notices Tab, Request for Evidence, p. 1 (July 6, 2023).

⁷¹ Id.

Given this information, I requested that Appellant produce the following by July 13, 2023:

Evidence indicating that logbook records, and not VMS data, are the best available information to determine Appellant's IBQ allocation. Such evidence may include, but is not limited to:

1. Appellant's copies of logbook records submitted to NMFS between November 1, 2019, and October 31, 2022;
2. Records establishing the date Appellant submitted the aforementioned logbook records to NMFS;
3. Records establishing the date NMFS received the logbook records submitted by Appellant; or
4. Records of electronic submissions made via the SAFIS eTrips mobile application of F/V [REDACTED] pelagic longline sets that occurred between November 1, 2019, and October 31, 2022.⁷²

On July 9, 2023, in response to the evidence request, Appellant sent an email to NAO containing two supporting documents.⁷³ The first document is a dealer report from [REDACTED], located in [REDACTED].⁷⁴ This dealer report reflects that on [REDACTED] 2022, Vessel unloaded and sold to [REDACTED] [REDACTED] pounds of various pelagic species caught using long line gear.⁷⁵ The dealer report further indicated that the VTR number for this fishing activity was [REDACTED].⁷⁶

The second document Appellant submitted is a screenshot of an eTrips "Trip Summary" created on [REDACTED] 2022.⁷⁷ This screenshot reflects that Vessel engaged in a "Fishing Trip With Efforts" that began on [REDACTED] 2022, and ended on [REDACTED] 2022.⁷⁸ Like the dealer report, the eTrips Trip Summary reflects that the VTR number for Vessel's fishing activity was [REDACTED].⁷⁹ Unlike the dealer report, however, the eTrips Trip Summary does not indicate the type or amount of fish caught by Vessel, nor the type of gear used for this fishing effort.⁸⁰

⁷² Id. p. 2.

⁷³ Appeals Communications Tab, email from Appellant to NAO titled "Bluefin IBQ Appeal-F/V [REDACTED] official # [REDACTED]" (July 9, 2023).

⁷⁴ Appeals Communications Tab, 22-0010 Appellant Support Documents, pp. 1-9 (received July 9, 2023).

⁷⁵ Id. The dealer report indicates that Vessel unloaded and sold dolphinfish, swordfish, albacore tuna, bigeye tuna, and yellowfin tuna. Id.

⁷⁶ Id. p. 1.

⁷⁷ Id. p. 10.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

On July 28, 2023, NAO sent an email to HMS and SEFSC CFMB personnel stating:

F/V ██████████ provided the NAO logbook copies (attached) for sets that the appellant said he reported through eTrips for 2022. You will notice that the logbooks are dated 2023 instead of 2022. The appellant stated that he did not have any 2022 logbooks, and he called someone at SEFSC, who informed the appellant that he could use his 2023 logbook forms to file his 2022 sets. The appellant did not say who he talked with and there is no record that SEFSC ever actually received the forms.

██████████ provided the eTrips data that seems to corroborate the appellant's assertion that he is due ██████████ additional sets in 2022. However, we have no way to tie the eTrips data to the logbooks data.

. . . Can either of you, by viewing the attached logbooks, confirm that under HMS/SEFSC rules, these ██████████ sets are compliant and should be considered valid/qualified for the HMS IBQ program?⁸¹

Attached to the email were copies of the 2023 logbook set forms Appellant submitted, and the 2022 eTrips data for Vessel that SEFSC had previously provided.⁸²

On July 31, 2023, SEFSC CFMB responded that:

The F/V ██████████ has been reporting through the eTrips application for the past 2 years and has served as one of our beta testers. The SEFSC has been granting several dual permitted fishermen (GARFO and SERO permit holders) compliance on a case by case basis, based on the principle that they reported fishing activity through the application and met all requirements known to them at the time. The appellant was informed that he would need to send weightout information associated with the electronic logbook trip to gain compliance, which he did. Fishers are allowed to report trips on another year's logbooks if they have run out of blank logbooks as long as they inform us of the correct year of the trip.

The trip in question reported gear sets = ██████████ in the application, which implies there were ██████████ sets in the trip. At the time, the application's instructions were not clear that each set had to be logged as a separate effort so ██████████ only logged information for the trip, not each set. We believe this vessel made a good faith effort to

⁸¹ Appeal Communications Tab, Email from NAO to HMS and SEFSC CFMB titled "eTrips Data Validation for 22-0010 Appeal" (July 28, 2023).

⁸² Id.

report correctly and the information on the logbook reports matches the information we were provided through eTrips.

