

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

In re Application of)
)
)
 F/V)
 Permit Number)
)
 Appellant)
)

Appeal No. 15-0029
DECISION

STATEMENT OF THE CASE

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 (Director) may affirm, reverse, modify, or remand this decision.

This appeal concerns Appellant's request for review of Appellant's eligibility to receive an Individual Bluefin Quota (IBQ) share for his Atlantic Tunas Longline category permit number [REDACTED] (Permit), and for Appellant's fishing vessel [REDACTED] (Vessel) to receive the resultant initial allocation.

On December 2, 2014, NMFS published its final rule implementing Amendment 7 to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (Regulation).¹ Thereafter, NMFS' Highly Migratory Species Management Division (HMS) sent Appellant a notice stating Appellant's Permit was ineligible to receive an initial IBQ share and the resultant allocation.² Specifically, this notice informed Appellant that his Permit was ineligible for one or more of the following reasons: (1) "[t]he vessel associated with [Appellant's] permit, the F/V, [REDACTED], was INACTIVE during the qualifying time period;" (2) "[t]he 'active' vessel now associated with [Appellant's] permit was not associated with a valid Atlantic Tunas Longline permit on the date of publication of the proposed rule;" or (3) "[Appellant] currently ha[s] an eligible Atlantic Tunas Longline permit in 'NOVESID' status."³ In addition, the notice informed Appellant that the vessel associated with Permit was not qualified to access the Cape Hatteras Gear Restricted Area in 2015.⁴

¹ Atlantic Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 7, 79 Fed. Reg 71510 (Dec. 2, 2014) (codified at 15 C.F.R. pt. 635).

² Application Tab, Letter to Permit Holder.

³ Application Tab, Letter to Permit Holder.

⁴ Application Tab, Letter to Permit Holder.

On February 27, 2015, Appellant sent a letter to HMS requesting HMS review Permit's eligibility for an initial IBQ share.⁵ In this letter, Appellant indicated that Vessel landed six bluefin tuna in 2006 before sinking on ██████████. ⁶ Appellant's letter went on to state that in 2007 NMFS personnel instructed Appellant to stop using the name F/V ██████████, and in December 2008, after again speaking with NMFS personnel, NMFS assigned Permit the "No Vessel ID#" ██████████. ⁷

On June 23, 2015, HMS sent Appellant the Initial Administrative Determination (IAD) at issue in this case.⁸ In the IAD, HMS affirmed its previous determination that Appellant and Vessel were ineligible to receive an initial IBQ share and the resultant allocation.⁹ The IAD went on to state that although Vessel was "active" during the qualifying year of 2006, Permit was not associated with a vessel on August 21, 2013, and, therefore, Appellant was not eligible to receive IBQ share and the resultant allocation.¹⁰ HMS noted Appellant had the right to appeal the IAD.¹¹

On September 1, 2015, Appellant appealed the IAD.¹² In Appellant's appeal letter, Appellant stated the IAD was inconsistent because "it is by NMFS definition that the vessel ceased to exist" and that Appellant would have continued to associate Vessel with Permit if NMFS personnel had not instructed Appellant on December 22, 2008, that Appellant had to place Permit in a No Vessel ID status.¹³ According to Appellant, the IAD "is saying that [NMFS] [is] not responsible for [its] own decisions."¹⁴ In addition, Appellant argued that the United States would benefit economically by keeping a minimal amount of bluefin tuna attached to all Atlantic Tunas Longline category permits because it would incentivize businesses to re-enter the fishery, which, in turn, would provide the fishery with longevity.¹⁵ In support of his appeal, Appellant attached the Request for Review filed with HMS on February 27, 2015, as well as United States Coast Guard vessel documentation for the period of February 17, 2006, to February 28, 2007.¹⁶

On October 15, 2015, NAO sent Appellant a letter notifying Appellant that the office had received his appeal and requesting Appellant submit any additional documentation or information in support of his appeal to NAO by November 10, 2015.¹⁷ Appellant provided no additional documentation or information.

On November 16, 2015, NAO sent Appellant a Notice Scheduling Hearing.¹⁸ On December 17, 2015, during the scheduled hearing, Appellant testified that he was seeking a minimal IBQ share

⁵ Notice to Submit Evidence Tab, Request for Review, dated February 27, 2015.

⁶ Notice to Submit Evidence Tab, Request for Review, dated February 27, 2015.

⁷ Notice to Submit Evidence Tab, Request for Review, dated February 27, 2015.

⁸ Denial Letter Tab, IAD, dated June 23, 2015.

⁹ Denial Letter Tab, IAD, dated June 23, 2015.

¹⁰ Denial Letter Tab, IAD, dated June 23, 2015.

