

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

In re Application of

[REDACTED]

F/V

Permit Number

[REDACTED]

Appellant

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Appeal No. 23-0006

**DECISION**

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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.<sup>1</sup>

[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), that 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."<sup>2</sup> 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."<sup>3</sup> 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."<sup>4</sup>

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

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<sup>1</sup> 15 C.F.R. § 906.17(c)(1) (2023).

<sup>2</sup> 84 Fed. Reg. 23020 (May 21, 2019).

<sup>3</sup> 86 Fed. Reg. 27686 (May 21, 2021).

<sup>4</sup> *Id.* pp. 27687 – 27694.

(Regulation).<sup>5</sup> The Regulation was codified at 50 C.F.R. § 635.15, and became effective January 1, 2023.<sup>6</sup>

On December 13, 2022, NMFS' Office of Sustainable Fisheries Highly Migratory Species Division (HMS) sent an email to Appellant titled "2023 IBQ Allocation Determination."<sup>7</sup> Attached to the email was Appellant's Initial Administrative Determination (IAD 1).<sup>8</sup>

In IAD 1, HMS considered [REDACTED] out of [REDACTED] of Vessel's reported pelagic longline sets between November 1, 2019 and October 31, 2022 (Qualifying Period) to be eligible sets.<sup>9</sup> The breakdown of Vessel's eligible sets used to calculate Appellant's IBQ share percentage was as follows:

Year	Months	Eligible Sets in GOM	Eligible Sets in ATL	Total Eligible Sets
2019	Nov-Dec	[REDACTED]		
2020	All			
2021	All			
2022	Jan-Oct			

IAD 1 calculated the 2023 IBQ share for Permit as [REDACTED] percent of the Longline category quota, which is equivalent to [REDACTED] pounds of IBQ allocation.<sup>10</sup> IAD 1 further indicated that the regional designation for Vessel's share was comprised of [REDACTED] percent Atlantic (ATL) shares.<sup>11</sup> As for the Gulf of Mexico (GOM) region, IAD 1 [REDACTED] thus, allocated [REDACTED] GOM shares.<sup>12</sup>

Subsequently, on December 20, 2022, HMS sent an email to Appellant titled "Updated 2023 IBQ Allocation Determination."<sup>13</sup> In the email, HMS notified Appellant that "Due to a calculation error associated with the 25 mt Northeast Distant Area set aside, your Individual Bluefin Quota [ ] allocation has been corrected." Attached to the email was Appellant's revised IAD (IAD 2).<sup>14</sup>

IAD 2 contained the same number of total pelagic longline sets and an identical breakdown of eligible sets for the relevant 36-month period as IAD 1 presented in the table above.<sup>15</sup> Additionally, Vessel's 2023 IBQ share in IAD 2 remained [REDACTED] percent of the Longline category

<sup>5</sup> 87 Fed. Reg. 59966 (Oct. 3, 2022).

<sup>6</sup> See 50 C.F.R. § 635.15 (2023).

<sup>7</sup> IAD Tab, Email from HMS to Appellant, dated December 13, 2022.

<sup>8</sup> IAD Tab, IAD 1.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> IAD Tab, Email from HMS to Appellant, dated December 20, 2022.

<sup>14</sup> IAD Tab, IAD 2.

<sup>15</sup> Id.

quota.<sup>16</sup> The corrected share, however, equates to [REDACTED] pounds of IBQ allocation with [REDACTED] percent of the share designated in the ATL region.<sup>17</sup>

On January 24, 2023, Appellant appealed IAD 2.<sup>18</sup> In his appeal letter (Letter), Appellant states that there is a system deficiency in his Faria Vessel Monitoring System (VMS) reporting module.<sup>19</sup> He explains, “[e]ven though the system is reflecting the proper send date and time as well as GPS, the set form does not. The system apparently does not allow for the set year field to be changed from 2020 therefore any overlapping dates in 2021, [or] 2022 would appear to be duplicate sets.”<sup>20</sup> For that reason, Appellant requests “NMFS to disregard any overlapping sets regardless of the fact they occurred in different years.”<sup>21</sup> Appellant further indicates in Letter that he is “in the process of requesting logbook data to determine the number and dates of the sets by confirming logbook data. However, the letters of determination do not contain enough information to provide a true comparison.”<sup>22</sup> Finally, Appellant maintains in Letter that “[t]he unfortunate shorting of IBQ can potentially have a devastating effect on [his] ability to fish as [his] vessels cannot leave port once the allocation has been utilized.”<sup>23</sup>

