

June 23, 2015, HMS sent Appellants the Initial Administrative Determination (IAD) at issue in this case.⁷ In the IAD, HMS stated that it was denying Appellants' request to review their amount of IBQ share because HMS received Appellants' request for review after the March 2, 2015, deadline established under the Regulation.⁸ HMS further noted that Appellants had provided no documentation supporting their request for an increase to the high tier of IBQ share.⁹ HMS informed Appellants they had the right to appeal the IAD.¹⁰

On September 22, 2015, Appellants appealed the IAD.¹¹ In their appeal letter, Appellants again requested they be placed in the high tier and that NAO consider that Vessel's landings during the qualifying period amounted to ██████ pounds, "which is med tier to be in high tier ██████;" that Appellants were unable to fish in 2010 due to the BP oil spill; and that ██████ prevented Appellants from fishing for "additional months."¹² Regarding the timeliness of their request for review, Appellants indicated their request was delayed due to the fact ██████ needed care for three months and they had to make "other arrangements" for their mail while ██████ was in ██████.¹³ According to Appellants, these events delayed their response to HMS' notice informing them they were eligible for the medium tier.¹⁴

On October 14, 2015, NAO sent Appellants a letter notifying Appellants that the office had received their appeal and requesting Appellants submit any additional documentation or information in support of their appeal to NAO by November 9, 2015.¹⁵ Appellants provided no additional documentation or information.

On November 16, 2015, NAO sent Appellants a Notice Scheduling Hearing.¹⁶ On December 16, 2015, during their scheduled hearing, Appellants testified that they are seeking to receive an IBQ share in the high tier.¹⁷ According to Appellants, several events occurred during the qualifying years of 2006 to 2012 that negatively affected their total landings.¹⁸ First, Appellant stated that in 2006, the swordfish fishery closed and they were forced to fish for species that were not considered pelagic.¹⁹ Second, Appellants argued that the 2010 BP oil spill in the Gulf of Mexico prevented them from fishing.²⁰ Third, Appellants stated that ██████ in late 2010, limited Appellants' abilities to fish in 2011.²¹ Appellants argued that if HMS had exempted these periods when determining Appellants' initial IBQ share, they would have qualified for the high tier.²² Appellants further testified they have made bluefin tuna a priority

⁷ Denial Letter Tab, Initial Administrative Decision, dated June 23, 2015.

⁸ Denial Letter Tab, Initial Administrative Decision, dated June 23, 2015.

⁹ Denial Letter Tab, Initial Administrative Decision, dated June 23, 2015.

¹⁰ Denial Letter Tab, Initial Administrative Decision, dated June 23, 2015.

¹¹ Pleadings Tab, Appellant's appeal letter, dated September 21, 2015, received September 22, 2015.

¹² Pleadings Tab, Appellant's appeal letter, dated September 21, 2015, received September 22, 2015.

¹³ Pleadings Tab, Appellant's appeal letter, dated September 21, 2015, received September 22, 2015.

¹⁴ Pleadings Tab, Appellant's appeal letter, dated September 21, 2015, received September 22, 2015.

¹⁵ Appeals Correspondence Tab, Letter from NAO to Appellant, dated October 14, 2015.

¹⁶ Appeals Correspondence Tab, Notice Scheduling Hearing, dated November 16, 2015.

¹⁷ Audio recording of December 16, 2015, scheduled hearing.

¹⁸ Audio recording of December 16, 2015, scheduled hearing.

¹⁹ Audio recording of December 16, 2015, scheduled hearing.

²⁰ Audio recording of December 16, 2015, scheduled hearing.

²¹ Audio recording of December 16, 2015, scheduled hearing.

