

The DL also indicated that vessels deemed "inactive" do not have enough relevant fishing history during the qualifying period (2006 through 2012) to consistently demonstrate an ability to avoid bluefin tuna during normal fishing operations, and that therefore Vessel was not qualified to fish in CHGRA in the 2015 fishing year.

On or about February 10, 2015, Appellant requested HMS review the DL.⁵ In the request for review, Appellant stated that (1) Permit was associated with fishing vessel [REDACTED] (Prior Vessel); (2) from 2010 to 2012, Prior Vessel had [REDACTED] designated species landings, accounting for 274,000 pounds; (3) Prior Vessel experienced a catastrophic accident on [REDACTED]; (4) after Prior Vessel's accident, Permit was transferred to [REDACTED] and finally transferred to Vessel; (5) had Appellant known the proposed rule would later be ratified, Appellant would have transferred it to an active vessel; (6) Permit was attached to a vessel that had designated species landings during the qualifying period (2006 to 2012); and, (7) Permit would still be assigned to Prior Vessel if the accident had not occurred. Appellant requested IBQ shares and access to the CHGRA.

On June 23, 2015, HMS sent Appellant the Initial Administrative Determination (IAD) at issue in this case.⁶ In the IAD, HMS denied Appellant's request to receive IBQ share and allocation, and denied Appellant access to the CHGRA.⁷ The IAD indicated that Appellant was ineligible for IBQ share because Permit was not associated with a vessel on August 21, 2013, as required by the eligibility criteria.⁸ HMS further indicated that the Regulation clearly states that reviews of decisions based on hardship will not be considered.⁹ HMS stated without an initial share and allocation of IBQ, access to the CHGRA cannot be granted.¹⁰ HMS noted Appellant had the right to appeal the IAD.¹¹

On September 18, 2015, Appellant appealed the IAD.¹² In Appellant's appeal letter, Appellant indicated (1) denial of IBQ share has resulted in significant financial loss to Appellant; (2) the total economic cost associated with vessel-based determination has compounded his losses, rendering Appellant's permit useless; (3) the vessel/permit fished every year from 2006 to 2011; (4) according to the Regulation, vessels can be destroyed or break down and it's easy to move a permit to another vessel; (5) Appellant's permit produced [REDACTED] pounds of HMS landings from 2010 to 2012 and was not an inactive permit or vessel; (6) when Appellant changed his permit to NOVESID status, the Regulation was not finalized, the move was not to a legal status, and Appellant did not receive any warning from NMFS' Southeast Regional Office (SERO) that the move would endanger Appellant's permit and render it worthless; (7) that it is SERO's responsibility to inform and instruct permit owners if their permit is in danger; (8) had Appellant not been compliant and moved his permit to NOVESID status, Appellant would have received IBQ share for the vessel; (9) the method of determination should be permit based, not vessel

⁵ Notice to Submit Evidence Tab, Appellant's letter to HMS, dated February 10, 2015.

⁶ Denial tab, Initial Administrative Determination, dated June 23, 2015.

⁷ Denial tab, Initial Administrative Determination, dated June 23, 2015.

⁸ Denial tab, Initial Administrative Determination, dated June 23, 2015.

⁹ Denial tab, Initial Administrative Determination, dated June 23, 2015.

¹⁰ Denial tab, Initial Administrative Determination, dated June 23, 2015.

¹¹ Denial tab, Initial Administrative Determination, dated June 23, 2015.

¹² Pleadings Tab, Appellant's appeal letter, dated September 18, 2015.

based, and according to the Regulation, this will be the method used in 2016; and (10) everything else in the Regulation is based on the permit.¹³

On October 14, 2015, NAO sent Appellant a letter notifying Appellant that the office had received Appellant's appeal and requesting any additional documentation or information in support of the appeal be submitted to NAO by November 9, 2015.¹⁴ Appellant provided no additional documentation or information.

