

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

In re Application of

F/V

Permit Number:

Appellant

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Appeal No. 23-0002

CORRECTED 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 located in NOAA's Silver Spring, Maryland headquarters. The Director of NMFS' Office of Sustainable Fisheries (Director) may affirm, reverse, modify, or remand this decision.¹

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

On May 21, 2021, NMFS published a proposed rule to modify the IBQ Program.² The rule states that ATL permit holders who NMFS determines had active permits associated with a vessel during a recent 36-month period are eligible to receive an annual IBQ share.³ The rule defines "active" vessels as "vessels that have used pelagic longline or greenstick gear and have designated species landings."⁴

On October 3, 2022, NMFS published a final rule (Amendment 13 to the 2006 Fishery Management Plan), which implemented changes to the IBQ Program.⁵ Amendment 13 became effective on January 1, 2023.⁶

On December 14, 2022, NMFS' Office of Sustainable Fisheries Highly Migratory Species Division (HMS) sent an email to Appellant titled "2023 IBQ Allocation Determination."⁷

¹ 15 C.F.R. § 906.17(c)(1) (2023).

² 86 Fed. Reg. 27686 (May 21, 2021).

³ Id. at 27686-27688

⁴ Id. at 27709

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," dated Dec. 14, 2022.

Attached to the email was Appellant’s Initial Administrative Determination (IAD).⁸ The IAD stated that Appellant’s IBQ share for 2023 was [REDACTED] pounds of IBQ allocation based on [REDACTED] eligible sets between November 1, 2019 and October 31, 2022.⁹ The IAD set out this information in a table:

Table 1: The vessel-specific data used to calculate your share percentage

Year	Months	Eligible Sets in GOM	Eligible Sets in ATL	Total Eligible Sets
2019	Nov-Dec	[REDACTED]	[REDACTED]	[REDACTED]
2020	All			
2021	All			
2022	Jan-Oct			
	Step 1			
	Step 2a*			
	Step 2b			
	Step 3			
	Step 4			
	Step 5			
	Step 6			

On December 20, 2022, HMS sent Appellant an updated email explaining that the initial IAD Appellant received contained a “calculation error.”¹⁰ Attached to the email was an updated IAD.¹¹ In the updated IAD, HMS informed Appellant that it had determined that Vessel had reported [REDACTED] eligible pelagic longline sets between November 1, 2019 and October 31, 2022, and Vessel “had a valid permit at the time of this fishing activity.”¹² The updated IAD stated that Vessel’s 2023 IBQ share was [REDACTED] percent of the Longline category quota, which equated to [REDACTED] pounds of ATL IBQ and [REDACTED] of GOM IBQ allocation.¹³ In the updated IAD, the information was again set out in a table:

⁸ IAD Tab, IAD.

⁹ Id.

¹⁰ IAD Tab, email from HMS to Appellant titled “Updated 2023 IBQ allocation determination letter” (Dec. 20, 2022).

¹¹ IAD Tab, updated IAD, titled [REDACTED]

¹² Id.

¹³ Id.

Table 1: The vessel-specific data used to calculate your share percentage

Year	Months	Eligible Sets in GOM	Eligible Sets in ATL	Total Eligible Sets
2019	Nov-Dec			
2020	All			
2021	All			
2022	Jan-Oct			
	Step 1			
	Step 2a*			
	Step 2b			
	Step 3			
	Step 4			
	Step 5			
	Step 6			

On January 13, 2023, Appellant filed a written appeal of the IAD.¹⁴ In [REDACTED] appeal, Appellant argues that [REDACTED] was not given credit for sets made [REDACTED], and that [REDACTED] only became aware that [REDACTED] had a non-working vessel monitoring system (VMS) unit on June 13, 2022. Appellant explained in [REDACTED] appeal that [REDACTED] had to purchase a new system that [REDACTED] installed and began operating on [REDACTED]. In support of [REDACTED] appeal, Appellant provided documentation of [REDACTED] logbooks showing [REDACTED] longline sets from [REDACTED].

On January 31, 2023, NAO sent to Appellant a letter acknowledging receipt of [REDACTED] appeal.¹⁶ In the letter, NAO informed Appellant that [REDACTED] could provide additional material by February 14, 2023.¹⁷ Appellant did not send any information.