²² Audio recording of December 16, 2015, scheduled hearing.

and have proven to be good stewards of bluefin tuna throughout their 35 years in the fishery.²³ Appellants stated their admission to CHGRA in 2015 evidences their commitment to the fishery.²⁴

Concerning the timeliness of their request for review, Appellants testified their response to HMS' notice was delayed because they had to temporarily relocate to ██████████ in order to care for ██████████, who was critically ill.²⁵ Appellants testified that during this time, their ██████████ was collecting Appellants' mail.²⁶ Appellants stated they could not recall exactly when they first became aware of the notice from HMS, but ventured they likely saw it a few days before drafting the request for review.²⁷ According to Appellants, they wrote their request for review on March 5, 2015.²⁸ Although they were unable to recall the date(s) they mailed and faxed their request to HMS, Appellants speculated they had done so on or about March 5, 2015.²⁹

At the conclusion of the hearing, I informed Appellants I would hold the record open until December 23, 2015, for Appellants to submit additional evidence.³⁰ On December 16, 2015, and December 17, 2015, respectively, Appellants submitted written statements clarifying testimony they had given during their hearing.³¹ Also on December 17, 2015, Appellants submitted documentation of ██████████.³² On December 18, 2015, ██████████, ██████████ submitted a written statement detailing the time Appellants spent caring for ██████████.³³

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

ISSUE

The first issue in this case is whether Appellants timely submitted their request for review to HMS. To resolve this issue, I must determine if Appellants submitted a written request for review to HMS postmarked no later than March 2, 2015.

If the answer to this question is no, Appellants were untimely in submitting their request for review to HMS and I must uphold the IAD.

²³ Audio recording of December 16, 2015, scheduled hearing.

²⁴ Audio recording of December 16, 2015, scheduled hearing.

²⁵ Audio recording of December 16, 2015, scheduled hearing.

²⁶ Audio recording of December 16, 2015, scheduled hearing.

²⁷ Audio recording of December 16, 2015, scheduled hearing.

²⁸ Audio recording of December 16, 2015, scheduled hearing.

²⁹ Audio recording of December 16, 2015, scheduled hearing.

³⁰ Audio recording of December 16, 2015, scheduled hearing.

³¹ Pleadings Tab, Letter from Appellants, dated and received December 16, 2015.

³² Pleadings Tab, Letter from Appellants, dated and received December 17, 2015.

³³ Pleadings Tab, Letter from ██████████, dated and received December 18, 2015.

³⁴ 15 C.F.R. § 906.12(a) (2014).

If the answer to this question is yes, the next issue I must resolve is whether Appellants qualify for the high tier of IBQ share allocation under the Regulation. To resolve that issue, I must answer the following:

1. Did NMFS' records accurately reflect Vessel's amount of designated species landings and bluefin tuna interactions?
2. Did NMFS correctly assign target species landings and bluefin interactions to Appellants?

If the answers to these questions are yes, Appellants do not qualify for the high tier of IBQ share allocation and I must uphold the IAD.

FINDINGS OF FACT

1. Appellants qualified to receive an initial IBQ share and a resultant allocation in the medium tier of ██████ pounds.³⁵
2. On March 9, 2015, Appellants submitted a written request for review via facsimile to HMS.³⁶

PRINCIPLES OF LAW

To initially qualify for an IBQ share, a permit holder must satisfy the eligibility criteria listed in the Regulation.³⁷ This criterion requires that (1) a permit holder possess a valid Atlantic Tunas Longline permit associated with a vessel as of August 21, 2013, and (2) that the vessel be considered "active" within the Atlantic Pelagic Longline fishery.³⁸ 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."³⁹ When determining a permitted vessel's initial IBQ share eligibility, NMFS uses data associated with the qualifying vessel's history—not the permit.⁴⁰ 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.⁴¹

NMFS determines a qualified permit holder's initial IBQ share using the following allocation formula: First, NMFS determines the qualifying vessel's bluefin tuna interaction to designated species landings ratio (Ratio) by dividing the vessel's number of bluefin tuna interactions for the years 2006 through 2012 by the vessel's amount of designated species landings for the years 2006 through 2012.⁴² Next, NMFS places the vessel into one of three bins (based on percentiles)

³⁵ Application Tab, Letter to Permit Holder.