On January 25, 2023, HMS notified NAO that Vessel’s pelagic longline set totals were adversely affected by a Faria VMS “unit error.”<sup>24</sup>

On January 31, 2023, NAO sent a letter to Appellant notifying him that the office had received his appeal, and advising him to submit any additional documentation or information in support of the appeal by February 13, 2023.<sup>25</sup> Appellant submitted no additional evidence.

On February 16, 2023, NAO contacted HMS to request its interpretation of the Regulation regarding what forms of data may be used to determine eligible pelagic longline sets made by permitted vessels.<sup>26, 27</sup> 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

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<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Appeal Tab, Appellant’s Appeal Letter, dated January 19, 2023, and received January 24, 2023.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Appeals Communication Tab, Email from HMS to NAO, dated January 25, 2023.

<sup>25</sup> Appeals Communication Tab, Letter from NAO to Appellant, dated January 31, 2023.

<sup>26</sup> 15 C.F.R. § 906.10(e) (2023).

<sup>27</sup> Appeal Communications Tab, Email from NAO to HMS, dated Feb. 16, 2023.

January 1, 2015, and are a management tool specifically implemented to determine dead discards and deduct that amount of quota from vessels' IBQ quota accounts. Since these reports were developed for and are integral to the IBQ program, and because NMFS receives the data within hours of fishing gear sets being made, VMS set reports are the preferred data to use for dynamic allocation. NMFS has made the determination that in 2023 VMS set reports are preferred over all other data sources.

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 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.<sup>28</sup>

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<sup>28</sup> Appeal Communications Tab, Email from HMS to NAO, dated Feb. 24, 2023.

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).<sup>29</sup> On May 30, 2023, SEFSC CFMB provided NAO with clarification on Vessel's logbook data, finalizing the data for Vessel.<sup>30</sup> This logbook data as of November 4, 2022, reflects that Vessel deployed [REDACTED] eligible GOM sets and [REDACTED] eligible ATL sets—[REDACTED] in 2019; [REDACTED] in 2020; [REDACTED] in 2021 and [REDACTED] in 2022.<sup>31</sup>

On April 11, 2023, HMS provided NAO with revised eligible set counts for Vessel taking into account the Faria VMS unit error.<sup>32</sup> Vessel's adjusted eligible pelagic longline sets by HMS totaled [REDACTED].<sup>33</sup> The following table illustrates the breakdown of Vessel's reassessed ATL sets:

Year	Months	Eligible Sets in GOM	Eligible Sets in ATL	Total Eligible Sets
2019	Nov-Dec	[REDACTED]		
2020	All			
2021	All			
2022	Jan-Oct			

On June 2, 2023, NAO issued to Appellant a Request for Evidence (RFE), requesting that Appellant provide evidence that logbook records, and not VMS data, should be used to determine Appellant's IBQ share given the provided interpretation of the Regulation by HMS.<sup>34, 35</sup> NAO indicated in its RFE that Appellant must provide the requested evidence by June 16, 2023.<sup>36</sup> On June 7, 2023, Appellant submitted Vessel's 2021 and 2022 Logbook Trip Summary Forms to NAO, which reported a total of [REDACTED] sets for the two years.<sup>37</sup> However, only [REDACTED] are eligible to be counted towards Vessel's total number of pelagic longline sets [REDACTED] eligible ATL sets in 2021 and [REDACTED] eligible ATL sets in 2022.

On June 13, 2023, NAO extracted Vessel's Logbook Data from the SEFSC Southeast Reporting System (SRS) to substantiate the number of eligible sets from the Trip Summary Forms provided by Appellant. The SRS data assisted in determining Vessel's individual set dates since Appellant's Trip Summary Forms contain the total number of sets deployed for an entire trip, and only one set per calendar day is counted when calculating a vessel's total number of pelagic longline sets.<sup>38</sup> The SRS data includes all logbook submissions accepted by SEFSC through the renewal of Vessel's permit regardless of whether the logbooks were submitted within seven days

<sup>29</sup> Appeal Communications Tab, Email from NAO to SEFSC, dated March 1, 2023.