On February 17, 2023, NAO sent to Appellant a notice informing [REDACTED] that a hearing was scheduled for February 27, 2023.¹⁸ On February 27, 2023, Appellant appeared for the hearing via videoconference.¹⁹ Appellant testified at [REDACTED] hearing that from approximately [REDACTED] [REDACTED] had [REDACTED] sets and that unbeknownst to [REDACTED] at that time, [REDACTED] VMS was not working. Appellant further testified that HMS failed to use [REDACTED] logbooks that [REDACTED] submitted to NMFS in calculating [REDACTED] sets and that HMS only gave [REDACTED] credit for [REDACTED] sets from [REDACTED] when [REDACTED] had a working VMS. Appellant stated that [REDACTED] should have been given credit for the sets [REDACTED] made while the VMS was not working. NAO held the record open until March 6, 2023, and gave Appellant an opportunity to provide documentation of the non-working

¹⁴ Appeal Tab, Appeal Letter, dated and received Jan. 13, 2023.

¹⁵ Appeal Communications Tab, Exhibits from Appellant, dated and received Jan 13, 2023.

¹⁶ Appeal Communications Tab, Acknowledgement Letter, dated Jan. 31, 2023.

¹⁷ *Id.*

¹⁸ Decisions, Orders, Notices Tab, Notice Scheduling Hearing, dated Feb. 17, 2023.

¹⁹ Hearing Tab, Audio Recording of Scheduled Hearing, dated Feb. 27, 2023.

VMS unit. On February 27, 2023, Appellant provided an email from VMS Support that stated “there is a chance your unit is dead and may need to be replaced.”²⁰

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 made by permitted vessels.^{21, 22} On February 24, 2023, HMS responded with the following interpretation of the Regulation and supporting rationale:

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.

Concerning the use of NMFS logbook data to determine the number of pelagic longline sets, HMS stated:

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

²⁰ Appeal Communications Tab, Email Documentation from Appellant, dated and received Feb. 27, 2023.

²¹ 15 C.F.R. § 906.10(e) (2023).

²² Appeal Communications Tab, email from HMS to NAO, dated Feb. 24, 2023.

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.

HMS further asserted that:

[B]y 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.²³

On March 1, 2023, NAO requested Vessel's logbook data for eligible sets reported during the qualifying period from NMFS Southeast Fisheries Science Center (SEFSC) Commercial Fisheries Monitoring Branch (CFMB).²⁴ On May 30, 2023, SEFSC CFMB provided NAO with clarification on Vessel's summary logbook data, finalizing the data for Vessel.²⁵ This logbook data as of November 4, 2022, reflects that Vessel deployed a total of [REDACTED] eligible ATL sets during the qualifying period in 2022.²⁶ There were [REDACTED] qualifying sets in 2019, 2020 and 2021.²⁷

On June 9, 2023, NAO sent to Appellant a Request for Evidence. The Request for Evidence gave Appellant until June 23, 2023 to produce:

- 1) Evidence indicating that logbook records, and not VMS data, should be used to determine Appellant's IBQ shares.
- 2) Copies of Logbooks supporting Appellant's sets during the qualifying period not previously sent to NAO. Appellant may send electronic or paper copies.²⁸

Appellant declined to provide the evidence requested and instead responded "Give my deserved quota, go check your Jan 27, 2023 email you sent me, you have my data."²⁹

On July 21, 2023, I issued a Decision on this appeal. The appeal contained a typographical error. Specifically, the Decision indicated that Appellant may submit a Motion for Reconsideration to

²³ Id.

²⁴ Appeal Communications Tab, email from NAO to SEFSC, dated March 1, 2023.

²⁵ Appeal Communications Tab, email from SEFSC CFMB to NAO, dated May 30, 2023.

²⁶ Id.

²⁷ Id.

²⁸ Appeal Communications Tab, email from NAO to Appellant, dated June 9, 2023.

²⁹ Appeal Communications Tab, email from Appellant to NAO, dated June 9, 2023.