³⁶ Notice to Submit Evidence Tab, Appellant's Request, dated March 5, 2015, received March 9, 2015.

³⁷ See generally 50 C.F.R. § 635.15 (2014).

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

³⁹ Id.

⁴⁰ Id.

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

⁴² Atlantic Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 7, 79 Fed. Reg 71,510-01, 71,515-16 (Dec. 2, 2014) (codified at 15 C.F.R. pt. 635).

based on the vessel's designated species landings and Ratio and assigns a corresponding score to each.⁴³ Using the sum of the two scores, NMFS places the vessel into one of three tiers: low, medium, and high.⁴⁴ Vessels assigned to the same tier will receive the same share allocation.⁴⁵

Permit holders may appeal HMS' decision regarding their initial IBQ shares through the two-step process outlined in the Regulation.⁴⁶ 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.⁴⁷ Current owners of a permitted vessel may also appeal on the basis of historical changes in vessel ownership or permit transfers.⁴⁸ The Regulation does not allow appeals based on hardship factors.⁴⁹

To appeal under this two-step process, a permit holder must first submit a written request for review, along with supporting documentation, directly to HMS.⁵⁰ All review requests must be postmarked by March 2, 2015.⁵¹ HMS will only consider supporting documentation consisting of official NMFS logbook records or weightout slips for landings between January 1, 2006, and December 31, 2012, that were submitted to NMFS prior to March 2, 2013, and verifiable sales slips; receipts from dealers; state landings records; and permit records.⁵² HMS will then evaluate the permit holder's review request and issue an IAD indicating whether the request is approved or denied.⁵³ Permit holders may then appeal the IAD to the NAO within 90 days of issuance.⁵⁴ NAO will give deference to the reasonable interpretation of applicable ambiguous laws and regulations made by officials issuing the IAD.⁵⁵

ANALYSIS

Did Appellants submit a written request for review to HMS postmarked no later than March 2, 2015?

Under the Regulation, NMFS implemented a two-step appeal process.⁵⁶ As the first step in this appeal process, the Regulation required Appellants submit a written request for review,

⁴³ Atlantic Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 7, 79 Fed. Reg 71,510-01, 71,516 (Dec. 2, 2014) (codified at 15 C.F.R. pt. 635).

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ 50 C.F.R. § 635.15(k)(4) (2014).

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

⁴⁸ Id.

⁴⁹ Id.

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

⁵¹ Id.

⁵² 50 C.F.R. § 635.15(k)(4)(iv) (2014).

⁵³ Id.

⁵⁴ 50 C.F.R. § 635.15(k)(4)(ii)(2014).

⁵⁵ 15 C.F.R. § 906.15(a) (2014).

⁵⁶ 50 C.F.R. § 635.15(k)(4) (2014).

accompanied by any supporting documentation, directly to HMS.⁵⁷ The Regulation mandated that all requests for review were to be postmarked no later than March 2, 2015.⁵⁸

In reaching my decision, I have carefully reviewed the entire record, including Appellants' arguments. The record reflects that HMS determined Appellants' were eligible for an initial IBQ share in the medium tier, and that Appellants submitted a written request for review to HMS requesting an IBQ share in the high tier. The record further shows, however, that Appellants submitted their written request for review to HMS via facsimile on March 9, 2015—seven days after the deadline established under the Regulation.

Appellants do not contend their request for review was timely, but that it was delayed due to the need to care for ██████████ which required Appellants relocate temporarily from their residence in ██████████ to ██████████. Appellants state that as a result, they had to make "other arrangements" for their mail. Appellants clarify that during this time they did not have their mail forwarded to them, but, instead, had their ██████████ hold their mail for them while Appellants were in ██████████. Appellants do not recall when they first saw the notice from HMS, but speculate it was likely a few days prior to submitting their request for review to HMS. Appellants state the notice "just got overlooked" and they did not realize they were going to receive something important during the time they were out of town.

