

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

In re Application of

[REDACTED]

Appellant

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Appeal No. 23-0004

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, implementation of a cap on IBQ shares that may be held by an entity, and implementation of a cost recovery program."³ NMFS then provided a summary of the proposed amendment to the 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

¹ 15 C.F.R. § 906.17(c)(1) (2014).

² 84 Fed. Reg. 23020 (May 21, 2019).

³ 86 Fed. Reg. 27686 (May 21, 2021).

⁴ *Id.* pp. 27687 – 27694.

On October 3, 2022, following an extended comment period, NMFS published a final rule implementing Amendment 13 to the 2006 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).⁸ In the IAD, HMS informed Appellant that it had determined that Vessel had reported [REDACTED] pelagic longline sets between November 1, 2019, and October 31, 2022, and "had a valid permit at the time of this fishing activity."⁹ The IAD went on to state that Vessel's 2023 IBQ share was [REDACTED] percent of the Longline category quota, which equated to [REDACTED] pounds of IBQ allocation.¹⁰ HMS further indicated that the regional designation for Vessel's share was comprised of [REDACTED] percent Atlantic (ATL) and Gulf of Mexico (GOM) shares, "which equates to [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ."¹¹

On January 20, 2023, Appellant's attorney, [REDACTED], filed a written appeal of the IAD on behalf of Appellant.¹² In his appeal, Appellant asserts the IAD issued by HMS on December 13, 2023, has "severely and adversely" affected Appellant's business and is "inconsistent with the laws governing the IAD."¹³ Appellant raises six arguments in support of these claims.¹⁴

First, Appellant states the IAD "conflicts with the objectives of the FMP and goals of the program."¹⁵ According to Appellant, the IAD's determination that Vessel is not eligible for IBQ shares and allocation conflicts with the Regulation's goal of addressing the declining fishing effort and under harvest of [REDACTED] by preventing Appellant from participating in the [REDACTED] fishery. Appellant avers that, as a result, the IAD denies Appellant "all economic benefits derived from increased fishing effort[] in conflict with 16 U.S.C. 1853a(c)(1)(C)(iii)."¹⁶

Appellant further contends the IAD conflicts with the Regulation's goal to "eliminate shareholders that neither fished nor leased their quota."¹⁸ Appellant explains that while the intent of Amendment 13 was to "remove inactive permits and keep IBQ allocation active," Appellant leased his GOM quota to another fisherman while Appellant was participating in the

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.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Appeal Tab, Petition of Appeal of 2023 IBQ Share and Allocation (dated and received Jan. 20, 2023).

¹³ *Id.* pp. 2-4.

¹⁴ *Id.* pp. 4-8.

¹⁵ *Id.* p. 4.

¹⁶ *Id.*

¹⁷ See 16 U.S.C. 1853a(c)(1)(C)(iii) (stating that limited access privilege plans to harvest fish shall promote "social and economic benefits").

¹⁸ Appeal Tab, Petition of Appeal of 2023 IBQ Share and Allocation, p. 4 (dated and received Jan. 20, 2023).

██████████¹⁹ Appellant maintains that by leasing his quota, he “increased [the lessee]’s fishing effort and helped promote [the lessee]’s sustained participation in the fishery.”²⁰ Appellant asserts, however, that the IAD has “severely and adversely impacted” Appellant and the lessee by preventing them from fishing.²¹

Appellant also argues the IAD is inconsistent with the Regulation’s objective to incentivize avoiding bluefin tuna during pelagic longline fishing.²² According to Appellant, the reallocation of his quota “to a much smaller pool of active fishermen . . . with a much larger quota” will actually de-incentivize fishery participants from avoiding bluefin tuna.²³

Second, Appellant argues the IAD is inconsistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) because “it failed to consider [Appellant]’s dependence on the fishery.”²⁴ In support, Appellant cites to 16 U.S.C. § 1853a(c)(5)(A)(iii).^{25, 26}