NAO no later than August 31, 2023.³⁰ However, NAO's Rules of Procedure state that a Motion for Reconsideration must be filed with NAO within 10 days after service of NAO's decision.³¹

ISSUES

The legal issue in this case is whether Vessel associated with Permit is eligible for additional 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.³²
2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.³³
3. The Regulation was codified at 50 C.F.R. § 635.15.³⁴
4. Appellant's IAD indicates that Vessel had [REDACTED] qualifying pelagic longline sets between November 1, 2019 and October 31, 2022.³⁵ Appellant's IAD states that Vessel's 2023 IBQ share was [REDACTED] percent of the Longline category quota, which equated to [REDACTED] pounds of IBQ allocation, with a regional designation of [REDACTED] percent ATL shares [REDACTED] GOM shares.³⁶
5. During the qualifying period of November 1, 2019 to October 31, 2022, Appellant had problems with [REDACTED] VMS unit. From [REDACTED], the VMS unit did not capture Appellant's sets, but Appellant submitted logbooks reflecting trips and sets made during that time period. Appellant replaced [REDACTED] VMS unit when [REDACTED] learned of the issues.³⁷
6. Appellant testified during [REDACTED] hearing that Vessel deployed [REDACTED] pelagic longline sets between [REDACTED], when [REDACTED] VMS unit was malfunctioning and provided copies of those logbooks supporting these sets.³⁸
7. Logbook data from SEFSC CFMB indicates [REDACTED] pelagic longline sets between [REDACTED]

³⁰ Decisions, Orders, Notices Tab, Decision, dated July, 21, 2023.

³¹ 15 C.F.R. § 906.16 (2023).

³² 86 Fed. Reg. 27686 (May 21, 2021).

³³ 87 Fed. Reg. 59966 (Oct. 3, 2022).

³⁴ 50 C.F.R. § 635.15 (2023).

³⁵ IAD Tab, updated IAD, titled '[REDACTED]'

³⁶ Id.

³⁷ Appeal Tab, Appeal Letter, dated and received Jan. 13, 2023.

³⁸ Hearing Tab, Audio Recording of Scheduled Hearing, dated Feb. 27, 2023.

³⁹ Appeal Communications Tab, SEFSC SRS Logbook Data.

8. HMS determined that “vessel monitoring system (VMS) set reports are 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.”
9. Logbook data from the SEFSC shows that Vessel deployed [REDACTED] sets during the qualifying period of November 1, 2019 to October 31, 2022.⁴⁰

PRINCIPLES OF LAW

An ATL 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.”⁴¹ In order for an IBQ shareholder’s vessel to be deemed an eligible vessel, it must have been issued a valid ATL permit when the pelagic longline sets occurred.⁴²

“The 36 month time period is a rolling period that changes annually, and is selected by NMFS based on the availability of recent data and time required by NMFS” to conduct eligibility and share determinations.⁴³ 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, EM, or permit data, in order to accurately determine a vessel’s eligibility status and shares.”⁴⁴

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.”⁴⁵ NMFS only counts one set per calendar day when calculating a vessel’s total number of pelagic longline sets.⁴⁶

During the last quarter of each year, NMFS issues IADs to 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.⁴⁷ Permit holders may appeal their IADs within 45 days after the date NMFS issues the IADs.⁴⁸ Permit holders may base their appeal on ownership of an active vessel with a valid Atlantic Tunas Longline category 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.⁴⁹ Hardship factors, however, are not valid bases for permit holders to appeal their IADs.⁵⁰

⁴⁰ Id.

⁴¹ 50 C.F.R. § 635.15(b)(1) (2023).

⁴² Id.

⁴³ Id. at § 635.15(c).

⁴⁴ Id.

⁴⁵ Id. § 635.15(c)(1).

⁴⁶ Id.

⁴⁷ Id. § 635.15(e).

⁴⁸ Id. § 635.15(e)(1).

⁴⁹ Id. § 635.15(e)(1)(i).

⁵⁰ Id.

Appellant has the obligation to obtain and present evidence to support the claims in his or her petition.⁵¹ On issues of fact, the appellant bears the burden of proving he or she should prevail by a preponderance of the evidence.⁵²

“NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.”⁵³

ANALYSIS

Is Vessel associated with Permit eligible for additional 2023 IBQ ATL shares and resultant allocation?

Under 50 C.F.R. § 635.15(b), eligibility for IBQ shares requires that a vessel must have fished at least one set during a recent 36-month period using pelagic longline gear. The updated IAD states that Vessel had [REDACTED] eligible pelagic longline sets from November 1, 2019 to October 31, 2022.⁵⁴

In Appellant’s appeal letter, Appellant explained that [REDACTED] only became aware of a non-working VMS unit on [REDACTED]. Appellant argued that [REDACTED] did not receive credit for sets made from [REDACTED] so the VMS record for Vessel is not accurate. Appellant provided copies of logbooks and trip summaries to support [REDACTED] claim.

