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

In re Application of)
) Appeal No. 24-0003
E/V) DECISION
Permit Number ATL)

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 at 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)

2 which was associated with Atlantic Tunas Longline (ATL) category limited access permit (LAP) number ATL
(Permit).³

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." 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." 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."

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 FMP

¹ 15 C.F.R. § 906.17(c)(1) (2024).

² Vessel's name appears misspelled in the Initial Administrative Determination (IAD). IAD lists Vessel's name as

On January 31, 2024, Permit was transferred to a different fishing vessel and permit holder.

^{4 84} Fed. Reg. 23020 (May 21, 2019).

⁵ 86 Fed. Reg. 27686 (May 21, 2021).

⁶ <u>Id</u>. pp. 27687 – 27694.

(Regulation). The Regulation was codified at 50 C.F.R. § 635.15, and became effective January 1, 2023.8

On October 18, 2023, NMFS' Office of Sustainable Fisheries Highly Migratory Species Division (HMS) sent an email to IBQ shareholders, including Appellant, using the IBQ shareholders listserv. The email explained the procedures NMFS would use to calculate "2024 base allocations to pelagic longline vessels participating in the IBQ program."

On December 21, 2023, HMS emailed its Initial Administrative Determination (IAD), dated

December 21, 2023, to Appellant's email address of record that was associated with Permit. 11 HMS indicated that the email address, is associated with a service provider, and is not a valid personal email address for any IBQ shareholder. 12, 13 On May 9, 2024, HMS confirmed that it did not send the IAD to Appellant's personal email address and that Appellant did not report an email address change to NMFS from the information contained in his permit application. 14 On January 18, 2024, HMS physically mailed its IAD to Appellant. ¹⁵ In the IAD, HMS informed Appellant that NMFS' records indicated that from November 1, 2020 to October 31, 2023, F/V reported eligible pelagic longline sets and had a valid permit during this time. 16 The IAD also stated that the 2024 IBQ share for Permit is of the Longline category quota, which is equivalent to pounds of IBQ allocation. 17 HMS noted Appellant had the right to appeal the IAD. 18

On February 11, 2024, Appellant appealed the IAD containing his 2024 IBQ allocation determination.¹⁹ In his appeal letter, Appellant states:

I am writing to appeal a determination that my permit ATL did not fish in any of the qualifying months for establishing BFT quot[a] for the permit.

⁷ 87 Fed. Reg. 59966 (Oct. 3, 2022).

⁸ See 50 C.F.R. § 635.15 (2024).

⁹ IAD Tab, HMS email to IBQ shareholders, dated October 18, 2023. On April 16, 2024, HMS provided to NAO a copy of the IBQ shareholders listsery, which contained Appellant's email address, Communications Tab, HMS email to NAO, dated April 16, 2024.

¹⁰ IAD Tab, HMS email to IBQ shareholders, dated October 18, 2023.

¹¹ Appeal Communications Tab, HMS emails to NAO, dated March 8, 2024 and March 28, 2024.

¹² Appeal Communications Tab, HMS emails to NAO, dated March 28, 2024 and May 9, 2024.

¹³ Appeal Communications Tab, NAO emails to HMS, dated March 28, 2024. is a company that assists commercial and pleasure boat owners in the documentation process for licensing their vessels. See About Us, available at:

¹⁴ Appeal Communications Tab, HMS email to NAO, dated May 9, 2024.

¹⁵ IAD Tab, IAD. See Appeal Communications Tab, HMS email to NAO, dated March 8, 2024 (indicating that HMS mailed a hardcopy of its 2024 IBQ determinations to Appellant on January 18, 2024).
¹⁶ IAD Tab, IAD.

¹⁷ <u>Id</u>. p. 1.

¹⁸ Id

¹⁹ Appeal Tab, Appeal Letter, received February 11, 2024.

In fact the vessel made trips and in February and April-May of 2022, for a total sets. These trips were duly reported with documents including Trip Summaries (HMS VTR number for the February trip with sets); HMS VTR number for the April-May trip with sets.²⁰

Appellant provided copies of the relevant Trip Summary Forms to demonstrate HMS' "error or oversight" and indicated, "failure to count these trips and sets adversely affects [his] operations for the 2024 permit year by denying [him] a share of the IBQ for that year."²¹

On February 12, 2024, NAO sent a letter to Appellant acknowledging receipt of his appeal, and requesting Appellant submit any additional material concerning the appeal to NAO by February 26, 2024. Appellant provided no additional supporting documentation.

