

⁴ Id. pp. 27687 – 27694.

(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 1).⁸ In IAD 1, HMS informed Appellant that it had determined that Vessel had reported [REDACTED] total pelagic longline sets between November 1, 2019, and October 31, 2022, and "had a valid permit at the time of this fishing activity."⁹ IAD 1 further indicated that of Vessel's [REDACTED] total pelagic longline sets, HMS had determined that [REDACTED] were considered eligible sets under the Regulation—[REDACTED] Gulf of Mexico (GOM) sets and [REDACTED] Atlantic (ATL) sets in 2019, [REDACTED] GOM sets and [REDACTED] ATL sets in 2020, [REDACTED] GOM sets and [REDACTED] ATL sets in 2021, and [REDACTED] GOM sets and [REDACTED] ATL sets in 2022.¹⁰ IAD 1 specified that Vessel's 2023 IBQ share was [REDACTED] percent of the Longline category quota, which equated to [REDACTED] pounds of IBQ allocation.¹¹ IAD 1 further indicated that the regional designation for Vessel's share was comprised of [REDACTED] percent ATL shares and [REDACTED] percent GOM shares, "which equates to [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ."¹²

Subsequently, on December 20, 2022, HMS sent an email to Appellant titled "Updated 2023 IBQ allocation determination letter."¹³ In this email, HMS states:

Due to a calculation error associated with the 25 mt Northeast Distant Area set aside, your Individual Bluefin Quota (IBQ) allocation has been corrected. The 2002 ICCAT recommendation included an annual 25 mt set-aside quota to account for bycatch of bluefin tuna in an area as the Northeast Distant Area. This set-aside quota is in addition to the overall incidental longline quota. The previous IBQ allocation determination letter emailed on 12/15/2022 was incorrect as it was calculated on the overall incidental longline quota, minus the 25mt. Thus, this has been corrected and the entire 209.3 mt has been allocated in accordance with Amendment 13 to the 2006 Consolidated Atlantic HMS Fishery Management Plan.¹⁴

Attached to this email was Appellant's "corrected 2023 IBQ allocation determination letter" (IAD 2).¹⁵ IAD 2 indicated that Vessel had reported [REDACTED] total pelagic longline sets between November 1, 2019, and October 31, 2022, and stated Vessel's 2023 IBQ share was [REDACTED] percent

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 1.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ IAD Tab, email from HMS to Appellant titled "Updated 2023 IBQ allocation determination letter" (Dec. 20, 2022)

¹⁴ Id.

¹⁵ Id.; IAD Tab, IAD 2.

of the Longline category quota, which equated to [REDACTED] pounds of IBQ allocation.^{16, 17} IAD 2 adjusted Vessel's IBQ allocation from [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ to [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ, and indicated that Vessel's IBQ share was comprised of [REDACTED] percent ATL and [REDACTED] percent GOM shares.¹⁸ IAD 2 reflected no change from IAD 1, however, in the distribution of Vessel's total eligible sets during the qualifying period.¹⁹

On February 3, 2023, Appellant filed a written appeal of IAD 2.²⁰ In his appeal, Appellant asserts Vessel had eligible sets in addition to those listed in IAD 2 "that were not recorded through the 'VMS' system, and should be recorded in the HMS [L]ogbook system."²¹ Appellant maintains that the additional IBQ quota derived from these additional eligible sets would potentially reduce the amount of quota that Vessel would have to lease, or permit Vessel to continue fishing if no quota is available to lease.²² Regarding the discrepancy between Appellant's records and the VMS data, Appellant states that "satellite or equipment glitches can effect and result readings."²³ Appellant adds that "[o]ver the past years we have no idea what the actual readings have been, and no background record."²⁴

In support of his appeal letter, Appellant provided his handwritten calculations of Vessel's eligible ATL and GOM sets from November 1, 2019, to October 31, 2022.²⁵ According to Appellant's calculations, Vessel had a total of [REDACTED] eligible sets during the qualifying period—[REDACTED] GOM sets and [REDACTED] ATL sets in 2019, [REDACTED] GOM sets and [REDACTED] ATL sets in 2020, [REDACTED] GOM sets and [REDACTED] ATL sets in 2021, and [REDACTED] GOM sets and [REDACTED] ATL sets in 2022.²⁶ In addition, Appellant provided some of Vessel's 2021 Atlantic Highly Migratory Species logbook trip summary forms and 2021 Pelagic longline observer trip summary log forms.^{27, 28}

On February 14, 2023, NAO sent Appellant a letter acknowledging receipt of his appeal and requesting Appellant submit any additional material concerning his appeal by February 24, 2023.²⁹ Appellant submitted no additional materials.

¹⁶ IAD Tab, IAD 2.