The Regulation established a deadline of March 2, 2015, for Appellants to submit their written request for HMS to review Appellants' IBQ share determination. The record establishes that Appellants did not submit their request for review to HMS until March 9, 2015. HMS interpreted the Regulation to mean that requests for review postmarked after March 2, 2015, would not be considered.⁵⁹ After reviewing the Regulation, I find this interpretation reasonable.

While I understand the difficulties Appellants likely faced after relocating to care for ██████████ ██████████ the Regulation does not permit me to consider appeals based on hardship factors.⁶⁰ Instead, the sole issue I am authorized to resolve is whether HMS correctly applied the Regulation in Appellants' case.⁶¹ Appellants' arguments do not provide me a basis to reverse the IAD. Consequently, I conclude HMS was correct to deny Appellants' request for review of their initial IBQ share and the resultant allocation.

Do Appellants qualify for the high tier of IBQ share allocation under the Regulation?

When determining a qualified permit holder's initial IBQ share, NMFS first calculates the qualifying vessel's Ratio.⁶² Next, NMFS scores the vessel's designated species landings and

⁵⁷ 50 C.F.R. § 635.15(k)(4)(i) (2014).

⁵⁸ *Id.*

⁵⁹ Appeals Correspondence Tab, email from HMS, dated January 4, 2015.

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

⁶¹ *Id.*

⁶² Atlantic Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 7, 79 Fed. Reg 71,510-01, 71,515-16 (Dec. 2, 2014) (codified at 15 C.F.R. pt. 635).

Ratio.⁶³ Using the sum of these two scores, NMFS places the vessel into one of three tiers: low, medium, and high.⁶⁴

Appellants raise multiple arguments why they should receive a high tier IBQ share and allocation. First, Appellants argue that Vessel's landings during the qualifying period amounted to ██████ pounds, "which is med tier to be in high tier ██████" Second, Appellants contend HMS should exempt their 2006 and 2010 landings data, because (1) the closure of the swordfish fishery in 2006 resulted in Appellants fishing for non-pelagic fish; (2) the 2010 BP oil spill limited Appellants' ability to fish in 2010; and (3) ████████████████████ in late 2010 further limited Appellants' ability to fish until Spring 2011. Third, Appellants state that fishing is their "sole business and source of family income." Last, Appellants argue their admission to CHGRA is evidence that they have been good stewards of bluefin tuna during their 35 years in the fishery.

As indicated above, Appellants were untimely in submitting their request for review to HMS. Therefore, I need not consider whether Appellants qualify for the high tier of IBQ share allocation under the Regulation. Nonetheless, I note that even if I were to address whether Appellants' qualify for the high tier, Appellants' above arguments do not address whether HMS' initial IBQ share allocation determination was inconsistent with the Regulation. Further the Regulation does not permit me to consider appeals based on hardship factors.⁶⁵

In summary, I conclude the IAD HMS issued to Appellants was consistent with the Regulation. In reaching my decision in this case, I carefully examined the record and considered Appellants' arguments. However, I must uphold the IAD because Appellants have not shown by a preponderance of the evidence that they timely submitted their written request for review to HMS.

CONCLUSIONS OF LAW

Appellants are not entitled to a review of the amount of initial IBQ share they received because Appellants did not prove by a preponderance of the evidence that they submitted a written request for review to HMS that was postmarked no later March 2, 2015.

The IAD is consistent with the Regulation.

⁶³ Atlantic Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 7, 79 Fed. Reg 71,510-01, 71,516 (Dec. 2, 2014) (codified at 15 C.F.R. pt. 635).

⁶⁴ *Id.*

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

ORDER

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

Appellants or HMS may submit a Motion for Reconsideration.⁶⁶ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later January 18, 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.

[REDACTED]
Kirk Essmyer
Administrative Judge

Date Issued: January 7, 2016

⁶⁶ 15 C.F.R. § 906.16 (2014).