¹¹ Denial Letter Tab, IAD, dated June 23, 2015.

¹² Pleadings Tab, Appellant's appeal letter, dated September 1, 2015, received September 21, 2015.

¹³ Pleadings Tab, Appellant's appeal letter, dated September 1, 2015, received September 21, 2015.

¹⁴ Pleadings Tab, Appellant's appeal letter, dated September 1, 2015, received September 21, 2015.

¹⁵ Pleadings Tab, Appellant's appeal letter, dated September 1, 2015, received September 21, 2015.

¹⁶ Pleadings Tab, Appellant's appeal letter, dated September 1, 2015, received September 21, 2015.

¹⁷ Appeals Correspondence Tab, Letter from NAO to Appellant, dated October 15, 2015.

¹⁸ Appeals Correspondence Tab, Notice Scheduling Hearing, dated November 16, 2015.

for Permit.¹⁹ Appellant stated Vessel sank on ██████████, but remained associated with Permit until December 22, 2008; at which time NMFS personnel informed Appellant that he could no longer associate Vessel with Permit because Vessel no longer existed.²⁰ Appellant testified he then placed Permit in No Vessel ID status, at which time NMFS associated Permit with ██████████.²¹ Appellant further testified that he never associated Permit with another vessel because after Vessel sank in ██████████, the resulting financial hardship prompted him to pursue a career in ██████████.²² Appellant indicated he will retire in approximately five years and hopes to return to the fishery at that time.²³

At the conclusion of the hearing, Appellant expressed no desire for the record to remain open for the submission of additional evidence.²⁴ Having determined the information in the record is sufficient to render a decision; I close the record and render this decision.²⁵ In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.

ISSUE

The broad issue in this case is whether Appellant qualifies for an IBQ share under the Regulation. To resolve that issue, I must determine whether Appellant's Permit was associated with an "active" vessel on August 21, 2013?

If the answer to this question is no, Appellant does not qualify for an IBQ share and I must uphold the IAD.

FINDINGS OF FACT

1. Vessel was "active" in the Atlantic Pelagic Longline fishery during the qualifying year of 2006.²⁶
2. Vessel sank on ██████████ ██████████.²⁷
3. Appellant possessed a valid Atlantic Tunas Longline permit on August 21, 2013.²⁸
4. Permit was associated with ██████████ on August 21, 2013.²⁹

¹⁹ Audio recording of December 17, 2015, scheduled hearing.

²⁰ Audio recording of December 17, 2015, scheduled hearing.

²¹ Audio recording of December 17, 2015, scheduled hearing.

²² Audio recording of December 17, 2015, scheduled hearing.

²³ Audio recording of December 17, 2015, scheduled hearing.

²⁴ Audio recording of December 17, 2015, scheduled hearing.

²⁵ 15 C.F.R. § 906.12(a) (2014).

²⁶ Notice to Submit Evidence Tab, 2006 Landings Records for Vessel.

²⁷ Notice to Submit Evidence Tab, Request for Review, dated February 27, 2015; Denial Letter Tab, IAD, dated June 23, 2015.

²⁸ Application Tab, Permits Information Management System.

²⁹ Application Tab, Permits Information Management System.

5. Permit was not associated with Vessel on August 21, 2013.³⁰

PRINCIPLES OF LAW

To initially qualify for an IBQ share, an Atlantic Tunas Longline permit holder must satisfy the eligibility criteria listed in the Regulation.³¹ 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.³² 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.³³ When determining initial IBQ share eligibility, NMFS uses data associated with the qualifying vessel’s history—not the permit.³⁴ Consequently, individuals who hold a permit that was not associated with a vessel as of August 21, 2013, are not eligible for initial IBQ share.³⁵

Permit holders may appeal HMS’ decision regarding their initial IBQ shares through the two-step process outlined in the Regulation.³⁶ 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.³⁷ Current owners of a permitted vessel may also appeal on the basis of historical changes in vessel ownership or permit transfers.³⁸ The Regulation does not allow appeals based on hardship factors.³⁹

To appeal under this two-step process, a permit holder must first submit a written request for reconsideration, along with supporting documentation, directly to HMS.⁴⁰ 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.⁴¹ HMS will then evaluate the permit holder’s reconsideration

³⁰ Application Tab, Permits Information Management System.

³¹ See generally 50 C.F.R. § 635.15 (2014).

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

³³ *Id.*

³⁴ *Id.*

³⁵ 50 C.F.R. § 635.15(k)(1)(ii) (2014). See also Atlantic Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 7, 79 Fed. Reg 71510, 71515 (Dec. 2, 2014) (codified at 15 C.F.R. pt. 635) (stating “[p]ermits that are not associated with a vessel, such as a permit characterized as ‘No Vessel ID,’ are not eligible for an initial IBQ share”).