¹⁷ On April 13, 2023, HMS informed NAO that it had queried the Vessel Monitoring System (VMS) data used to calculate IAD 1 and IAD 2 on November 3, 2022. See Appeals Communications Tab, Email from HMS to NAO titled "VMS dataset query date" (Apr. 13, 2023).

¹⁸ IAD Tab, IAD 2.

¹⁹ Id.

²⁰ Appeal Tab, Appeal Letter (dated Jan. 31, 2023; received Feb. 3, 2023).

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Appellant indicated that he had "not been able to find some past log copies, only [V]essel records." Id.

²⁹ Appeal Communications Tab, Acknowledgement Letter (Feb. 14, 2023).

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.^{30, 31} On February 24, 2023, HMS responded with the following interpretation of the Regulation:

NAO Question: Has HMS interpreted the above sections of 50 C.F.R. § 635.15 regarding what forms of data may be used to determine the number of pelagic longline sets legally made by each permitted, eligible vessel? If so, please provide your interpretation and supporting rationale.

[HMS] Response: Regarding allocations made for the 2023 calendar year, NMFS determined that mandatory vessel monitoring system (VMS) set reports are the best available data to use to inform dynamic IBQ allocation. VMS set reports are required to be submitted within 12 hours of completing a pelagic longline set (50 CFR 635.69(e)(4)(i)), in order to determine vessel interactions with bluefin tuna and accurately manage Individual Bluefin Quota (IBQ) allocation. These reports have been mandatory since January 1, 2015, and are a management tool specifically implemented to determine dead discards and deduct that amount of quota from vessels' IBQ quota accounts. Since these reports were developed for and are integral to the IBQ program, and because NMFS receives the data within hours of fishing gear sets being made, VMS set reports are the preferred data to use for dynamic allocation. NMFS has made the determination that in 2023 VMS set reports are preferred over all other data sources.

NAO Question: More specifically, has HMS interpreted the above sections of 50 C.F.R. § 635.15 to mean that NMFS logbook data may not be used to determine the number of pelagic longline sets legally made by each permitted, eligible vessel? If so, please provide your interpretation and supporting rationale.

Response: 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.

³⁰ 15 C.F.R. § 906.10(e) (2023).

³¹ Appeal Communications Tab, email from HMS to NAO titled "Re: Interpretation of Regulation" (Feb. 24, 2023).

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.

Here are a couple of side notes. First, by 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.³²

On March 1, 2023, NAO contacted the NMFS Southeast Fisheries Science Center (SEFSC) Commercial Fisheries Monitoring Branch (CFMB) to request Vessel's logbook data for eligible sets reported during the qualifying period.³³ On May 26, 2023, NAO extracted Vessel's Logbook Data from the SEFSC Southeast Reporting System (SRS) to evaluate Appellant's eligible sets based on the logbook numbers and dates provided in Appellant's appeal letter.³⁴ The SRS logbook data reflects that as of November 15, 2022, Vessel deployed a total of [REDACTED] eligible sets during the qualifying period—[REDACTED] GOM sets and [REDACTED] ATL sets in 2019; [REDACTED] GOM sets and [REDACTED] ATL sets in 2020; [REDACTED] GOM sets and [REDACTED] ATL sets in 2021; and [REDACTED] GOM sets and [REDACTED] ATL sets in 2022.³⁵ On May 30, 2023, SEFSC CFMB provided NAO with clarification on Vessel's logbook data, finalizing the data for Vessel.³⁶

Having carefully reviewed IAD 2, Appellant's written materials, supporting documentation, 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.³⁷

ISSUE

The legal issue in this case is whether IAD 2 correctly assessed Vessel's eligible sets when determining Vessel's 2023 IBQ share and resultant allocation.

³² *Id.*

³³ Appeal Communications Tab, email from NAO to SEFSC CFMB titled "Re: Logbook Summary Data" (Mar. 1, 2023).

³⁴ Appeal Communications Tab, SEFSC Logbook Data as of November 15 2022 for F/V [REDACTED] 23-0016.

³⁵ *Id.*

³⁶ Appeal Communications Tab, email from SEFSC CFMB to NAO titled "Re: Logbook Data Discrepancy" (May 30, 2023).

³⁷ 15 C.F.R. § 906.12(a) (2023).