Under the regulations, 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, EM, or permit data, in order to accurately determine a vessel’s eligibility status and shares.”⁵⁵ According to HMS, “vessel monitoring system (VMS) set reports are 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.”

In this case, the updated IAD lists a total of [REDACTED] eligible pelagic longline sets made during the qualifying time period. HMS provided to NMFS NAO the underlying data for the updated IAD gathered from VMS. According to that VMS data, the first sets in 2022 for Vessel took place on [REDACTED]. However, Appellant provided copies of logbook files listing additional sets during the timeframe of [REDACTED]. I reviewed additional information consisting of logbook data obtained from SEFSC CFMB; this data includes the [REDACTED] pelagic longline sets between [REDACTED] that Appellant cited in [REDACTED] appeal letter and oral testimony, and shows a total of [REDACTED] eligible pelagic longline sets from November 1, 2019, to October 23, 2022.⁵⁷

⁵¹ 15 CFR § 906.15 (2023).

⁵² Id.

⁵³ 15 C.F.R. § 906.15(a) (2023).

⁵⁴ IAD Tab, updated IAD, titled [REDACTED]

⁵⁵ 50 C.F.R. § 635.15(c) (2023).

⁵⁶ Appeal Communications Tab, Bluefin Tuna 2022 Allocation math Raw VMS Pull.csv, dated 3/27/2023.

⁵⁷ Appeal Communications Tab, SEFSC SRS Logbook Data for Vessel No. [REDACTED]

According to NAO's Rules of Procedure, NAO must "give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the [IAD]." ⁵⁸ HMS indicated in its email, dated February 24, 2023, 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 set report data," it had not determined that logbook data could not be used for determining the number of pelagic longline sets made by a permitted vessel in order to allocate IBQ.

Appellant met [REDACTED] burden of proving by a preponderance of the evidence that the updated IAD did not accurately assess Vessel's eligible pelagic longline sets when determining Vessel's 2023 IBQ share and resultant allocation. Data provided by HMS shows that sets used for the updated IAD first began on [REDACTED] and this data totaled [REDACTED] sets. Given the discrepancy between the updated IAD and Vessel's logbook data from SEFSC CFMB, as well as the fact that the logbook data supports Appellant's evidence of [REDACTED] additional eligible ATL sets during the qualifying period before [REDACTED], I find HMS' determination that "[VMS] set reports are the best available data" to determine Vessel's IBQ allocation from [REDACTED] is unreasonable. I understand that HMS considers VMS set report data timelier than logbook data; however, the variation between the updated IAD and Logbook data documented by Appellant and corroborated by SEFSC CFMB indicates that there was a problem with VMS set report data during this time period.

Appellant's evidence does not include evidence of logbooks for the remainder of the time period in 2022. In the absence of such evidence, I find that the information in the IAD/VMS set report data together with the logbooks should be used for the most reliable accounting of Vessel's eligible sets during the qualifying period.

CONCLUSIONS OF LAW

The IAD issued to Appellant on December 20, 2022, was inconsistent with the Regulation because a preponderance of the evidence establishes that the updated IAD does not correctly assess Vessel's eligible pelagic longline sets when determining Vessel's 2023 IBQ share and resultant allocation.

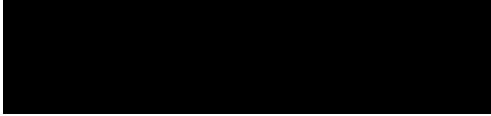
ORDER

The updated IAD issued December 20, 2022, and all prior NAO Decisions are **VACATED**.

NAO directs HMS to award Vessel [REDACTED] eligible ATL pelagic longline sets in 2022. Vessel should be awarded [REDACTED] in 2019, 2020 and 2021. NAO further directs HMS to recalculate Vessel's 2023 IBQ share and the resultant allocation.

⁵⁸ 15 C.F.R. § 906.15(a) (2023).

Appellant may submit a Motion for Reconsideration.⁵⁹ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later than July 31, 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.



Administrative Judge

Date Issued: **July 21, 2023**

⁵⁹ 15 C.F.R. § 906.16 (2023).