I have determined the information in the record is sufficient to render a decision. I therefore close the record and render this decision.¹⁵ In reaching my decision, I have carefully reviewed the entire record.

ISSUES

The first issue in this case is whether Appellant qualifies for IBQ share under the Regulation. To resolve that issue, I must answer the following:

1. Did Appellant have a valid permit associated with Vessel as of August 21, 2013?
2. Was Vessel active in the Atlantic Pelagic Longline fishery between 2006 and 2012?

If the answer to either question is no, Appellant does not qualify for IBQ share.

The second issue in this case is whether Appellant qualifies for access to the CHGRA. To resolve that issue, I must answer the following:

1. Does Vessel's performance qualify it for access to the CHGRA?

If the answer to this question is no, Appellant does not qualify for access to the CHGRA.

FINDINGS OF FACT

1. Prior Vessel was actively fishing pelagic longline gear between 2006 and 2012.¹⁶
2. Prior Vessel ██████████ on ██████████¹⁷

¹³ Pleadings Tab, Appellant's appeal letter, dated September 18, 2015.

¹⁴ Appeals Correspondence Tab, Letter from NAO to Appellant, dated October 14, 2015.

¹⁵ 15 C.F.R. § 906.12(a) (2014).

¹⁶ Denial Tab, Memorandum from Margo Schulze-Haugen to Alan D. Risenhoover, dated June 19, 2015.

¹⁷ Notice to Submit Evidence Tab, U.S. Department of Homeland Security, U.S. Coast Guard, Report of Marine Accident, Injury or Death, dated ██████████, photographic evidence.

3. Appellant's Permit was associated with Prior Vessel until May 15, 2013.
4. On May 15, 2013, Permit was placed into NOVESID status.¹⁸
5. On July 23, 2013, HMS informed Appellant that NMFS would be publishing a proposed rule that planned a wide variety of changes to the regulations governing the management of Atlantic bluefin tuna.¹⁹
6. On October 22, 2014, Permit became associated with Vessel²⁰

PRINCIPLES OF LAW

To initially qualify for an IBQ share, a permit holder must satisfy the eligibility criteria listed in the Regulation.²¹ This criterion requires that (1) a permit holder hold a valid permit associated with a vessel as of August 21, 2013, and (2) that the vessel be considered "active" within the Atlantic Pelagic Longline fishery.²² According to the Regulation, "[a]ctive" vessels are those vessels that have used pelagic longline gear on at least one set between 2006 and 2012 as reported to NMFS on logbooks.²³ When determining a permitted vessel's initial IBQ share eligibility, NMFS uses data associated with the qualifying vessel's history—not the permit.²⁴ Consequently, individuals who hold a permit that was not associated with a vessel as of August 21, 2013, are not eligible for an initial IBQ share.²⁵ If the logbook reports indicate that a particular vessel used pelagic longline gear for at least one set between 2006 and 2012, and the vessel was issued a valid Atlantic Tunas Longline category permit as of August 21, 2013, the current permit holder is qualified to receive an initial IBQ share.²⁶ Permits that are not associated with a vessel, such permits in NOVESID status, are not eligible for an initial IBQ share.²⁷

Permit holders may appeal HMS' decision regarding their initial IBQ shares through the two-step process outlined in the Regulation.²⁸ The only items subject to appeal are: (1) a Permit holder's initial IBQ share eligibility based on ownership of an active vessel with a valid Permit, (2) the accuracy of NMFS' records regarding the vessel's amount of designated species landings and/or bluefin interactions, and (3) the correct assignment of target species landings and bluefin interactions to the vessel owner/permit holder.²⁹ Current owners of a permitted vessel may also

¹⁸ Notice to Submit Evidence Tab, NMFS Permits Information Management System, Permit ██████████

¹⁹ Notice to Submit Evidence Tab, Letter from HMS to Appellant, dated July 23, 2013.

²⁰ Notice to Submit Evidence Tab, NMFS Permits Information Management System, Permit ██████████

²¹ See generally 50 C.F.R. § 635.15 (2014).