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.³⁸
2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.³⁹
3. The Regulation was codified at 50 C.F.R. § 635.15.⁴⁰
4. HMS concluded that mandatory VMS set reports were the best available data to use to determine Vessel's 2023 IBQ share and resultant allocation.⁴¹
5. On December 20, 2022, HMS issued to Appellant IAD 2 indicating that Vessel reported [REDACTED] eligible pelagic longline sets from November 1, 2019, to October 23, 2022—[REDACTED] GOM sets and [REDACTED] ATL sets in 2019; [REDACTED] GOM sets and [REDACTED] ATL sets in 2020; [REDACTED] GOM sets and [REDACTED] ATL sets in 2021; and [REDACTED] GOM sets and [REDACTED] ATL sets in 2022.⁴²
6. IAD 2 stated that Vessel's 2023 IBQ share was [REDACTED] percent of the Longline category quota, which equated to [REDACTED] pounds of IBQ allocation.⁴³
7. IAD 2 indicated that Vessel's IBQ share was comprised of [REDACTED] percent ATL and [REDACTED] percent GOM shares, "which equates to [REDACTED] pounds of ATL IBQ and [REDACTED] pounds of GOM IBQ."⁴⁴
8. NMFS SEFSC CFMB logbook data indicates that Vessel deployed a total of [REDACTED] eligible pelagic longline sets from November 1, 2019, to October 31, 2022—[REDACTED] GOM sets and [REDACTED] ATL sets in 2019; [REDACTED] GOM sets and [REDACTED] ATL sets in 2020; [REDACTED] GOM sets and [REDACTED] ATL sets in 2021; and [REDACTED] GOM sets and [REDACTED] ATL sets in 2022.⁴⁵

PRINCIPLES OF LAW

The Regulation states that an Atlantic Tunas Longline category 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."⁴⁶ In order for an IBQ shareholder's vessel to be deemed an eligible vessel, it must have been issued a valid Atlantic

³⁸ 86 Fed. Reg. 27686 (May 21, 2021).

³⁹ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁴⁰ 50 C.F.R. § 635.15 (2023)

⁴¹ Appeal Communications Tab, email from HMS to NAO titled "Re: Interpretation of Regulation" (Feb. 24, 2023).

⁴² IAD Tab, IAD 2.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Appeal Communications Tab, SEFSC Logbook Data as of November 15 2022 for [REDACTED] 23-0016.

⁴⁶ 50 C.F.R. § 635.15(b)(1) (2023).

Tunas Longline category permit when the pelagic longline sets occurred during the relevant 36-month period.⁴⁷

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.⁴⁸ 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.”⁴⁹

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.⁵⁰ Additionally, logbook forms must be submitted postmarked to NMFS no later than 7 days of offloading all Atlantic HMS.⁵¹

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.”⁵² NMFS only counts one set per calendar day when calculating a vessel’s total number of pelagic longline sets.⁵³ In addition, NMFS will only count sets that occurred when a vessel was issued a valid Atlantic Tunas Longline category permit.⁵⁴

The Regulation defines a shareholder’s annual IBQ allocation as “the amount of [bluefin tuna] . . . in metric tons corresponding to [the] IBQ shareholder’s share percentage, distributed to their vessel to account for incidental landings and dead discards of [bluefin tuna] during a specified calendar year.”⁵⁵ 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.⁵⁶

In the last quarter of each year, NMFS issues IADs to Atlantic Tunas Longline category 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.⁵⁷ ATL permit holders may appeal their IADs within 45 days after the date NMFS issues the IADs.⁵⁸ Permit holders may base their appeal on ownership of an active vessel with a valid ATL permit; IBQ share percentage; IBQ

⁴⁷ Id.

⁴⁸ Id. § 635.15(c).

⁴⁹ Id.

⁵⁰ 50 C.F.R. § 635.5(a)(1) (2023).

⁵¹ Id.

⁵² 50 C.F.R. § 635.15(c)(1) (2023).

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id. § 635.15(d).

⁵⁶ Id.

⁵⁷ Id. § 635.15(e).

⁵⁸ Id. § 635.15(e)(1).

allocations; regional designations of their shares and allocations; or NMFS' determination of the pelagic longline sets legally made by the permitted vessel.⁵⁹ Hardship factors, however, are not valid bases for permit holders to appeal their IADs.⁶⁰

“NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.”⁶¹

ANALYSIS

Does IAD 2 correctly assess Vessel's eligible sets when determining Vessel's 2023 IBQ share and resultant allocation?

The Regulation indicates that an Atlantic Tunas Longline category 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 Atlantic Tunas Longline category permit at the time the fishing activity occurred. IAD 2 states that Vessel reported a total of [REDACTED] eligible pelagic longline sets during the qualifying period of November 1, 2019, to October 31, 2022. IAD 2 further indicates that these [REDACTED] eligible sets were comprised of [REDACTED] GOM sets and [REDACTED] ATL sets in 2019; [REDACTED] GOM sets and [REDACTED] ATL sets in 2020; [REDACTED] GOM sets and [REDACTED] ATL sets in 2021; and [REDACTED] GOM sets and [REDACTED] ATL sets in 2022.