Appellant explains that since he began participating in the ██████████ in 2008, Appellant has repeatedly informed HMS personnel that if Congress passed the ██████████ he and his crew would have to stop participating in the ██████████ and resume ██████████ “in order to supplement his crews’ income or else he’d lose them.”²⁷ Appellant adds that “HMS is aware of [his] dependency upon the ██████████ fishery and his need for IBQ allocation in order to leave the dock, and of his historical participation in the ██████████ fishery.”²⁸

Third, Appellant maintains that the IAD conflicts with National Standard 8 (NS 8) because it hinders Appellant’s “ability to leave the dock,” and “prevent[s], rather than sustain[s]” Appellant’s ability to participate in the ██████████ fishery.²⁹ In support, Appellant cites to NS 8, found at 16 U.S.C. § 1851(a)(8).³⁰

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ See 16 U.S.C. § 1853a(c)(5)(A)(iii) (stating that “[i]n developing a limited access privilege program to harvest fish a Council or the Secretary shall . . . establish procedures to ensure fair and equitable initial allocations, including consideration of . . . investments in, and dependence upon, the fishery”).

²⁷ Appeal Tab, Petition of Appeal of 2023 IBQ Share and Allocation, p. 5 (dated and received Jan. 20, 2023).

²⁸ Id.

²⁹ Id.

³⁰ See 16 U.S.C. § 1851(a)(8), stating:

Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data . . . in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

Appellant states that to participate in the [REDACTED] he must own a [REDACTED] Permit, an ATL Permit, and a [REDACTED] Permit—all of which Appellant has acquired.³¹ In addition, Appellant explains, he is required to have at least “[REDACTED] [pounds] of IBQ quota in order to leave the dock to longline [REDACTED] in the Gulf region and [REDACTED] [pounds] in the Atlantic region.”³² Appellant avers that prior to the IAD, he had been allocated approximately [REDACTED] pounds of GOM quota and had purchased [REDACTED] pounds of ATL quota, which “afforded him the privilege to harvest [REDACTED] and participate in the commercial [REDACTED] fishery, as the permits were intended.”³³ Appellant states that he expected “those shares would remain with the permit and the poundage allocated would be available to use at his discretion,” and insists the IAD “unfairly deprives [him] of an interest in those shares,” thereby preventing, rather than sustaining Appellant’s ability to participate in a fishery that he has an established history of participating in.³⁴

Fourth, Appellant asserts that the IAD “conflicts with [the] MSA” because it does not provide Appellant “a reasonable opportunity to harvest the U[nited] S[tates]’ allotted quota of [REDACTED] authorized under international agreement.”³⁵ For this claim, Appellant cites to 16 U.S.C. § 1854(g)(1)(D).^{36, 37} Appellant explains the IAD, “prevents [Appellant]’s ability to leave the dock in order to [REDACTED] and, therefore, denies Appellant the opportunity to participate in harvesting the [REDACTED] quota allotted to United States under such international agreements.”³⁸

Fifth, Appellant claims the IAD is inconsistent with the MSA’s provision at 16 U.S.C. § 1853a(f) because it “failed to provide adequate notice.”³⁹ Appellant maintains that under 16 U.S.C. § 1853a(f), fishermen’s limited access privileges will “be renewed unless revoked, limited, or modified.”⁴⁰ And, in the event those privileges are revoked, limited, or modified, permit holders must be provided with notice and an opportunity for a hearing.⁴¹ Appellant argues that “[b]ecause Amendment 13 anticipated revoking permit holders’ limited access privileges, those permit holders should have been notified and provided an opportunity for a hearing.”⁴²

In addition, Appellant contends that HMS failed to provide permit holders with “adequate notice,” because HMS did not send them “an informative letter regarding their sets and the potential eligibility or ineligibility before the final rule so that permit holders/shareholders could adequately respond during the comment period.”⁴³ Appellant insists that he and other

³¹ Appeal Tab, Petition of Appeal of 2023 IBQ Share and Allocation, p. 5 (dated and received Jan. 20, 2023).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* p. 6.