Given that context, it is at the HMS IBQ program's discretion if these sets should be considered for their calculations.⁸³

On August 1, 2023, HMS replied that it concurred with SEFSC CFMB's determination and indicated "that the[] additional sets are valid."⁸⁴ HMS further specified that the sets "may be included in [the] calculation of allocation."⁸⁵ On August 2, 2023, SEFSC CFMB provided additional confirmation that the sets in question satisfy the Regulation's eligibility requirements.⁸⁶

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.⁸⁷

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.⁸⁸
2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.⁸⁹
3. The Regulation was codified at 50 C.F.R. § 635.15.⁹⁰
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.⁹¹

⁸³ Appeal Communications Tab, Email from SEFSC CFMB to NAO titled "eTrips Data Validation for 22-0010 Appeal" (July 31, 2023).

⁸⁴ Appeal Communications Tab, Email from HMS to NAO titled "eTrips Data Validation for 22-0010 Appeal" (Aug. 1, 2023).

⁸⁵ *Id.*

⁸⁶ Appeal Communications Tab, Email from SEFSC CFMB to NAO titled "eTrips Data Validation for 22-0010 Appeal" (Aug. 2, 2023).

⁸⁷ 15 C.F.R. § 906.12(a) (2023).

⁸⁸ 86 Fed. Reg. 27686 (May 21, 2021).

⁸⁹ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁹⁰ 50 C.F.R. § 635.15 (2023).

⁹¹ Appeal Communications Tab, email from HMS to NAO titled "Re: Interpretation of Regulation" (Feb. 24, 2023).

5. On December 20, 2022, HMS issued to Appellant IAD 2 indicating that Vessel reported ██████ eligible ATL pelagic longline sets from November 1, 2019, to October 31, 2022—█████ in 2019; ██████ in 2020; and ██████ in 2021 and 2022.⁹²
6. IAD 2 stated that Vessel’s 2023 IBQ share was ██████ percent of the Longline category quota, which equated to ██████ pounds of IBQ allocation.⁹³
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 2022.⁹⁴
8. NMFS SEFSC logbook data indicated that Vessel deployed a total of ██████ eligible ATL sets from November 1, 2019, to October 31, 2022—█████ in 2019; ██████ in 2020; and ██████ in 2021 and 2022.⁹⁵
9. SAFIS eTrips data indicated that Vessel engaged in ██████ hours of pelagic longline fishing activity from ██████, 2022, to ██████, 2022.⁹⁶
10. On August 1, 2023, HMS confirmed that Vessel had ██████ additional eligible sets.⁹⁷

PRINCIPLES OF LAW

The Regulation states that an Atlantic Tunas Longline category permit holder who 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.”⁹⁸ 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.⁹⁹

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.¹⁰⁰ 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.”¹⁰¹

⁹² IAD Tab, IAD 2.

⁹³ *Id.*

⁹⁴ Appeal Communications Tab, Faria Vessel Adjusted Set Breakdown.

⁹⁵ Appeal Communications Tab, SEFSC Logbook Data as of November 15 2022 for F/V ██████ 22-0010.

⁹⁶ Appeal Communications Tab, ██████ Pelagic LL trips eTrips.

⁹⁷ Appeal Communications Tab, Email from HMS to NAO titled “eTrips Data Validation for 22-0010 Appeal” (Aug. 1, 2023).

⁹⁸ 50 C.F.R. § 635.15(b)(1) (2023).

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 635.15(c).

¹⁰¹ *Id.*

An owner of an Atlantic tunas permitted vessel must maintain fishing records on logbook forms for daily fishing activities. Entries “must be entered on the logbook form within 48 hours of completing that day’s activities or before offloading, whichever is sooner.”¹⁰² Additionally, logbook forms must be submitted postmarked to NMFS no later than 7 days of offloading all Atlantic HMS.¹⁰³

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.”¹⁰⁴ NMFS only counts one set per calendar day when calculating a vessel’s total number of pelagic longline sets.¹⁰⁵ In addition, NMFS will only count sets that occurred when a vessel was issued a valid Atlantic Tunas Longline category permit.¹⁰⁶

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.”¹⁰⁷ 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.¹⁰⁸

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 those shares and allocations, for the subsequent year.¹⁰⁹ ATL permit holders may appeal their IADs within 45 days after the date NMFS issues the IADs.¹¹⁰ 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.¹¹¹ Hardship factors, however, are not valid bases for permit holders to appeal their IADs.¹¹²

“NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.”¹¹³

¹⁰² 50 C.F.R. § 635.5(a)(1) (2023).

¹⁰³ *Id.*

¹⁰⁴ 50 C.F.R. § 635.15(c)(1) (2023).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 635.15(d).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 635.15(e).

¹¹⁰ *Id.* § 635.15(e)(1).

