

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

In re Application of

F/V

Permit Number ATL-

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Appeal No. 23-0015

DECISION

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

(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 (Vessel) which is associated with Atlantic Tuna Longline category permit number ATL- (Permit).

On May 21, 2019, NMFS published a Notice of Intent announcing "the start of a public process for determining the scope of significant issues related to the management of Atlantic bluefin tuna . . . and addressing issues identified by considering modification of bluefin regulations."² Two years later, on May 21, 2021, NMFS published a proposed rule that would "make several changes to the [IBQ] Program, including the distribution of IBQ shares to only active vessels [and] implementation of a cap on IBQ shares that may be held by an entity."³ NMFS then provided a summary of the proposed amendment to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (FMP), i.e., Amendment 13, and requested "comments on the proposed measures, alternatives, and analyses described in th[e] proposed rule."⁴

On October 3, 2022, following an extended comment period, NMFS published a final rule implementing changes to the bluefin fishery under Amendment 13 to the 2006 Consolidated FMP (Regulation).⁵ The Regulation was codified at 50 C.F.R. § 635.15, and became effective January 1, 2023.⁶

¹ 15 C.F.R. § 906.17(c)(1).

² 84 Fed. Reg. 23020 (May 21, 2019).

³ 86 Fed. Reg. 27686 (May 21, 2021).

⁴ *Id.* pp. 27687 – 27694.

⁵ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁶ See 50 C.F.R. § 635.15 (2023).

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 HMS' Initial Administrative Determination (IAD).⁸

In the IAD, HMS informed Appellant that it had determined that Vessel had reported deploying a total of 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 percent of the Longline category quota, which equated to pounds of IBQ allocation.¹⁰ HMS further indicated in the IAD that the regional designation for Vessel's share was comprised of percent Atlantic (ATL) and percent Gulf of Mexico (GOM) shares, "which equates to pounds of ATL IBQ and pounds of GOM IBQ."¹¹

On January 19, 2023, Appellant appealed the IAD.¹² In his appeal, Appellant states that he purchased Vessel on December 16, 2021, and launched it on February 17, 2022. Appellant indicates that he reported Vessel's sets using a "Faria" unit vessel monitoring system (VMS), as well as through log books, but that "Faria" units only report sets through calendar year 2020. Appellant maintains that he spoke with HMS personnel who confirmed his 2022 sets. Appellant does not state in his appeal how many sets he believes should be attributed to Vessel.

On February 16, 2023, NAO sent to Appellant a letter acknowledging receipt of his appeal, and requesting Appellant submit any additional material concerning the appeal to NAO by February 28, 2023.¹³ Appellant provided no additional supporting documentation.

On May 17, 2023, HMS sent an email to NAO concerning Vessel stating that:

ATL- was expired at the time the IBQ allocation calculations were made resulting in the initial allocation determination of sets. Since that initial determination, ATL- has been renewed and is associated with the F/V , thus the permit holder and corresponding IBQ account are now entitled to receive the allocation based on that vessel's fishing effort history.¹⁴

HMS also indicated that " sets is an accurate reflection of this vessel's fishing history."¹⁵

After carefully reviewing the information contained in the record, I have determined it is sufficient to adjudicate this appeal. I therefore close the record and render this decision.¹⁶

⁷ IAD Tab, email from HMS to Appellant titled "2023 IBQ Allocation Determination," dated December 13, 2022.

⁸ IAD Tab, undated IAD.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Appeal Tab, Appellant's appeal letter sent by mail, dated January 16, 2023, and received January 19, 2023.

¹³ Appeal Correspondence Tab, Acknowledgment Letter, dated February 16, 2023.

¹⁴ Appeal Correspondence Tab, email from HMS to NAO, dated May 17, 2023.

¹⁵ Id.

¹⁶ 15 C.F.R. § 906.11(a)(1); 15 C.F.R. § 906.12(a).

ISSUES

The legal issue in this case is whether the HMS correctly assessed Vessel's eligible sets when determining Vessel's 2023 IBQ share and resultant allocation.

FINDINGS OF FACT

1. On December 13, 2022, HMS issued to Appellant an IAD indicating that Vessel had pelagic longline sets between November 1, 2019, and October 31, 2022.¹⁷
2. On May 17, 2023, HMS informed NAO that Permit was expired at the time of the IBQ allocation calculations, however since that time Permit has been renewed and Vessel is entitled to receive the allocation based on Vessel's fishing effort history. HMS indicated that Vessel's fishing efforts during the qualifying period was sets.¹⁸

PRINCIPLES OF LAW

The Regulation states that an Atlantic Tunas Longline category permit holder (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."¹⁹

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.²⁰

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."²¹ NMFS only counts one set per calendar day when calculating a vessel's total number of pelagic longline sets.²²

In 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.²³ Permit Holders may appeal their IADs within 45 days after the date NMFS issues the IADs.²⁴ 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;

¹⁷ IAD Tab, undated IAD.

¹⁸ Appeal Correspondence Tab, email from HMS to NAO dated May 17, 2023.

¹⁹ 50 C.F.R. § 635.15(b)(1) (2023).

²⁰ Id. § 635.15(c).

²¹ Id. § 635.15(c)(1).

²² Id.

²³ Id. § 635.15(e).

²⁴ Id. § 635.15(e)(1).

regional designations of their shares and allocations; or NMFS' determination of the pelagic longline sets legally made by the permitted vessel.²⁵

ANALYSIS

Does the IAD correctly assess Vessel's eligible sets when determining Vessel's 2023 IBQ share and resultant allocation?

In this appeal, Appellant claims that the IAD is inaccurate, however he does not state how many sets he believes should be attributed to Vessel.

HMS informed Appellant in the IAD that Vessel had reported deploying a total of pelagic longline sets during the qualifying period, however, HMS subsequently conceded that Vessel's fishing efforts during the qualifying period was sets, and that "the permit holder and corresponding IBQ account are now entitled to receive the allocation based on that vessel's fishing effort history."

Based on the record, I find that Vessel shall receive pelagic longline sets and resultant 2023 IBQ share and allocation of the Atlantic Tunas Longline category quota.


CONCLUSIONS OF LAW

I conclude that the IAD HMS issued to Appellant was inconsistent with the Regulation. In reaching my decision, I carefully examined the entire record.

ORDER

The IAD issued on December 13, 2022, is vacated. NAO directs HMS to issue to Appellant pelagic longline sets and the resultant 2023 IBQ share and allocation of the Atlantic Tunas Longline category quota.

Appellant may submit a Motion for Reconsideration.²⁶ Any Motion for Reconsideration must be transmitted by fax to NAO no later than June 15, 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.


Steven Goodman
Chief Administrative Judge

Date Issued: June, 5, 2023

²⁵ Id. § 635.15(e)(1)(i).

²⁶ 15 C.F.R. § 906.16.