<sup>30</sup> Appeal Communications Tab, Email from SEFSC CFMB to NAO, dated May 30, 2023.

<sup>31</sup> Appeal Communications Tab, SEFSC Logbook Data [REDACTED] 23-0006, received March 1, 2023 and finalized May 30, 2023.

<sup>32</sup> Appeal Communications Tab, Email from HMS to NAO, dated April 11, 2023.

<sup>33</sup> Appeal Communications Tab, Faria Vessel HMS Adjusted Set Breakdown, received April 11, 2023; see also, Appeal Communications Tab, HMS Bluefin Tuna A13 Math Faria Adjust, received February 13, 2023 (The adjusted [REDACTED] total sets would result in an IBQ share calculation of [REDACTED] percent of the Longline category quota, equivalent to [REDACTED] pounds of IBQ allocation in the ATL region.).

<sup>34</sup> 15 C.F.R. § 906.12(b) (2023).

<sup>35</sup> Appeal Communications Tab, Email from NAO to Appellant, dated June 2, 2023.

<sup>36</sup> Id.

<sup>37</sup> Appeals Communication Tab, [REDACTED] 2021-2022 Trip Summaries, received June 7, 2023.

<sup>38</sup> See 50 CFR § 635.15(c)(1) (2023).



of offloading as required by 50 C.F.R. § 635.5.<sup>39</sup> The SRS Logbook data reflected that Vessel deployed [REDACTED] GOM sets and [REDACTED] eligible ATL sets during the Qualifying Period [REDACTED] in 2019; [REDACTED] in 2020; [REDACTED] in 2021 and [REDACTED] in 2022.<sup>40</sup>

Below is an example of one of Appellant's Trip Summary Forms:

2022 ATLANTIC HIGHLY MIGRATORY SPECIES LOGBOOK TRIP SUMMARY FORM		OMB Control No. 0648-0371 Expiration Date 02/28/2024 NOAA Form 88-191 Version Date 05/20	
Please Use <u>Blue or Black Ink</u> only		NMFS Use Only:	Received Date: HMS VTR# / Schedule Number:
Vessel Name: [REDACTED]		Vessel Number: [REDACTED]	
Contact Name (Please Print): [REDACTED]	Date of Departure:	Month: 9	Day: 30 / Year: 2022
Contact Phone No.: [REDACTED]	Date of First Set:	Month: 10	Day: 03 / Year: 2022
I certify that the information contained on this form is true, accurate and complete to the best of my knowledge.	Date of Last Set:	Month: 10	Day: 13 / Year: 2022
	Date of Landing:	Month: 10	Day: 14 / Year: 2022
Contact's Signature: [REDACTED]	Date of Offload:	Month: 10	Day: 15 / Year: 2022
Operator's Name (Please Print): [REDACTED]	NHID Number: [REDACTED]		
Port & State of Departure: [REDACTED]	Number of Sets: [REDACTED]		
Port & State of Landing: [REDACTED]	Number of Crew Members (excluding captain): [REDACTED]		
Dealer Name(s): [REDACTED]	Observer onboard: Yes <input type="radio"/> No <input checked="" type="radio"/>		
State Trip Ticket Number(s):		1.) [REDACTED]	
2.) [REDACTED]		2.) [REDACTED]	
3.) [REDACTED]		3.) 11/04/22	

This entry indicates that Vessel deployed [REDACTED] sets between October 3, 2022 and October 13, 2022, which is within the Qualifying Period, and offloaded on October 15, 2022. Additionally, it is noted that the Trip Summary Form was "finished + mailed" on November 4, 2022.<sup>41</sup>

No hearing was scheduled in this appeal as Appellant indicated in his appeal letter that, "We will be satisfied to allow the NAO to make a determination without a hearing as this is a matter of factual inconsistency that the agency must and is best equipped to reconcile."<sup>42</sup>

<sup>39</sup> Appeal Communications Tab, SEFSC CFMB Email to NAO, dated May 30, 2023.