³⁶ *Id.*

³⁷ See 16 U.S.C. § 1854(g)(1)(D) (stating that when preparing a highly migratory species FMP or FMP amendment, the DOC Secretary shall “provide fishing vessels of the United States with a reasonable opportunity to harvest” highly migratory species that the United States is authorized to harvest under an international fishery agreement).

³⁸ Appeal Tab, Petition of Appeal of 2023 IBQ Share and Allocation, p. 6 (dated and received Jan. 20, 2023).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

shareholders were not provided sufficient information to determine “what an active participant was” and, as a result, Appellant believed that he had “an active permit” because he was “actively leasing his quota.”⁴⁴ Appellant maintains that had he known that he would lose his bluefin quota and, concomitantly, his ability to participate in the [REDACTED] he would have redirected his efforts away from the [REDACTED].⁴⁵

Sixth, Appellant argues the IAD is “against public policy” because it “penalizes [Appellant] for his participation in [the [REDACTED]].”⁴⁶ Appellant explained that he provided his vessel, gear, crew, expertise, and services to assist HMS in the collecting [REDACTED] research data “within his quota,” as well as “extra quota provided to him by HMS . . . in order for HMS to collect the species-specific information needed.” Appellant states, however, that the IAD penalizes him for participating in the [REDACTED] and, therefore, is against public policy.⁴⁷

In addition to these six arguments, Appellant maintains that due to his active participation in the [REDACTED] he should receive the same proxy the Regulation provides for the inactiveness of the Deepwater Horizon participants.⁴⁸ Appellant insists that providing him a proxy is proper under 16 U.S.C. § 1853a(c)(5)(C) and (E).⁴⁹

In support of his arguments, Appellant provides six exhibits to his appeal letter that reflect Vessel’s 2023 IBQ allocation and quota, as well as his participation in the [REDACTED] during the previous 3 years.⁵⁰

On January 25, 2023, NAO sent Appellant a letter acknowledging receipt of his appeal and requesting Appellant submit any additional material concerning his appeal by February 6, 2023.⁵¹ Appellant submitted no additional material at that time. Thereafter, on February 13, 2023, I issued to Appellant a notice scheduling a videoconference hearing for February 28, 2023, at 11:00 a.m. (Eastern).⁵²

On February 28, 2023, Appellant appeared for his scheduled hearing accompanied by his attorney.⁵³ At his hearing, Appellant testified that he was seeking either reinstatement of his prior IBQ or proxy IBQ for his participation in the [REDACTED].⁵⁴ Appellant testified that Vessel deployed [REDACTED] pelagic longline sets between November 1, 2019, and October 31, 2022, because he had been focusing his fishing efforts on participating in [REDACTED] since 2008.⁵⁵ Appellant averred,

⁴⁴ *Id.* Appellant adds that other fishermen also believed their permit was active because they were leasing their quota. *Id.*

⁴⁵ *Id.* p. 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* p. 8.

⁴⁹ *Id.*

⁵⁰ Appeal Tab, Exhibit A: IAD for F/V [REDACTED], Exhibit B: IAD for F/V [REDACTED], Exhibit C: 2022 [REDACTED] Permit, Exhibit D: 2021 [REDACTED] Permit, Exhibit E: 2021 [REDACTED] Permit (dated and received Jan. 20, 2023).

⁵¹ Appeal Communications Tab, Acknowledgement Letter (Jan. 25, 2023).

⁵² Decisions, Orders, Notices Tab, Notice Scheduling Hearing (Feb. 13, 2023).

⁵³ Hearing Tab, Audio Recording of Scheduled Hearing (Feb. 28, 2023).

