

⁴ Id. pp. 27687 – 27694.

HMS 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 Management 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 considered [REDACTED] out of [REDACTED] of Vessel's reported total pelagic longline sets between November 1, 2019 and October 31, 2022 to be eligible sets. The breakdown of Vessel's [REDACTED] 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			
2020	All			
2021	All			
2022	Jan-Oct			

IAD 1 calculated the 2023 IBQ share for [REDACTED] quota, which is equivalent to [REDACTED] pounds of IBQ allocation.⁹ IAD 1 further indicated that the regional designation for Vessel's share was comprised of [REDACTED] percent Atlantic (ATL) shares.¹⁰ As for the Gulf of Mexico (GOM) region, IAD 1 did not note any eligible GOM sets and thus, allocated zero GOM shares.¹¹

Subsequently, on December 20, 2022, HMS sent an email to Appellant titled “Updated 2023 IBQ Allocation Determination Letter.”¹² In that letter, 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).¹³

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.¹⁴ Additionally, Vessel's 2023 IBQ share in IAD 2 remained [REDACTED] percent of the Longline category

⁵ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁶ See 50 C.F.R. § 635.15 (2023).

⁷ IAD Tab, letter from HMS to Appellant, dated December 13, 2022.

⁸ IAD tab, IAD 1.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² IAD Tab, letter from HMS to Appellant, dated December 20, 2022.

¹³ IAD tab, IAD 2.

¹⁴ Id.

quota.¹⁵ The corrected share, however, equated to █████ pounds of IBQ allocation with █████ percent of the share still designated in the ATL region.¹⁶

On January 24, 2023, Appellant appealed IAD 2.¹⁷ In his appeal letter (Letter), Appellant states that there is a system deficiency in his Faria VMS reporting module.¹⁸ 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 field to be changed from 2020 therefore any overlapping dates in 2021, or 2022 would appear to be duplicate sets.”¹⁹ Therefore, the Appellant requests “NMFS to disregard any overlapping sets regardless of the fact they occurred in different years.”²⁰ The Appellant further indicated 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.”²¹ 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.”²²

On January 25, 2023, HMS notified NAO of vessels that were affected by a Faria VMS “unit error” creating false duplicate pelagic longline sets for trips that occurred after 2020; Vessel was not among the vessels included on the list.²³

On January 31, 2023, NAO sent a letter to Appellant notifying him that the office had received his appeal, and requesting that he submit any additional documentation or information in support of the appeal to NAO by February 13, 2023.²⁴ Appellant provided no additional documentation or information.

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.^{25, 26} 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

¹⁵ Id.

¹⁶ Id.

¹⁷ Appeals Tab, Appellant’s appeal letter, dated January 19, 2023, and received January 24, 2023.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ Appeals Communication Tab, email from HMS to NAO, dated January 25, 2023.

²⁴ Appeals Correspondence Tab, Letter from NAO to Appellant, dated January 31, 2023.

²⁵ 15 C.F.R. § 906.10(e) (2023).

²⁶ Appeal Communications Tab, email from HMS to NAO, dated Feb. 24, 2023.

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 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.²⁷

²⁷ Id.

On March 1, 2023, NAO requested Vessel's logbook data for eligible sets reported between November 1, 2019 and October 31, 2022 (Qualifying Period) from NMFS Southeast Fisheries Science Center (SEFSC) Commercial Fisheries Monitoring Branch (CFMB).²⁸ On May 30, 2023, SEFSC CFMB provided NAO with clarification on Vessel's logbook data, finalizing the data for Vessel.²⁹ This logbook data as of November 4, 2022, reflects that Vessel deployed a total of █████ eligible ATL sets during the Qualifying Period—█████ in 2019; █████ in 2020; and █████ in 2021 and 2022.³⁰

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.³¹ NAO indicated in its RFE that Appellant must provide the requested evidence by June 16, 2023.³² Appellant did not provide any evidence.

I have determined that the information in the record is sufficient to render a decision. I therefore close the record and render this decision. In reaching my decision, I have carefully reviewed the entire record.³⁴

ISSUES

The legal issue in this case is whether IAD 2 issued on December 20, 2022, correctly assesses Vessel's eligible pelagic longline sets in 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.³⁵
2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.³⁶
3. The Regulation was codified at 50 C.F.R. § 635.15.³⁷

²⁸ Appeal Communications Tab, email from NAO to SEFSC, dated March 1, 2023.

²⁹ Appeal Communications Tab, email from SEFSC CFMB to NAO, dated May 30, 2023.

³⁰ Appeal Communications Tab, SEFSC Logbook Data as of 11-4-22 for 23-0011 █████, received March 1, 2023 and finalized May 30, 2023.

³¹ 15 C.F.R. § 906.12(b) (2023).

³² Appeal Communications Tab, email from NAO to Appellant, dated June 2, 2023.

³³ *Id.*

³⁴ 15 C.F.R. § 906.11(a)(1) (2023).

³⁵ 86 Fed. Reg. 27686 (May 21, 2021).

³⁶ 87 Fed. Reg. 59966 (Oct. 3, 2022).

³⁷ 50 C.F.R. § 635.15 (2023).