On March 11, 2024, NAO sent a Hearing Notice to Appellant informing him that a hearing regarding his appeal was scheduled for March 21, 2024. ²³ In the notice, NAO advised Appellant to submit any additional evidence concerning the appeal to NAO by March 18, 2024. NAO received no additional evidence from Appellant.

On March 21, 2024, Appellant appeared for the hearing via telephone.²⁴ Appellant testified that while he has received other communications from HMS to his personal email address, he did not receive the IAD via email. Appellant affirmed that he only received a hardcopy of the IAD in the mail in January 2024 and within a few weeks of receipt, he faxed his appeal to NAO. In addition, Appellant testified that he is not the current permit holder , owner of as he transferred Permit to , a couple of months after Permit was renewed in March 2023. Appellant asserted that he was appealing on . Appellant further testified that the vessel name, " listed in the IAD is incorrect. He explained that he sold F/V in March 2023 and ." Nevertheless, Appellant is not familiar with the vessel name " maintained that the IAD is incorrect because he reported eligible sets and Permit's catch history entitles the current permit holder to IBQ allocation. At the conclusion of the hearing, I kept the record open for Appellant to submit additional information in support of his appeal by April 4, 2024.

On March 20, 2024, NAO contacted HMS to obtain Permit's history. ²⁵ On March 21, 2024, the SERO Permit Office provided NAO with a spreadsheet detailing the full history of Permit, including the permit holder and vessel information. ²⁶ The table below captures the relevant information:

²⁰ <u>Id</u>. p. 2

²¹ Id. pp. 2, 6-7.

²² Appeal Communications Tab, Acknowledgment Letter, dated February 12, 2024.

²³ Decisions, Orders, Notices Tab, Notice Scheduling Hearing, dated March 11, 2024.

²⁴ Appeal Tab, Audio Recording of Scheduled Hearing, dated March 21, 2024.

²⁵ Appeal Communications Tab, HMS email to NAO, dated March 20, 2024 (HMS replied that the SERO Permit Office would be able to provide the permit history. See id.

²⁶ Appeal Communications Tab, SERO Permit Office email to NAO, dated March 21, 2024.

VESSEL NUMBER	VESSEL NAME	PERMIT HOLDER	EFF DATE	EXP DATE
			1/30/2024	9/30/2024
			3/27/2023	6/30/2024
			10/26/2021	6/30/2022
			11/2/2020	10/31/2021

On March 22, 2024, Appellant emailed to NAO several documents concerning his appeal and stated the additional following arguments in support of his appeal:

Two things seem clear but in direct contradiction:

- 1. Several documents suggest that the transfer or permits was competed in March of 2023
- 2. Other documents have been mailed to (my company which owned the permits before the transfer) suggesting that I am still the owner of the permits, and that certain actions are required of me; and that catch data that SHOULD BE credited to these permits is being denied or ignored

If it weren't for the latter I would ignore it as sloppy or delayed record keeping- but the fact that valuable catch history may be discarded or ignored is something I feel needs to be fixed.

. . .

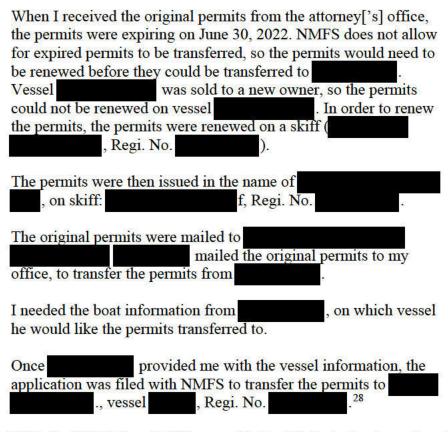
I have also attached an email exchange with from March of 2023 stating that the transfer had taken place.

I also confirmed yesterday that the new owners of the permits has the logbooks and has been reporting NO FISHING months since December of 2023[.]²⁷

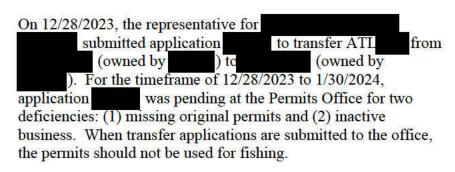
In addition, on March 22, 2024, sent an email to NAO on behalf of Appellant explaining the events surrounding the Permit transfer as follows:

The transfer of the permits from began in June 2022.