²² 50 C.F.R. § 635.15(k)(1)(i) (2014).

²³ 50 C.F.R. § 635.15(k)(1)(i) (2014).

²⁴ 50 C.F.R. § 635.15(k)(1)(i) (2014).

²⁵ 50 C.F.R. § 635.15(k)(1)(ii) (2014).

²⁶ 50 C.F.R. § 635.15(k)(1)(i) (2014).

²⁷ 79 Fed. Reg. 71510, 71515 (Dec. 2, 2014).

²⁸ 50 C.F.R. § 635.15(k)(4) (2014).

²⁹ 50 C.F.R. § 635.15(k)(4)(iii) (2014).

appeal on the basis of historical changes in vessel ownership or permit transfers.³⁰ The Regulation does not allow appeals based on hardship factors.³¹

A vessel that has been issued, or is required to have been issued, a limited access permit may fish with pelagic longline gear in the CHGRA provided NMFS determines the vessel is qualified for the relevant year.³² In making such vessel qualification determinations, NMFS will use fishery dependent and independent data to evaluate vessel performance.³³ This data will be based on avoidance of bluefin tuna interactions while fishing with a pelagic longline gear and history of compliance with the observer and logbook requirements.³⁴

ANALYSIS

Did Appellant have a valid Permit associated with Vessel as of August 21, 2013?

Under the regulation, to initially qualify for IBQ share, Appellant must have held a valid permit associated with a vessel as of August 21, 2013.³⁵ Permits that are not associated with a vessel, such as permits in NOVESID status, are not eligible for an initial IBQ share.³⁶

The record establishes Appellant held a valid Permit as of August 21, 2013; however, the record does not reflect that Permit was associated with a vessel on this date. Specifically, the record indicates that Permit was in NOVESID status on August 21, 2013, and remained in such status until October 22, 2014, when Appellant associated it with Vessel.

Appellant argues when Appellant changed Permit to NOVESID status, the Regulation was not finalized and Appellant did not receive any warning from SERO that the change would endanger Appellant's Permit and render it worthless. Appellant further argues that it is SERO's responsibility to inform and instruct permit owners if their permit is in danger, and had Appellant not been compliant and moved Appellant's permit to a NOVESID status, Appellant would have received IBQ share for the vessel.

Appellant has provided no evidence to support the proposition that NMFS is required to "inform and instruct permit owners if their permit is in danger." Further, even if Appellant were to provide evidence establishing that NMFS had such a requirement, the record establishes that on July 23, 2013, HMS informed Appellant that NMFS would be publishing a proposed rule that planned a wide variety of changes to the regulations governing the management of Atlantic bluefin tuna, including changes for the pelagic longline fishery. Therefore, the record establishes NMFS provided notice to Appellant of planned changes to the fishery associated with Permit.

³⁰ 50 C.F.R. § 635.15(k)(4)(iii) (2014).

³¹ 50 C.F.R. § 635.15(k)(4)(iii) (2014).

³² 50 C.F.R. § 635.21(c)(3) (2014); 50 C.F.R. § 635.14(a) (2014).

³³ 50 C.F.R. § 635.14(a) (2014); 79 Fed. Reg. 71510, 71590 (Dec. 2, 2014).

³⁴ 50 C.F.R. § 635.21(c)(3) (2014); 50 C.F.R. § 635.14(a) (2014).

³⁵ 50 C.F.R. § 635.15(k)(1)(i) (2014).

³⁶ 79 Fed. Reg. 71510, 71515 (Dec. 2, 2014).

Was Vessel active in the Atlantic Pelagic Longline fishery between 2006 and 2012?

Under the Regulation, in addition to holding a valid permit associated with a vessel as of August 21, 2013, the vessel must be considered “active” within the Atlantic Pelagic Longline fishery.³⁷ According to the Regulation, “[a]ctive’ vessels are those vessels that have used pelagic longline gear on at least one set between 2006 and 2012 as reported to NMFS on logbooks.”³⁸

Appellant argues that the vessel/permit fished every year from 2006 to 2011, that the permit produced ██████████ pounds of HMS landings from 2010 to 2012, and that during this time it was not an inactive permit or vessel.