³⁶ 50 C.F.R. § 635.15(k)(4) (2014).

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

³⁸ *Id.*

³⁹ *Id.*

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

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

request and issue an IAD indicating whether the request is approved or denied.⁴² Permit holders may then appeal the IAD to the NAO within 90 days of issuance.⁴³

ANALYSIS

To initially qualify for an IBQ share, Appellant must have held a valid Atlantic Tunas Longline permit associated with a vessel as of August 21, 2013.⁴⁴ In addition, the vessel must be considered “active” within the Atlantic Pelagic Longline fishery.⁴⁵

In reaching my decision, I have carefully reviewed the entire record, including Appellant’s arguments. The record establishes both that Appellant’s Permit was valid as of August 21, 2013, and that Vessel was “active” during the qualifying year of 2006.⁴⁶ However, the record does not reflect that Vessel was associated with Permit on August 21, 2013. Instead, the record shows that Permit was placed in No Vessel ID status and associated with [REDACTED] on December 22, 2008,⁴⁷ and remained in that status on August 21, 2013.⁴⁸

Appellant argues that he only placed Permit in No Vessel ID status because a NMFS employee told Appellant that Vessel could no longer be associated with Permit due to Vessel sinking in [REDACTED]. Appellant contends that had NMFS not insisted he place Permit in No Vessel ID status, he would have continued to associate Vessel with Permit and, therefore, would have qualified for IBQ share and allocation.

Appellant has not provided support for the proposition that Appellant could have continued to associate Vessel with Permit after Vessel sank in [REDACTED]. The Regulation defines “active vessels” as “those vessels that have used pelagic longline gear on at least one set between 2006 and 2012 as reported to NMFS on logbooks.”⁴⁹ While Vessel clearly qualifies as an “active vessel” under the Regulation, the record establishes it was not associated with Permit on August 21, 2013. Instead, the record reflects Permit was in a No Vessel ID status and associated with [REDACTED] on the qualifying date. And, as stated in the final rule implementing the Regulation, “[p]ermits that are not associated with a vessel, such as a permit characterized as ‘No Vessel ID,’ are not eligible for an initial IBQ share.”⁵⁰

Appellant also argues his long history in the fishery should entitle him to a minimal IBQ share. Appellant states that after Vessel sank, he chose to suspend his fishing efforts in order to focus on his career as a [REDACTED]. Appellant indicates he stopped actively fishing due to

⁴² *Id.*

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

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

⁴⁵ *Id.*

⁴⁶ Application Tab, Permits Information Management System; Notice to Submit Evidence Tab, 2006 Landings Records for Vessel.

⁴⁷ Notice to Submit Evidence Tab, 2008 Fishing Year Permit, issued December 22, 2008.

⁴⁸ Application Tab, Permits Information Management System.

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

⁵⁰ Atlantic Highly Migratory Species; 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan; Amendment 7, 79 Fed. Reg 71510, 71515 (Dec. 2, 2014) (codified at 15 C.F.R. pt. 635).

financial hardships brought on by the loss of Vessel and low market prices, but hopes to return to actively fishing after retiring from his current position. In order to do so, however, Appellant states he needs at least a minimal IBQ share. Appellant adds that the United States would benefit economically by allowing him an initial IBQ quota share. According to Appellant, keeping a minimal amount of bluefin tuna attached to permits will incentivize businesses to re-enter the fishery.

While I understand the unfortunate situation in which Appellant finds himself, the Regulation prohibits me from considering appeals based on hardship factors.⁵¹ Furthermore, the sole issue I am authorized to resolve in the appeal is whether HMS correctly applied the Regulation in Appellant's case.⁵² Appellant's above arguments do not address this issue, and, therefore, provide me no basis to reverse the IAD.

After carefully examining the record and considering Appellant's arguments, I conclude the IAD HMS issued to Appellant was consistent with the Regulation. I must uphold the IAD because Appellant has not shown by a preponderance of the evidence that Permit was associated with an "active" vessel on August 21, 2013.

CONCLUSIONS OF LAW

Appellant is not eligible for an initial IBQ share and the resultant allocation because Appellant did not prove by a preponderance of the evidence that Permit was associated with an "active" vessel as of August 21, 2013.

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.⁵³ Any Motion for Reconsideration must be postmarked or transmitted by fax to NAO no later January 8, 2016. A Motion for Reconsideration must be in writing and contain a detailed statement of one or more material matters of fact or law that the administrative judge overlooked or misunderstood.

[REDACTED]
Kirk Essmyer
Administrative Judge
Date Issued: December 29, 2015

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

⁵² *Id.*

⁵³ 15 C.F.R. § 906.16 (2014).