²⁷ Appeal Communications Tab, Appellant email to NAO, dated March 22, 2024.



On March 26, 2024, the SERO Permit Office provided to NAO electronic copies of the issued permits and explained why the transfer was delayed:

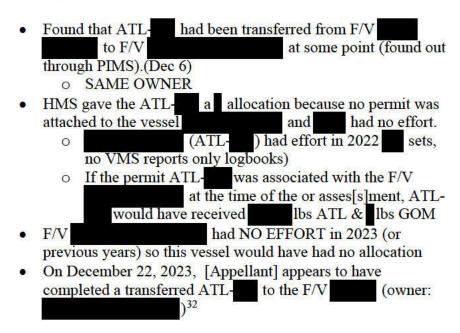


On or about 1/5/2024, the Permits office received the original permits to be transferred. The permits were digitized and uploaded to application. On or about 1/30/2024, the constituent provided sufficient documentation to verify the activity of the business. Permits were issued on 1/30/2024. While we were waiting on the original permits to be received at the Permits Office,

²⁸ Appeal Communications Tab, Vessel Documentation Service email to NAO, dated March 22, 2024.

the permit holder () should not have been using the permits to fish 29, 30

On April 8, 2024, HMS provided to NAO a timeline of HMS staff's communications with Appellant and justification for Vessel's 2024 IBO allocation determination. 31 HMS detailed the following events in November to December 2023:



In the same email, HMS concluded:

[Appellant] has not owned ATL-since Dec 2023. Amendment 13 states "Individual bluefin quota (IBQ) shares and allocations will be determined annually during the last quarter of each year, based on the number of pelagic longline sets that a vessel deployed during the recent 36 months of best available data", and the Federal Registers states "IBO allocations are required for vessels with Atlantic Tunas Longline category permits to fish with pelagic longline or green-stick gear."

 While F/V did have fishing effort in 2022 (sets) it did not have a permit associated with it in 2023 when the calculations were performed nor when the letters went out.

³² Id.

²⁹ Appeal Communications Tab, SERO Permit Office email to NAO, dated March 26, 2024. ³⁰ On April 23, 2024, the SERO Permit Office provided to NAO a digital application packet for the transfer of from corresponding cover letters that describe the application deficiencies and permit issuance. Appeal Communications Tab, SERO Permit Office email to NAO, dated April 23, 2024. ³¹ Appeal Communications Tab, HMS email to NAO, dated April 8, 2024.

 His mailing address was valid, letters went out Jan 2024 and we did not receive a bounce back.³³

Having carefully reviewed Appellant's written materials and testimony, as well as the information from HMS and the SERO Permit Office, I have determined there is sufficient evidence to adjudicate this appeal. Therefore, I close the record and render this decision.³⁴

ISSUES

At issue in this appeal is whether the vessel associated with Permit number ATL— is eligible for 2024 IBQ share and resultant allocation. However, before I may consider the merits of the case, I must first determine whether Appellant timely appealed the IAD and whether Appellant has standing to request an appeal of the IAD.

FINDINGS OF FACT

- On May 21, 2021, NMFS published a proposed rule to modify Atlantic Highly Migratory Species bluefin tuna management measures applicable to bluefin fisheries.³⁵
- 2. On October 3, 2022, NMFS published a final rule implementing the Regulation, which became effective on January 1, 2023.³⁶
- 3. The Regulation was codified at 50 C.F.R. § 635.15.³⁷
- 4. On December 21, 2023, HMS emailed its IAD, dated December 21, 2023, to Appellant's email address of record that was associated with Permit.³⁸
- On January 18, 2024, HMS physically mailed to Appellant the IAD, dated December 21, 2023.³⁹
- 6. Appellant's IAD indicates that F/V reported pelagic longline sets for the 36-month period from November 1, 2020 to October 31, 2023. 40
- 7. Appellant filed his appeal on February 11, 2024. 41

³³ Id.

³⁴ 15 C.F.R. § 906.12(a) (2024).

^{35 86} Fed. Reg. 27686 (May 21, 2021).

^{36 87} Fed. Reg. 59966 (Oct. 3, 2022).