The record establishes Prior Vessel was actively fishing pelagic longline gear between 2006 and 2012. However, the record does not reflect that Vessel was actively fishing pelagic longline gear between 2006 and 2012. Under the Regulation, when determining a permitted vessel’s initial IBQ share eligibility, NMFS uses data associated with the qualifying vessel’s history—not the permit. Therefore, the fact that Prior Vessel was actively fishing with pelagic longline gear during the qualifying period, and that Permit was associated with Prior Vessel, has no effect on whether Vessel was active within the Atlantic Pelagic Longline fishery.

Appellant further argues not issuing Appellant IBQ share has resulted in significant financial loss, and that the total economic cost associated with vessel-based determination has compounded Appellant’s losses, rendering Appellant’s Permit useless. Appellant argues that the *method of determination should be permit based, not vessel based, and that everything else in the Regulation is permit based.* Appellant also argues that vessels can be destroyed or break down and it’s easy to move a permit to another vessel

I understand Appellant’s difficult financial situation and his concerns regarding the Regulation. However, the administrative appeals process is not the appropriate vehicle to resolve these challenges. Instead, the sole issue I am authorized to resolve in this appeal is whether NMFS correctly applied the Regulation in Appellant’s case. Appellant’s above arguments do not address whether he had a valid Permit associated Vessel as of August 21, 2013, or whether Vessel was active in the Atlantic Pelagic Longline fishery between 2006 and 2012. Further, the Regulation explicitly bars me from considering hardship as a basis for appeal. Therefore, Appellant’s above arguments do not provide a basis to reverse HMS’s IAD.

Does Vessel’s performance qualify it for access to the CHGRA?

Under the Regulation, NMFS will determine access to the CHGRA based on vessel performance.³⁹ NMFS interpreted the Regulation to mean that when a vessel was not active during the qualifying period NMFS would not grant CHGRA access to that vessel because there was no data available that NMFS could use to make its determination on vessel performance.⁴⁰

³⁷ 50 C.F.R. § 635.15(k)(1)(i) (2014).

³⁸ 50 C.F.R. § 635.15(k)(1)(i) (2014).

³⁹ 50 C.F.R. § 635.15(k)(1)(i) (2014); 79 Fed. Reg. 71510, 75190 (Dec. 2, 2014).

⁴⁰ Notice to Submit Evidence Tab, IBQ share determination letter.

After reviewing the Regulation, I find this interpretation reasonable. Appellant provided no specific argument challenging NMFS' CHGRA access eligibility determination.

In summary, I conclude the IAD NMFS issued to Appellant was consistent with the Regulation. In reaching my decision, I carefully examined the entire record. I must uphold the IAD because (1) Appellant did not possess a valid Permit associated with Vessel as of August 21, 2013, (2) Vessel was not active in the Atlantic Pelagic Longline fishery between 2006 and 2012, and (3) Vessel's performance did not qualify it for access to the CHGRA.

CONCLUSIONS OF LAW

Appellant does not qualify for IBQ share because he did not prove by a preponderance of the evidence that Appellant had a valid Permit associated with Vessel as of August 21, 2013, and that Vessel was active in the Atlantic Pelagic Longline fishery between 2006 and 2012. Vessel does not qualify for access to the CHGRA because Appellant did not prove by a preponderance of the evidence that Vessel was active between 2006 and 2012. The IAD is consistent with the Regulation.

ORDER

The IAD dated June 23, 2015, is upheld. The Director may affirm, reverse, modify, or remand this decision.

Appellant or HMS may submit a Motion for Reconsideration.⁴¹ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later than January 14, 2016. 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.

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Steven Goodman
Chief Administrative Judge

Date Issued:

⁴¹ 15 C.F.R. § 906.16 (2014).