¹¹¹ *Id.* § 635.15(e)(1)(i).

¹¹² *Id.*

¹¹³ 15 C.F.R. § 906.15(a) (2023).

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 asserts that Vessel deployed [REDACTED] eligible pelagic longline sets in [REDACTED] 2022 that were not included in IAD 2. Appellant indicates that he initially reported these sets using Vessel's VMS system and eTrips, and later reported these [REDACTED] additional sets to SEFSC CFMB using 2023 logbook set forms provided to him by SEFSC personnel. In support of his claims, Appellant provided documentary evidence consisting of [REDACTED] logbook set forms dated [REDACTED] of 2023; a dealer report dated [REDACTED], 2022; and an eTrips Trip Summary showing that Vessel engaged in a "Fishing Trip with Efforts" from [REDACTED] to [REDACTED] of 2022.

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.

Despite this presumption of reasonableness, the conflicting data presented in the initial and corrected Faria VMS data sets combined with the notable discrepancies between the corrected Faria VMS data, SEFSC logbook data, eTrips data, and supporting evidence provided by Appellant, raise substantial doubts as to the accuracy and reliability of the VMS data used to calculate Vessel's eligible pelagic longline sets and 2023 IBQ allocation. Accordingly, I find that HMS' determination that VMS set reports were the best available data to calculate Vessel's eligible pelagic longline sets and 2023 IBQ allocation to be unreasonable.

At issue in this case are Vessel's eligible sets for 2020 and 2022. As demonstrated above and in the table below, IAD 2, the corrected Faria VMS data, SEFSC logbook data, and Appellant agree that Vessel had █ eligible ATL sets in 2019 and █ eligible sets in 2021.¹¹⁴ These sources diverge, however, regarding Vessel's eligible sets in 2020 and 2022.

	IAD 2	Corrected Faria VMS Data	SEFSC CFMB Summary Logbook Data (as of November 15, 2022)	Appellant's Claimed Eligible Sets
2019	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL
2020	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL
2021	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL
2022	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL	█ GOM; █ ATL
Total	█	█	█	█

Concerning Vessel's 2020 eligible sets, IAD 2, SEFSC logbook data, and Appellant each indicate that Vessel had █ eligible ATL sets. The corrected Faria VMS data provided by HMS, on the other hand, reflects that Vessel had only █ eligible ATL set in 2020. An examination of electronic copies of the 2020 logbook set forms Appellant submitted to SEFSC CFMB, however, confirms that Vessel had █ eligible ATL sets in 2020.¹¹⁵ These records reflect that these █ sets occurred on █ of 2020.¹¹⁶

Regarding Vessel's 2022 eligible sets, IAD 2 and SEFSC logbook data both indicate that Vessel had █ eligible sets. In contrast, HMS' corrected Faria VMS data indicates that Vessel had █ eligible sets in 2022, while Appellant maintains that Vessel had █ eligible sets in 2022.

Appellant's testimonial and documentary evidence provides significant support for his assertion that Vessel had █ qualifying sets in 2022. At his hearing, Appellant testified that these █ additional qualifying sets occurred on █ of 2022, and that he reported these sets via VMS, eTrips, and 2023 logbook forms provided by SEFSC.¹¹⁷ While Appellant

¹¹⁴ According to the Regulation, logbook records must be postmarked to NMFS no later than 7 days after the offloading date. 50 C.F.R. § 635.5(a)(1) (2023). To account for this 7-day period and the time required for SEFSC to receive and process mailed logbook records, NAO examined logbook records received by SEFSC as of November 15, 2022.

¹¹⁵ Appeal Communications Tab, █ 2020 Logbooks.

¹¹⁶ Id.

¹¹⁷ Although the Regulation does not explicitly identify eTrips as an available source to inform IBQ calculation, I find eTrips is an acceptable data source based on HMS' interpretation that "other data sources could/may be used in accordance with the regulations, for example, if technological advances facilitate the implementation of electronic

provided no evidence supporting his claim that these [REDACTED] sets were reported via Vessel's VMS, Appellant did provide a screenshot of an eTrips "Trip Summary" indicating that Vessel had engaged in fishing activity from [REDACTED] to [REDACTED] of 2022.¹¹⁸

In addition, Appellant provided a dealer report and a handwritten tally sheet showing that on [REDACTED], 2022, Vessel unloaded and sold [REDACTED] pounds of various fish species caught using long line gear.^{119, 120} Appellant also provided [REDACTED] logbook forms reflecting that Vessel had pelagic longline sets on [REDACTED] of 2022. Even though these logbook forms were printed for use in calendar year 2023, the eTrips and dealer report evidence provided by Appellant supports Appellant's claim that these sets actually occurred on the corresponding dates in 2022.¹²¹