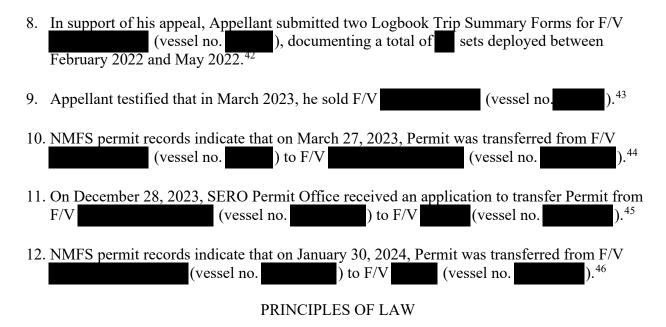
^{37 50} C.F.R. § 635.15 (2024).

³⁸ Appeal Communications Tab, HMS emails to NAO, dated March 8, 2024 and March 28, 2024.

³⁹ IAD Tab, IAD; Appeal Communications Tab, HMS email to NAO, dated March 8, 2024 (indicating that HMS mailed a hardcopy of its 2024 IBQ determination to Appellant on January 18, 2024).

⁴⁰ IAD Tab, IAD.

⁴¹ Appeal Tab, Appeal Letter, dated February 11, 2024.



"Any person who is the named recipient of an initial administrative determination" may file an appeal.⁴⁷ "In the petition, the person shall state how the initial administrative determination directly and adversely affects him or her, why he or she believes the initial administrative determination is inconsistent with the law and regulations governing the initial administrative determination, and whether he or she requests a hearing or prefers that an appellate officer make a decision based on the NAO case record and without a hearing."⁴⁸

"A petition must be filed within 45 days after the date the initial administrative determination is issued unless a shorter or longer filing timeframe is explicitly specified in the regulations governing the initial administrative determination." "Atlantic Tunas Longline Permit holders may appeal the IAD by submitting a written request for an appeal to the National Appeals Office within 45 days after the date the IAD is issued." 50

"When computing any time period specified under these rules, count every day, including intermediate Saturdays, Sundays, and legal holidays. If the date that ordinarily would be the last day for filing with NAO falls on a Saturday, Sunday, or Federal holiday, or a day NAO is closed, the filing period will include the first NAO workday after that date." ⁵¹

⁴² <u>Id</u>. pp. 6-7.

⁴³ Appeal Tab, Audio Recording of Scheduled Hearing, dated March 21, 2024.

⁴⁴ Appeal Communications Tab, SERO Permit Office email to NAO, dated March 26, 2024.

⁴⁵ <u>Id.</u>; Appeal Communications Tab, SERO Permit Office email to NAO, dated April 23, 2024, Application 6289<u>, p.</u> 5.

^{5. 46} Appeal Communications Tab, SERO Permit Office emails to NAO, dated March 26, 2024 and April 23, 2024, Application 6289, p. 9.

⁴⁷ 15 C.F.R. § 906.3(a) (2024).

⁴⁸ <u>Id</u>. § 906.3(b)(3).

⁴⁹ <u>Id</u>. § 906.3(e).

⁵⁰ 50 °C.F.R. § 635.15(e)(1) (2024).

⁵¹ 15 C.F.R. § 906.2 (2024).

The Regulation states that in the last quarter of each year, NMFS issues IADs to notify ATL category LAP holders "via electronic methods (such as an email) and/or letter" of their "IBQ shares, their IBQ allocations, and the regional designations of those shares and allocations for the subsequent fishing year." However, if an IBQ shareholder does not have a valid ATL category LAP associated with a vessel as of December 31 "due to a permit renewal or transfer, NMFS will issue IBQ allocation for the relevant fishing year if/when the permit renewal or transfer is completed and a valid LAP is associated with a vessel." ⁵³

The Regulation further provides that an ATL LAP 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." In order for an IBQ shareholder's vessel to be considered an "eligible vessel," it must have been issued a valid ATL permit when the pelagic longline sets occurred. 55

"In circumstances where a LAP is transferred from one vessel to another during the relevant 36 month period, the eligible vessel(s) is that which deployed the pelagic longline sets." NMFS permit records are "the sole basis for determining permit transfers, permit renewals, and the validity of permits;" no other proof of permit history will be considered as supporting documentation for appeals. 57

Regarding changes in permit application information, "a vessel owner or dealer must report any change in the information contained in an application for permit within 30 days after such change. The report must be submitted in a manner and/or to a location designated by NMFS." ⁵⁸

ANALYSIS

Did Appellant file a timely appeal of the IAD issued to him?