<sup>40</sup> Appeal Communications Tab, SEFSC SRS Logbook Data [REDACTED] 23-0006, received June 13, 2023.

<sup>41</sup> Similarly, Schedule [REDACTED] documents [REDACTED] deployed sets between October 24 and October 29, 2022, and offloaded on November 2, 2022; however that Trip Summary Form was not mailed until November 11, 2022.

<sup>42</sup> Appeal Tab, Appellant's Appeal Letter, dated January 19, 2023, and received January 24, 2023.

Having carefully reviewed IAD 2, Appellant's written materials, and 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.<sup>43</sup>

### ISSUE

HMS concedes that Vessel's 2023 IBQ share and resultant allocation in IAD 2 is inaccurate due to a system error with Vessel's Faria VMS unit that resulted in an incorrect assessment of Vessel's eligible pelagic longline sets.

The legal issue in this case is whether HMS correctly reassessed Vessel's eligible pelagic longline sets to rectify Vessel's 2023 IBQ share and allocation calculations.

### 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.<sup>44</sup>
2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.<sup>45</sup>
3. The Regulation was codified at 50 C.F.R. § 635.15.<sup>46</sup>
4. On December 20, 2022, HMS issued to Appellant IAD 2 indicating for the 36-month period from November 1, 2019 to October 31, 2022, Vessel reported a total of █████ eligible pelagic longline sets comprised of █████ ATL sets in 2019; █████ ATL sets in 2020; and █████ eligible sets in 2021 and 2022.<sup>47</sup>
5. IAD 2 indicated that Vessel's 2023 IBQ share was █████ percent of the Longline category quota, which equates to █████ pounds of IBQ allocation with █████ percent of the share in the ATL region.<sup>48</sup>
6. On January 25, 2023, HMS acknowledged that Vessel's pelagic longline set totals were adversely affected by a Faria VMS "unit error."<sup>49</sup> Subsequently, on April 11, 2023, HMS provided NAO with revised eligible set counts for Vessel, which totaled █████ ATL sets in 2019; █████ ATL sets in 2020; █████ ATL sets in 2021; and █████ ATL sets in 2022.<sup>50</sup>

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<sup>43</sup> 15 C.F.R. § 906.11(a)(1) (2023); 15 C.F.R. § 906.12(a) (2023).

<sup>44</sup> 86 Fed. Reg. 27686 (May 21, 2021).

<sup>45</sup> 87 Fed. Reg. 59966 (Oct. 3, 2022).

<sup>46</sup> 50 C.F.R. § 635.15 (2023).

<sup>47</sup> IAD Tab, IAD 2.

<sup>48</sup> Id.

<sup>49</sup> Appeals Communication Tab, Email from HMS to NAO, dated January 25, 2023.

<sup>50</sup> Appeal Communications Tab, Email from HMS to NAO, dated April 11, 2023, Faria Vessel Adjusted Set Breakdown, received April 11, 2023.

7. NMFS SEFSC CFMB Summary Logbook Data as of November 4, 2022, indicates that Vessel deployed [REDACTED] eligible GOM sets and [REDACTED] eligible ATL sets [REDACTED] in 2019; [REDACTED] in 2020; [REDACTED] in 2021 and [REDACTED] in 2022.<sup>51</sup>
8. On June 7, 2023, Appellant submitted Vessel's 2021 and 2022 Logbook Trip Summary Forms to NAO, which totaled [REDACTED] eligible ATL sets in 2021 and [REDACTED] in 2022.<sup>52</sup>
9. Two of Appellant's Trip Summary Forms, Schedule numbers [REDACTED] and [REDACTED] documented that a total of [REDACTED] sets were offloaded on October 15, 2022 and November 2, 2022. These forms were "finished + mailed" to SEFSC on November 4 and November 11, 2022, respectively.<sup>53</sup>
10. One of Appellant's Trip Summary Forms, Schedule number [REDACTED], contains one set that was deployed after the Qualifying Period on November 14, 2022.<sup>54</sup>
11. SEFSC SRS Logbook data indicates that Vessel deployed [REDACTED] GOM sets and [REDACTED] eligible ATL sets during the Qualifying Period—[REDACTED] in 2019, [REDACTED] in 2020, [REDACTED] in 2021 and [REDACTED] in 2022.<sup>55</sup>
12. SEFSC SRS Logbook data extracted on June 13, 2023, indicates that [REDACTED] sets were deployed each day on May 4, 2021, May 2, 2022 and June 16, 2022, affecting the total number of eligible sets from Schedule numbers [REDACTED] [REDACTED].
13. SEFSC SRS data clarified that [REDACTED] of the [REDACTED] sets captured on Schedule number [REDACTED] occurred at the end of December 2021, and the remaining [REDACTED] sets occurred at the beginning of January 2022.<sup>57</sup>