⁵⁴ *Id.*

⁵⁵ *Id.*

however, that he did not leave his IBQ dormant while participating in the ██████████⁵⁶ Instead, he had leased his IBQ “whenever someone needed it,” which he believed would keep his permit active.⁵⁷ To that end, Appellant testified that if he had known that he would lose his IBQ in 2023, he would have stopped participating in the ██████████ in 2022 and used Vessel to make pelagic longline sets.⁵⁸

In addition, Appellant testified that HMS failed to provide shareholders with adequate notice of how the Regulation would impact their quotas, adding that permit holders would have been unable to provide meaningful comments when the Regulation was proposed because they did not understand how it was going to affect them.⁵⁹ Appellant further testified that he was in constant communication with HMS personnel throughout his participation in the ██████████ and that he repeatedly informed them that he was “holding on” to his ██████████ permits because he knew his ██████████ involvement was “coming to an end.”⁶⁰ Appellant stated that despite his constant communication with HMS personnel, nobody at HMS informed him that he could lose his bluefin tuna quota under the Regulation.⁶¹

Appellant further testified that the IAD is inconsistent with the MSA and public policy.⁶² Appellant explained that because he received no 2023 IBQ, he will be unable to participate in the ██████████ fishery, which requires permit holders to have a set amount of ATL or GOM IBQ in order to harvest ██████████.⁶³ Appellant averred that this result violates the MSA’s mandate that HMS provide United States fishermen with the opportunity to harvest the United States’ allotted ██████████ quotas under international treaties.⁶⁴ Appellant explained that whenever the United States fails to harvest its allotted quota, the unused quota is redistributed to other countries.⁶⁵

Appellant also testified that the IAD violated public policy by punishing him for assisting HMS in its ██████████. To that point, Appellant asserted that he should be awarded a proxy quota similar to the one awarded to the DWH fishery participants under the Regulation.⁶⁶

In addition, Appellant testified that the IAD has or will result in multiple personal and financial hardships for himself, his family, and his crewmembers.⁶⁷ Appellant explained that a majority of his and his crew’s income had previously come from Vessel’s participation in the ██████████, and without the ability to participate in the ██████████ fishery, he will have no way to supplement this lost income.⁶⁸ Appellant added that because the Regulation divided the bluefin tuna among a

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* Appellant added that he had many opportunities to sell his permits, but refused to do so because he intended to continue ██████████ after his participation in the ██████████ ended.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* Appellant added that the United States has consistently failed to meet its annual allotted ██████████ quota, which has resulted in more quota being awarded to other countries.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

much smaller number of vessels, it will be more valuable for these vessels to target bluefin tuna than to lease their quota to other vessels.⁶⁹

At the conclusion of the hearing, I informed Appellant that I would be holding the record open until March 7, 2023, during which time Appellant could submit any additional evidence for me to consider.⁷⁰ Subsequently, on March 7, 2023, Appellant's attorney submitted a supplemental appeal letter accompanied by seven exhibits.⁷¹ In the supplemental appeal letter, Appellant supplements several arguments from his initial appeal letter and hearing.⁷²

First, Appellant argues that the IAD violates the MSA because it failed to "take into account [Appellant]'s historic harvests, historic fishing investment, and dependence upon the fishery."⁷³ In support of this claim, Appellant cites Appellant's supplemental Exhibits A through C, stating:

Exhibit A shows [Appellant] as a [REDACTED]% shareholder of GOM IBQ ([REDACTED]) and Exhibit C shows [Appellant] as [REDACTED]% shareholder of ATL IBQ as of 2/27/23, this is likely an error as the IAD determination provided [REDACTED] allocation of quota, but is provided to illustrate [Appellant]'s history and percentage share within the fishery. Exhibit B is the contract in the amount of \$[REDACTED] for which [Appellant] paid for the [ATL] quota and second set of LAP permits required for the PLL [REDACTED] fishery. This is provided to illustrate his investment into and intent to participate in the fishery (and his intent to secure a future fishery for his sons).^{74, 75}