4. HMS determined that mandatory VMS set reports are the best available data to use to inform dynamic IBQ allocation for calendar year 2023.³⁸
5. 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 with ██████ eligible sets in GOM and ██████ eligible sets in 2021 and 2022; ██████ eligible ATL sets in 2019 and 15 eligible ATL sets in 2020.³⁹
6. IAD 2 indicated that Vessel's 2023 IBQ share was ██████ percent of the Longline category quota, which equated to ██████ pounds of IBQ allocation with ██████ percent of the share in the ATL region.⁴⁰
7. SEFSC CFMB Summary Logbook data as of November 4, 2022, indicates 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 2022.⁴¹

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.”⁴² 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.⁴³

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.⁴⁴ 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.”⁴⁵

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

³⁸ Appeal Communications Tab, email from HMS to NAO, dated Feb. 24, 2023.

³⁹ IAD tab, IAD 2.

⁴⁰ *Id.*

⁴¹ Appeal Communications Tab, SEFSC Logbook Data as of 11-4-22 for 23-0014 ██████████ received March 1, 2023 and finalized May 30, 2023.

⁴² 50 C.F.R. § 635.15(b)(1) (2023).

⁴³ *Id.*

⁴⁴ *Id.* § 635.15(c).

⁴⁵ *Id.*

longline sets made by all IBQ shareholders' eligible vessels.”⁴⁶ NMFS only counts one set per calendar day when calculating a vessel’s total number of pelagic longline sets.⁴⁷

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.⁴⁸ Permit holders may appeal their IADs within 45 days after the date NMFS issues the IADs.⁴⁹ 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.⁵⁰ Hardship factors, however, are not valid bases for permit holders to appeal their IADs.⁵¹

Appellant has the obligation to obtain and present evidence to support the claims in his or her petition.⁵² On issues of fact, the appellant bears the burden of proving he or she should prevail by a preponderance of the evidence.⁵³

“NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.”⁵⁴

ANALYSIS

A preponderance of the evidence establishes that IAD 2 accurately assesses Vessel’s eligible pelagic longline sets when determining Vessel’s 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 ██████████ eligible pelagic longline sets during the Qualifying Period. IAD 2 further indicates that the ██████████ eligible sets were comprised solely of ATL sets—██████████ in 2019 and ██████████ in 2020.

In his appeal, Appellant claims that the 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.

⁴⁶ Id. § 635.15(c)(1).

⁴⁷ Id.

⁴⁸ Id. § 635.15(e).

⁴⁹ Id. § 635.15(e)(1).

⁵⁰ Id. § 635.15(e)(1)(i).

⁵¹ Id.

⁵² 15 CFR § 906.15 (2022).

⁵³ Id.

⁵⁴ 15 C.F.R. § 906.15(a) (2022).

HMS clarified that only vessels with Faria VMS units that submitted trips after 2020 were at risk of reporting false duplicate sets. NAO received no information to support that Vessel had any trips in 2021 and 2022; therefore, it is not logical to deduce that its pelagic longline set totals were adversely affected by the Faria VMS “unit error.” Thus, unlike other vessels that experienced the Faria VMS “unit error,” it is reasonable to conclude that Vessel’s eligible sets did not need to be reassessed and its IBQ allocation did not need to be adjusted due to Faria unit issues.

Appellant also argues that IAD 2 will have a “devastating effect on [his] ability to fish as [his] vessels cannot leave port once the allocation has been utilized.”⁵⁵ I empathize with Appellant’s unfortunate operational business circumstances; however, the Regulation explicitly bars me from considering hardship as a basis for an appeal.⁵⁶

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].”⁵⁷ 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.”

Appellant has the burden to show by a preponderance of the evidence that HMS incorrectly applied the Regulation in determining Vessel’s eligibility for 2023 IBQ share and resultant allocation.⁵⁸ Appellant has the obligation to obtain and present evidence to support the claims in his petition.⁵⁹ Appellant has not met this burden. While I recognize that the SEFSC CMB Logbook data accounts for three more eligible sets than the VMS, data used in IAD 2 Appellant provided insufficient evidence to support why logbook, and not VMS data, should be used to calculate Vessel’s 2023 IBQ allocation. Without sufficient evidence, I must give deference to HMS’ determination that VMS set reports were the best available data to determine Vessel’s eligible pelagic longline sets and calculate Vessel’s 2023 IBQ allocation. Appellant has not provided a legal basis to reverse the IAD.

CONCLUSIONS OF LAW

IAD 2 is consistent with the Regulation because a preponderance of the evidence establishes that IAD 2 correctly assesses Vessel’s eligible pelagic longline sets when determining Vessel’s 2023 IBQ share and resultant allocation.

⁵⁵ Appeal Tab, Appellant’s appeal letter, dated January 19, 2023, and received January 24, 2023.

⁵⁶ 50 CFR § 635.15(e)(1)(i).

⁵⁷ 15 C.F.R. § 906.15(a) (2023).


⁵⁸ 15 CFR § 906.14 (2023).

⁵⁹ Id.

ORDER

The IAD issued December 20, 2022, is **UPHELD**.

Appellant may submit a Motion for Reconsideration.⁶⁰ Any Motion for Reconsideration must be transmitted by email or fax to NAO no later than July 16, 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.


Sofia Rizvi
Administrative Judge

Date Issued: July 6, 2023

⁶⁰ 15 C.F.R. § 906.16 (2014).