#### PRINCIPLES OF LAW

The Regulation states that an Atlantic Tunas Longline category limited access permit (LAP) 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."<sup>58</sup> In order for an IBQ shareholder's vessel to be considered "eligible," it must have been issued a valid Atlantic Tunas Longline category LAP when the sets occurred during the relevant 36-month period.<sup>59</sup>

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<sup>51</sup> Appeal Communications Tab, SEFSC Logbook Data [REDACTED] 23-0006, received March 1, 2023 and finalized May 30, 2023.

<sup>52</sup> Appeals Communication Tab, [REDACTED] 2021-2022 Trip Summaries, received June 7, 2023.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Appeal Communications Tab, SEFSC SRS Logbook Data [REDACTED] 23-0006, received June 13, 2023.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 50 C.F.R. § 635.15(b)(1) (2023).

<sup>59</sup> *Id.*



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.<sup>60</sup> 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.”<sup>61</sup>

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.”<sup>62</sup> NMFS only counts one set per calendar day when calculating a vessel’s total number of pelagic longline sets.<sup>63</sup>

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.<sup>64</sup> Permit holders may appeal their IADs within 45 days after the date NMFS issues the IADs.<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> Additionally, logbook forms must be submitted postmarked to NMFS no later than seven days of offloading all Atlantic HMS.<sup>68</sup>

Appellant has the obligation to obtain and present evidence to support the claims in his petition.<sup>69</sup> On issues of fact, the appellant bears the burden of proving he or she should prevail by a preponderance of the evidence.<sup>70</sup>

“NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.”<sup>71</sup>

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<sup>60</sup> *Id.* § 635.15(c).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* § 635.15(c)(1).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 635.15(e).

<sup>65</sup> *Id.* § 635.15(e)(1).

<sup>66</sup> *Id.* § 635.15(e)(1)(i).

<sup>67</sup> 50 C.F.R. § 635.5(a)(1) (2023).

<sup>68</sup> *Id.*

<sup>69</sup> 15 CFR § 906.15 (2023).

<sup>70</sup> *Id.*

<sup>71</sup> 15 C.F.R. § 906.15(a) (2023).

## ANALYSIS

*A preponderance of the evidence establishes that HMS did not accurately reassess Vessel's eligible pelagic longline sets to determine Vessel's correct 2023 IBQ share and resultant allocation.*

The Regulation indicates that in order to be eligible for IBQ share, an Atlantic Tunas Longline category LAP holder's vessel must have fished at least one set during a specified 36-month period using pelagic longline gear and while possessing a valid permit. IAD 2 states that Vessel possessed a valid permit and reported [REDACTED] eligible pelagic longline sets during the Qualifying Period. IAD 2 further indicates that the [REDACTED] eligible sets were comprised of [REDACTED] ATL sets in 2019, [REDACTED] ATL sets in 2020, and [REDACTED] eligible sets in 2021 and 2022. As explained below, however, HMS concedes that Vessel's 2023 IBQ share and resultant allocation contained in IAD 2 were miscalculated.