Second, Appellant contends that HMS violated the MSA by "fail[ing] to provide actual or adequate notice to the . . . Amendment 7 permit holders/shareholders."⁷⁶ Appellant again cites to 16 U.S.C. § 1853a(f) for the proposition that HMS was required to provide fishermen actual notice "in the form of an informative letter on how the proposed rule would affect individual shareholder's permits" before taking away or modifying their fishing privileges.⁷⁷ Appellant argues that it would have been "appropriate" for HMS to issue permit holders an "informative letter" because HMS "anticipated that more than 20% of the shareholders would be impacted by losing their shareholder status, and the rule could potentially meet the criteria of a 'significant impact.'"⁷⁸ In support, Appellant cites to *S. Offshore Fishing Ass'n v. Daley*, 955 F. Supp. 1411 (M.D. Fla. 1998), which states that DOC regulations consider a rule to have a significant impact when "a significant number of small entities (twenty percent of those engaged in the fishery)

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Pleadings Tab, Email from Appellant to NAO entitled "Additional Support Appeals 23-0004 and 23-0012" (Mar. 7, 2023).

⁷² Pleadings Tab, Supplemental Appeal Letter (dated and received Mar. 7, 2023).

⁷³ *Id.* pp. 1-2.

⁷⁴ *Id.* p. 2.

⁷⁵ Pleadings Tab, Supplemental Exhibit A: [REDACTED]'s Shareholder Percentage of Gulf of Mexico BFT, Supplemental Exhibit B: Purchase Contract for [REDACTED], Supplemental Exhibit C: [REDACTED]'s Shareholder Percentage of Atlantic BFT (received Mar. 7, 2023).

⁷⁶ Pleadings Tab, Supplemental Appeal Letter, p. 2 (dated and received Mar. 7, 2023).

⁷⁷ *Id.*

⁷⁸ *Id.*

have a reduction in gross revenues of more than five percent[,] or if more than two percent of those engaged in the fishery are forced to cease operations.”⁷⁹

Appellant also points to supplemental Exhibits D and E as further evidence that HMS failed to provide permit holders with adequate notice.⁸⁰ Supplemental Exhibit D is an email from the Blue Water Fishermen’s Association (BWFA) to HMS, in which BWFA states “I think it is important that our PLL participants have an accurate understanding of what each vessel’s 2023 BFT-IBQ should actually have been.”⁸¹ Appellant maintains this email demonstrates that BWFA members “did not have [an] ‘accurate understanding’ of what the final outcome of BFT quota could or would be.”⁸² Supplemental Exhibit E is a letter from [REDACTED], a fisherman who had previously leased Appellant’s GOM IBQ.⁸³ According to Appellant, [REDACTED] letter demonstrates the “confusion and lack of notice during the [Amendment 13] rulemaking process,” and “supports the position that fishermen were not provided adequate understanding of how the rule could impact them.”⁸⁴

Third, Appellant reasserts that the IAD is inconsistent with the MSA because it prevents him from “leav[ing] the dock for the purpose of longlin[ing] the U.S.’ allocation of [REDACTED] established through international fishery agreements.”⁸⁵ In support, Appellant cites to Supplemental Exhibit F, as well as NOAA’s HMS website,⁸⁶ to demonstrate that that the United States has consistently “harvested less than 30% of its [REDACTED] allocation over the last 3 years.”⁸⁷

Lastly, Appellant states “[t]he IAD is inconsistent with the objective to create an incentive to avoid bluefin during pelagic longline fishing.”⁸⁸ Appellant explains that by reallocating his IBQ “to a much smaller pool of fishermen . . . with a much larger quota,” the IAD eliminates the incentive to avoid bluefin tuna.⁸⁹ In support, Appellant cites to Supplemental Exhibit G, which outlines the “objectives of the IBQ program.”⁹⁰

Appellant submitted no additional evidence.

Having carefully reviewed Appellant’s written materials, supporting documentation, and testimony, as well as the information contained in the record, I have determined there is

⁷⁹ *Id.*

⁸⁰ *Id.* p. 3.

⁸¹ Pleadings Tab, Supplemental Exhibit D: Email from BWFA to HMS, dated February 10, 2023 (received Mar. 7, 2023).