In this appeal, Appellant claims Vessel had [REDACTED] additional eligible sets during the qualifying period that were not included in IAD 2. Specifically, Appellant asserts Vessel had a total of [REDACTED] eligible sets during the qualifying period—[REDACTED] GOM sets and [REDACTED] ATL sets in 2019, [REDACTED] GOM sets and [REDACTED] ATL sets in 2020, [REDACTED] GOM sets and [REDACTED] ATL sets in 2021, and [REDACTED] GOM sets and [REDACTED] ATL sets in 2022.

NAO's Rules of Procedure require that I “give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the [IAD].” In its February 24, 2023, email to NAO, HMS indicated 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 although vessel logbook data is “not as timely” as VMS data, it had not determined that logbook data could not be used for determining IBQ allocation.

HMS later informed NAO on April 13, 2023, that it had queried the VMS data used to calculate IAD 2 on November 3, 2022. According to the Regulation, however, logbook records must be postmarked to NMFS no later than 7 days after the offloading date. To account for this 7-day period and the time required for SEFSC to receive and process mailed logbook records, NAO examined SEFSC CFMB SRS logbook records received by SEFSC by November 15, 2022. This data reflected that Vessel had a total of [REDACTED] eligible sets during the qualifying period—[REDACTED] GOM

⁵⁹ Id. § 635.15(e)(1)(i).

⁶⁰ Id.

⁶¹ 15 C.F.R. § 906.15(a) (2023).

sets and ■ ATL sets in 2019, ■ GOM sets and ■ ATL sets in 2020, ■ GOM sets and ■ ATL sets in 2021, and ■ GOM sets and ■ ATL sets in 2022.

As illustrated in the table below, the VMS data that HMS used to calculate Vessel's eligible sets in IAD 2, queried on November 3, 2022, and SEFSC CFMB SRS logbook data, queried using a cut-off date of November 15, 2022, differ significantly in the total number of eligible sets awarded to Vessel and how those sets are distributed throughout the qualifying period.⁶² In addition, SEFSC CFMB SRS logbook data aligns directly with the total eligible sets and set distribution asserted by Appellant in his appeal letter.

	IAD 2	SEFSC CFMB Summary Logbook Data (as of November 15, 2022)	Appellant's Claimed Eligible Sets
2019	■ GOM; ■ ATL	■ GOM; ■ ATL	■ GOM; ■ ATL
2020	■ GOM; ■ ATL	■ GOM; ■ ATL	■ GOM; ■ ATL
2021	■ GOM; ■ ATL	■ GOM; ■ ATL	■ GOM; ■ ATL
2022	■ GOM; ■ ATL	■ GOM; ■ ATL	■ GOM; ■ ATL
Total	■	■	■

The ■ eligible set difference between the VMS data used to calculate IAD 2 and the SEFSC CFMB logbook data, combined with the fact that the SEFSC CFMB logbook data aligns exactly with Appellant's claimed eligible sets, raises serious concerns about the accuracy and reliability of the VMS data used to calculate Vessel's eligible pelagic longline sets and 2023 IBQ allocation. Accordingly, I find that HMS' determination that VMS set reports are the best available data to use to determine Vessel's eligible sets and 2023 IBQ allocation to be unreasonable.

Moreover, I find a preponderance of the evidence establishes that IAD 2 is inconsistent with the Regulation because it fails to accurately assess and distribute Vessel's eligible pelagic longline sets during the qualifying period.

CONCLUSIONS OF LAW

IAD 2 is inconsistent with the Regulation because a preponderance of the evidence establishes that IAD 2 did not correctly assess and distribute Vessel's eligible pelagic longline sets when determining Vessel's 2023 IBQ share and resultant allocation.

⁶² SEFSC CFMB SRS logbook records indicate that SEFSC received Vessel's final set of 2022 logbook records on November 8, 2022. See Appeals Communication Tab, ■ Trips and Sets Raw Data.

ORDER

IAD 2, issued on December 20, 2022, is **VACATED**. HMS is directed to award Vessel a total of [REDACTED] eligible pelagic longline sets—[REDACTED] ATL sets for 2019; [REDACTED] ATL sets for 2020; [REDACTED] GOM sets and [REDACTED] ATL sets for 2021; and [REDACTED] GOM sets and [REDACTED] ATL sets for 2022. NAO further directs HMS to recalculate Vessel's 2023 IBQ share and the resultant allocation.

Appellant may submit a Motion for Reconsideration.⁶³ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later than **July 24, 2023**.⁶⁴ 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.⁶⁵

J. Kirk Essmyer
Administrative Judge

Date Issued: July 13, 2023

⁶³ 15 C.F.R. § 906.16(a) (2023).

⁶⁴ Id. § 906.16(b).

⁶⁵ Id.