In his appeal, Appellant claims that IAD 2 is inaccurate. Appellant believes Vessel's logbook data reflects the accurate number of sets that should be attributed to Vessel due to a technical issue with Appellant's Faria VMS reporting module. Appellant explained that there was a date discrepancy with his VMS unit incorrectly recording sets in 2020 instead of 2021 and 2022, which erroneously resulted in overlapping dates and duplicate sets. However, Appellant did not state explicitly how many sets he believed should be attributed to Vessel and did not provide evidence to challenge the number of eligible pelagic longline sets allocated for 2019 or 2020.

HMS acknowledged that Vessel's 2023 IBQ share and resultant allocation were miscalculated due to a system error with Vessel's Faria unit that caused an incorrect assessment of Vessel's eligible pelagic longline sets. Subsequently, HMS reassessed Vessel's eligible sets and found [REDACTED] more sets, which yielded a new total of [REDACTED] eligible sets. This adjustment reduced the sets in 2020 to [REDACTED] and allocated [REDACTED] sets in 2021 and [REDACTED] sets in 2022; the total number of eligible sets in 2019 remained at [REDACTED].

Appellant submitted copies of Vessel's 2021 and 2022 Logbook Trip Summary Forms to NAO. Appellant's records are corroborated by SEFSC SRS data. On my careful review of Vessel's Trip Summary Forms, I tallied [REDACTED] eligible ATL sets for calendar year 2021 and [REDACTED] eligible ATL sets from January to October 2022. Schedule number [REDACTED] contains [REDACTED] set that was deployed on November 14, 2022, which is after the Qualifying Period, and therefore, not eligible to be counted towards Vessel's total number of pelagic longline sets. Only one set per calendar day is counted when calculating a vessel's total number of pelagic longline sets—SEFSC SRS Logbook data extracted on June 13, 2023, indicates that [REDACTED] sets were deployed each day on May 4, 2021, May 2, 2022 and June 16, 2022.<sup>72</sup>

SEFSC SRS data also assisted in assessing the [REDACTED] sets reported on Schedule number [REDACTED]. The Trip Summary Form only documents the dates of the first and last sets, while the SRS data provides the individual set dates, which allows for an accurate allocation of sets by

<sup>72</sup> Therefore, I subtracted the second set from the total number of sets on each of the following Trip Summary Forms submitted by Appellant: Schedule numbers [REDACTED].

year. [REDACTED] sets occurred at the end of December 2021, and the remaining [REDACTED] sets occurred at the beginning of January 2022.<sup>73</sup>

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]."<sup>74</sup> 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.

The table below illustrates a comparison of the revised number of eligible pelagic longline sets provided by HMS on April 11, 2023 (data adjusted for the Faria VMS error), SEFSC CFMB Summary Logbook data as of November 4, 2022, and Vessel's Trip Summary Forms submitted by Appellant to NAO on June 7, 2023. The VMS data sets used and SEFSC Summary Logbook data had approximately the same cutoff date of November 3, 2022, and November 4, 2022, respectively.<sup>75</sup>

In addition, the data used in IAD 2 from the VMS set reports extracted as of November 3, 2022, is also included in the table below to demonstrate that the adjusted Faria VMS data, SEFSC Logbook Data, and Vessel's Trip Summary records all contradict IAD 2 in that they each indicate that Vessel had eligible sets in 2021 and 2022 and allot Vessel more total eligible pelagic longline sets than IAD 2. Accordingly, I find that IAD 2 did not accurately assess Vessel's eligible pelagic longline sets when determining Vessel's 2023 IBQ share and resultant allocation due to the system error with Vessel's Faria VMS unit not reporting any sets in 2022.

	VMS Set Reports (IAD 2)	Faria VMS Adjustment	SEFSC CFMB Summary Logbook Data	Vessel's Trip Summary Forms
Nov. – Dec. 2019	[REDACTED]			
Jan. – Dec. 2020				
Jan. – Dec. 2021				
Jan. – Oct. 2022				
Total Eligible Sets				

<sup>73</sup> The individual set dates were December 28 to December 31, 2021, January 4 to January 5, 2022, and January 7, 2022. See Appeal Communications Tab, SEFSC SRS Logbook Data [REDACTED] 23-0006, received June 13, 2023.

<sup>74</sup> 15 C.F.R. § 906.15(a) (2023).