⁸² Pleadings Tab, Supplemental Appeal Letter, p. 3 (dated and received Mar. 7, 2023).

⁸³ Pleadings Tab, Supplemental Exhibit E: [REDACTED] Letter, dated March 6, 2023 (received Mar. 7, 2023).

⁸⁴ Pleadings Tab, Supplemental Appeal Letter, p. 3 (dated and received Mar. 7, 2023).

⁸⁵ *Id.* p. 4.

⁸⁶ See NMFS HMS, 2022, [REDACTED] available at: [REDACTED]

⁸⁷ Pleadings Tab, Supplemental Exhibit F: Federal Register Describing [REDACTED] (received Mar. 7, 2023).

⁸⁸ Pleadings Tab, Supplemental Appeal Letter, p. 4 (dated and received Mar. 7, 2023).

⁸⁹ *Id.*

⁹⁰ Pleadings Tab, Supplemental Exhibit G: Objectives of IBQ Program (received Mar. 7, 2023)

sufficient evidence to adjudicate this appeal. I therefore close the record and render this decision.⁹¹

ISSUES

The legal issue in this case is whether Vessel associated with Permit is eligible for 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.⁹²
2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.⁹³
3. The Regulation was codified at 50 C.F.R. § 635.15.⁹⁴
4. On December 13, 2022, HMS issued to Appellant an IAD indicating that Vessel reported █████ pelagic longline sets from November 1, 2019, to October 23, 2022.⁹⁵
5. Appellant's IAD stated that Vessel's 2023 IBQ share was █████ percent of the Longline category quota, which equated to █████ pounds of IBQ allocation.⁹⁶
6. Appellant testified that Vessel deployed █████ pelagic longline sets between November 1, 2019, and October 23, 2022.⁹⁷

PRINCIPLES OF LAW

The Regulation states that an ATL 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.”⁹⁸ 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.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

⁹¹ 15 C.F.R. § 906.12(a) (2014).

⁹² 86 Fed. Reg. 27686 (May 21, 2021).

⁹³ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁹⁴ 50 C.F.R. § 635.15 (2023)

⁹⁵ IAD Tab, IAD.

⁹⁶ Id.

⁹⁷ Hearing Tab, Audio Recording of Scheduled Hearing (Feb. 28, 2023).

⁹⁸ 50 C.F.R. § 635.15(b)(1) (2023).

⁹⁹ Id.

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, EM, or permit data, in order to accurately determine a vessel's eligibility status and shares.”¹⁰¹

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.”¹⁰² NMFS only counts one set per calendar day when calculating a vessel's total number of pelagic longline sets.¹⁰³ In addition, NMFS will only count sets that occurred when a vessel was issued a valid ATL permit.¹⁰⁴

The Regulation defines a shareholder's annual IBQ allocation as “the amount of BFT . . . in metric tons corresponding to [the] IBQ shareholder's share percentage, distributed to their vessel to account for incidental landings and dead discards of BFT during a specified calendar year.”¹⁰⁵ 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.¹⁰⁶

The Regulation further provides that “valid participants” in the Deepwater Horizon Oceanic Fish Restoration Project (DWH Project) will receive an additional “proxy amount of sets” added to their vessels' history during the participation of those vessels' participation in the Project.¹⁰⁷ Per the Regulation, “[t]he proxy will be based upon the average number of sets made by IBQ shareholders' vessels that did not participate in the [DWH] Project during the period that participants fished under the [DWH] Project.”¹⁰⁸

In the last quarter of each year, NMFS issues IADs to ATL 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

¹⁰⁰ Id. § 635.15(c).

¹⁰¹ Id.

¹⁰² Id. § 635.15(c)(1).

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id. § 635.15(d).

¹⁰⁶ Id.

¹⁰⁷ Id. § 635.15(c)(2).

¹⁰⁸ Id.

¹⁰⁹ Id. § 635.15(e).

¹¹⁰ Id. § 635.15(e)(1).

¹¹¹ Id. § 635.15(e)(1)(i).