The Regulation provides that NMFS will inform ATL permit holders of their IBQ share and allocation during the last quarter of each year, "via electronic methods (such as an email) and/or letter." Pursuant to 15 C.F.R. § 906.3(e) and 50 C.F.R. § 635.15(e)(1), Appellant had 45 days after the date of the IAD to timely file his appeal.

HMS asserted that on December 21, 2023, it emailed Appellant's IAD to Appellant's email address of record that was associated with Permit. HMS acknowledged that the email address belongs to the semail address belongs to the semail address change to NMFS from the

⁵² 50 CFR § 635.15(e).

⁵³ Id

⁵⁴ <u>Id</u>. § 635.15(b)(1).

⁵⁵ <u>Id</u>.

⁵⁶ T.J

⁵⁷ <u>Id</u>. § 635.15(e)(1)(ii).

⁵⁸ <u>Id.</u> § 635.4(i).

⁵⁹ 50 C.F.R. § 635.15(e).

⁶⁰ Appeal Communications Tab, HMS emails to NAO, dated March 8, 2024 and March 28, 2024.

⁶¹ Appeal Communications Tab, HMS email to NAO, dated March 28, 2024.

information contained in his permit application.⁶² However, the record indicates that on October 18, 2023, HMS communicated IBQ allocation procedures to Appellant via his personal email address, which is not the email address to which HMS sent Appellant's IAD on December 21, 2023. Appellant maintains that he did not receive and HMS did not inform him of his IBQ share and allocation via email. Given that HMS sent IBQ allocation information to Appellant's personal email address, it was reasonable for Appellant to conclude that HMS would have sent an IAD to the same email address that HMS sent other related communications.

According to HMS, on January 18, 2024, HMS mailed hardcopies of IADs to permit holders.⁶³ While HMS issued the IAD on December 21, 2023, Appellant did not receive the IAD until after January 18, 2024, in the mail, which is just about one month after the date that appears on the IAD. Therefore, starting the 45-day period to file an appeal on December 21, 2023 is unreasonable.

Under these circumstances, I find the IAD physical mailing date of January 18, 2024, to be the appropriate date from which to calculate the 45-day filing period. Thus, Appellant had 45 days after January 18, 2024, to timely file his appeal, which was March 4, 2024. Appellant transmitted his petition to appeal via facsimile to NAO on February 11, 2024, 65 which is prior to March 4, 2024. Accordingly, Appellant timely filed his appeal.

Does Appellant have standing to appeal the IAD?

Pursuant to NAO Rules of Procedures, any person who is the named recipient of an IAD may file an appeal. HMS addressed its IAD, dated December 21, 2023, to Appellant's company,

LLC. However, Appellant testified that he is not the current permit holder and argued that he transferred Permit to in 2023. With respect to supporting documentation for appeals, the Regulation provides that NMFS permit records are the sole basis for determining permit transfers and the validity of permits. Agency records indicate that as of the date on the IAD, December 21, 2023, Appellant was the permit holder.

The Regulation states that, "As of December 31, if an IBQ shareholder does not have a valid Atlantic Tunas Longline category LAP associated with a vessel due to a permit renewal or transfer, NMFS will issue IBQ allocation for the relevant fishing year if/when the permit renewal or transfer is completed and a valid LAP is associated with a vessel." On December 28, 2023,

submitted an online permit transfer application to the SERO Permit Office on behalf of transferring ATL from , to was

⁶² Appeal Communications Tab, HMS email to NAO, dated May 9, 2024.

⁶³ Appeal Communications Tab, HMS email to NAO, dated March 8, 2024.

^{64 15} C.F.R. § 906.3(e) (2024).

⁶⁵ Appeal Tab, Appeal Letter, received February 11, 2024.

^{66 15} C.F.R. § 906.3(a) (2024).

^{67 50} C.F.R. § 635.15(e)(1)(ii) (2024).

⁶⁸ While the IAD is dated December 21, 2023, Appellant did not receive the IAD until after January 18, 2024. <u>See</u> Appeal Communications Tab, HMS emails to NAO, dated March 8, 2024 and March 28, 2024.