Furthermore, although SEFSC personnel reported that Appellant had not submitted paper logbooks in 2022, they did confirm that Appellant had used eTrips to report [REDACTED] pelagic longline fishing trips.¹²² A review of the eTrips spreadsheet provided by SEFSC CFMB revealed that [REDACTED] of these 2022 fishing trips occurred during the qualifying period. This trip consisted of an [REDACTED] hour fishing trip from [REDACTED] to [REDACTED] of 2022. Although the spreadsheet provided no information regarding the number of sets deployed by Vessel during this trip, it did show that the VTR number for the trip was the same VTR number shown on the eTrips screenshot, dealer report, and logbook forms provided by Appellant.¹²³ Moreover, SEFSC CFMB indicated in its July 31, 2023, email that Appellant had reported [REDACTED] gear sets through eTrips for Vessel's [REDACTED], 2022 fishing trip "which implies there were [REDACTED] sets in the trip."¹²⁴ SEFSC CFMB further stated, "We believe this vessel made a good faith effort to report correctly and the information on the logbook reports matches the information we were provided through eTrips."¹²⁵ HMS subsequently confirmed that Appellant's [REDACTED] additional sets satisfied the Regulation's eligibility requirements and could be included in the calculation of Vessel's IBQ allocation.¹²⁶

In light of the foregoing, I find a preponderance of the evidence 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. Additionally, I find that a

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."

¹¹⁸ The eTrips "Trip Summary" shows the dates of the trip, but not the number of pelagic longline sets Vessel deployed during the trip.

¹¹⁹ According to the dealer report, Vessel unloaded and sold dolphinfish, swordfish, albacore tuna, bigeye tuna, and yellowfin tuna.

¹²⁰ The Regulation does not state that only sets of specific species count towards vessels' IBQ share.

¹²¹ Appellant provided no documentary evidence establishing that he mailed these logbook forms to SEFSC CFMB.

¹²² NAO searched the SEFSC SRS database in an attempt to locate the 2023 logbook set forms that Appellant claimed to have submitted to SEFSC. However, NAO was unable to verify that SEFSC received the 2023 logbook set forms.

¹²³ [REDACTED] reasoned Appellant had likely "misinterpreted some of the questions about logging each set." Appeal Communications Tab, email from NAO to SEFSC CFMB titled "[REDACTED] Logbooks for 2022" (June 22, 2023).

¹²⁴ Appeal Communications Tab, Email from SEFSC CFMB to NAO titled "eTrips Data Validation for 22-0010 Appeal" (July 31, 2023).

¹²⁵ *Id.*

¹²⁶ Appeal Communications Tab, Email from HMS to NAO titled "eTrips Data Validation for 22-0010 Appeal" (Aug. 1, 2023).

preponderance of the evidence establishes that Vessel had a total of [REDACTED] eligible ATL sets during the qualifying period—[REDACTED] in 2019; [REDACTED] in 2020; and [REDACTED] in 2022.

Concerning Appellant's arguments that he was "unable to physically perform the job" [REDACTED] that he should not be punished for redirecting his fishing efforts away from the pelagic longline fishery; and that NMFS failed to provide "clear notice to passing" the Regulation, I note that the Regulation does not authorize me to consider claims of this nature. While I understand Appellant's concerns, the Regulation limits my review to issues concerning ownership of an active vessel with a valid ATL permit; IBQ share percentage; IBQ allocations; regional designations of shares and allocations; or NMFS' determination of the pelagic longline sets legally made by the permitted vessel.¹²⁷ Relatedly, the Regulation explicitly bars me from considering hardship as a basis for an appeal.¹²⁸ As such, Appellant's argument that Vessel's 2023 IBQ allocation is insufficient for he and his crewmembers "to make any kind of living" provides no legal basis for me to reverse IAD 2.

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 IBO 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**. HMS is directed to award Vessel a total of [REDACTED] eligible pelagic longline sets—[REDACTED] ATL sets for 2019; [REDACTED] ATL sets for 2020; and [REDACTED] ATL sets for 2022. HMS is further directed to recalculate Vessel's 2023 IBO share and the resultant allocation.

Appellant may submit a Motion for Reconsideration.¹²⁹ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later than **August 21, 2023**.¹³⁰ 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.¹³¹

J. Kirk Essmyer
Administrative Judge

Date Issued: August 9, 2023

¹²⁷ 50 C.F.R. § 635.15(e)(1)(i) (2023).

128 Id.

¹²⁹ 15 C.F.R. § 906.16(a) (2023).

130 Id.

¹³¹ Id. § 906.16(b).