¹¹² Id.

ANALYSIS

Is Vessel associated with Permit eligible for 2023 IBQ share and resultant allocation?

The Regulation indicates that an ATL 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 ATL category permit at the time the fishing activity occurred. The IAD states that Vessel reported [REDACTED] pelagic longline sets during the qualifying period of November 1, 2019, to October 31, 2022. Appellant did not contest this fact. Therefore, pursuant to the Regulation, Vessel is not eligible for 2023 IBQ share and resultant allocation.

Appellant did not argue in his appeal letters or during his hearing that the IAD is incorrect in its determination that Vessel deployed [REDACTED] pelagic longline sets during the qualifying period of November 1, 2019, to October 31, 2022. Instead, Appellant raised several arguments that the IAD violates portions of the MSA and is internally inconsistent. Specifically, Appellant asserted the IAD denies him "all economic benefits derived from increased fishing effort[]; conflicts with the Regulation's goals to "eliminate shareholders that neither fished nor leased their quota" and incentivize avoiding bluefin tuna; fails to consider his dependence on the [REDACTED] fishery; hinders his "ability to leave the dock" and "prevent[s], rather than sustain[s]" his ability to participate in the [REDACTED] fishery; and does not provide him with "a reasonable opportunity to harvest the U[nited] S[tates]" allotted quota of [REDACTED] authorized under international agreement." In addition, Appellant asserted that HMS violated the MSA by revoking his fishing privileges without providing him adequate notice and an opportunity for a hearing.

Moreover, Appellant asserted that the IAD is "against public policy" because it penalizes him for participating in the [REDACTED]. To that end, Appellant argued that due to his longstanding participation in the [REDACTED], it would be proper under the MSA to award him the same proxy amount of sets the Regulation provides for participants in the DWH Project. Furthermore, Appellant maintained that absent an award of IBQ allocation or a proxy amount of sets, he, his family members, and Vessel's crewmembers will experience financial hardships due to the loss of income from not being able to participate in the [REDACTED] fishery.

In this appeal, Appellant has the burden to show by a preponderance of the evidence that NMFS incorrectly applied the Regulation in determining Vessel's eligibility for 2023 IBQ share and resultant allocation.¹¹³ Appellant has not met this burden. Instead, Appellant argues that I should reverse the IAD because both the IAD and the Regulation run afoul of several sections of the MSA, because HMS failed to provide permit holders with adequate notice of how Amendment 13 would impact their bluefin tuna quotas, and because it would be contrary to public policy for Appellant not to receive the same proxy amount of sets awarded to DWH Project participants.

While I understand Appellant's concerns, the Regulation does not authorize me to consider the arguments that Appellant has raised in adjudicating this appeal. As indicated above, the Regulation limits my review to issues concerning ownership of an active vessel with a valid ATL

¹¹³ Id. § 635.15(e)(1).

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.¹¹⁴

Relatedly, Appellant argues that I should reverse the IAD because of the financial hardships it will cause him, his family, and his crewmembers. Like Appellant's previous arguments, however, the Regulation explicitly bars me from considering hardship as a basis for an appeal.¹¹⁵ Accordingly, Appellant's arguments provide no legal basis for me to reverse the IAD.

CONCLUSIONS OF LAW

Vessel is not eligible for IBQ share because Appellant did not prove by a preponderance of the evidence that Vessel deployed qualifying pelagic longline sets between November 1, 2019, and October 31, 2022. The IAD is consistent with the Regulation.

ORDER

The IAD issued December 13, 2022, is **UPHELD**. Appellant may submit a Motion for Reconsideration.¹¹⁶ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later than **April 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.¹¹⁷

[REDACTED]

J. Kirk Essmyer
Administrative Judge

Date Issued: **March 31, 2023**

¹¹⁴ Id. § 635.15(e)(1)(i).

¹¹⁵ Id.

¹¹⁶ 15 C.F.R. § 906.16 (2014).

¹¹⁷ Id. § 906.16(b).