<sup>75</sup> HMS confirmed to NAO that the VMS dataset used to determine Vessel's eligible pelagic longline sets was queried on November 3, 2022. Appeal Communications Tab, Email from HMS to NAO, dated April 13, 2023.



Appellant did not provide evidence to contest the number of eligible sets allotted in 2019 or 2020. In regard to Appellant's claim concerning Vessel's eligible sets in 2021, SEFSC CFMB Summary Logbook data is consistent with Appellant's submitted records. In contrast, the adjusted Faria VMS data allots [REDACTED] less sets in 2021 than is indicated in the SEFSC CFMB Summary Logbook data and Appellant's submitted records.

Concerning Vessel's eligible sets from January to October 2022, the data sources vary in the number of sets allocated to Vessel. Appellant's Trip Summary data for 2022 [REDACTED] eligible sets) differs from SEFSC CFMB Summary Logbook data as of November 4, 2022 [REDACTED] eligible sets) due to SEFSC not timely receiving Vessel's logbooks. According to the Regulation, logbook records must be postmarked to NMFS no later than 7 days after the offloading date. Appellant's Trip Summary Forms (Schedule numbers [REDACTED] and [REDACTED]) that encompass this [REDACTED] set difference were offloaded on October 15, 2022 and November 2, 2022, but were "finished + mailed" to SEFSC on "11/4" and "11/11," respectively. While these [REDACTED] sets occurred prior to the end of the Qualifying Period, the logbook records documenting the sets were not mailed before the November 3, 2022, cutoff. Therefore, they may not be counted towards Vessel's total number of pelagic longline sets.

Appellant met his burden of proving by a preponderance of the evidence that VMS set reports do not correctly assess and distribute Vessel's eligible pelagic longline sets when determining Vessel's 2023 IBQ share and resultant allocation. Given the documented errors in the initial Faria VMS data set combined with the discrepancies between the adjusted Faria VMS data and Vessel's logbook data from SEFSC CFMB, as well as the fact that the SRS Logbook data corroborates Appellant's evidence, I find HMS' determination that "[VMS] set reports are the best available data" to determine Vessel's IBQ allocation is unreasonable. I understand that HMS considers VMS set report data timelier than logbook data; however, the variation between the data sources raises concerns about the accuracy and reliability of using VMS data to calculate Vessel's eligible pelagic longline sets.

Appellant did not state in his Letter the number of sets he believed should be attributed to Vessel; rather, he merely disputed the IAD 2 calculation of Vessel's eligible sets as shorting his IBQ allocation. Appellant did not provide sufficient evidence to establish that the data from his Logbook Trip Summary Forms is superior to that of SEFSC.<sup>76</sup> In absence of such evidence, I find SEFSC CFMB Logbook data to be the most reliable accounting of Vessel's eligible pelagic longline sets for the 2023 IBQ allocation.<sup>77</sup>

## CONCLUSIONS OF LAW

HMS' adjustment of the VMS set report data that was incorrectly calculated in IAD 2 is inconsistent with the Regulation because a preponderance of the evidence establishes that VMS

<sup>76</sup> Vessel's Logbook Trip Summary Forms include the total number of sets deployed for an entire trip spanning multiple days and does not indicate how many sets occurred each day.

<sup>77</sup> Given the factors specified above supporting that HMS' determination that VMS data is the best available data is unreasonable, it is reasonable to conclude that SEFSC CFMB Logbook data, and not initial or adjusted VMS data, is the best available data for all years during the Qualifying Period.

set reports do not correctly assess and distribute Vessel's eligible pelagic longline sets when determining Vessel's 2023 IBQ share and resultant allocation.

ORDER

The IAD issued on December 20, 2022, is **VACATED**.

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

Appellant may submit a Motion for Reconsideration.<sup>78</sup> Any Motion for Reconsideration must be transmitted by email or fax to NAO no later than July 29, 2023. A Motion for Reconsideration must be in writing and contain a detailed statement of one or more specific material matters of fact or law that the administrative judge overlooked or misunderstood.

[REDACTED]  
Sofia Rizvi  
Administrative Judge

Date Issued: July 19, 2023

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<sup>78</sup> 15 C.F.R. § 906.16 (2023).