^{69 50} CFR 635.15(e) (2024).

⁷⁰ Appeal Communications Tab, SERO Permit Office email to NAO, dated April 23, 2024, Application 4.

approved.⁷¹ The IAD, dated December 21, 2023, is the only operative IAD associated with Permit.

The NAO Rules of Procedures provide that in a petition for appeal, the appellant must state how the IAD "directly and adversely affects" them. ⁷² On January 30, 2024, prior to Appellant filing his petition to appeal on February 11, 2024, Permit was transferred to the new owner, . ⁷³ In his appeal, Appellant states that the IAD "adversely affects his operations for the 2024 permit year by denying [him] a share of the IBQ." However, at the time of filing the appeal, Appellant was no longer an ATL category LAP holder. Further, at the hearing, Appellant testified that he appealed the IAD on behalf of the current permit holder; however, it is reasonable to conclude that Appellant's appeal on behalf of the current permit holder is significantly attenuated from Appellant's interests. Therefore, I find that the IAD does not directly and adversely affect Appellant.

Thus, I find that Appellant does not have standing to appeal the instant IAD and the appeal is moot. However, even if Appellant did have standing to appeal the IAD, his appeal fails on the merits.

For an IBQ shareholder's vessel to be considered an "eligible vessel," the Regulation provides that the vessel must have been issued a valid Atlantic Tunas Longline category LAP when set(s) occurred during the relevant 36-month period. Additionally, under 50 C.F.R. § 635.15(b), eligibility for IBQ share requires that a vessel must have fished at least one set during a recent 36-month period using pelagic longline gear. The Regulation also accounts for "circumstances where a LAP is transferred from one vessel to another during the relevant 36 month period," providing that "the eligible vessel(s) is that which deployed the pelagic longline sets."

While F/V (vessel no.) had a valid ATL category LAP, effective March 27, 2023, Appellant did not claim and the record does not establish that this vessel deployed any pelagic longline sets prior to October 31, 2023—the end of the relevant qualifying 36-month period. Appellant provided evidence, and HMS confirmed, that the previous vessel associated with Permit, F/V (vessel no.), deployed a total of pelagic longline sets in 2022; however, Appellant sold that vessel in March 2023. Appellant does not have standing to file an appeal for 2024 IBQ share on account of pelagic longline sets deployed from a vessel that he sold because Appellant no longer has an interest in that vessel.

Appellant did not provide any evidence to support the proposition that permit holders are eligible for IBQ allocation based solely on the utilization of the ATL category LAP irrespective of which vessel engaged in the fishing activity. If Appellant had standing to appeal the IAD, he would not have met his burden of proving by a preponderance of the evidence that NMFS incorrectly

⁷¹ Appeal Communications Tab, SERO Permit Office emails to NAO, dated March 26, 2024 (Federal Fisheries Permit effective January 30, 2024) and April 23, 2024, Application 6289, pp. 9-10.

⁷² 15 C.F.R. § 906.3(b)(3).

⁷³ Appeal Communications Tab, SERO Permit Office email to NAO, dated March 26, 2024.

⁷⁴ 50 C.F.R. § 635.15(b)(1) (2024).

⁷⁵ <u>Id</u>.

applied the Regulation in determining F/V eligibility for 2024 IBQ share and resultant allocation.

Since F/V did not deploy any pelagic longline sets during the qualifying period it is not an "eligible vessel" for 2024 IBQ share and resultant allocation. Furthermore, when Appellant transferred Permit to transfer to F/V ., effective January 30, 2024, there was no IBQ share associated with Permit to transfer to F/V .

CONCLUSIONS OF LAW

Appellant's appeal is rendered moot and therefore, dismissed.

ORDER

The IAD dated December 21, 2023, is **UPHELD**. Appellant may submit a Motion for Reconsideration.⁷⁷ Any Motion for Reconsideration must be filed with NAO no later than May 25, 2024. 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.⁷⁸

Sofia Rizvi Administrative Judge

Date Issued: May 15, 2024

⁷⁶ <u>See</u> 50 C.F.R. § 635.15(i) (Stating that when a vessel owner that has an annual IBQ share transfers their ATL category LAP to another person, the IBQ share transfers with the permit to the new vessel and remains associated with that permit for the remainder of that fishing year.).

⁷⁷ 15 C.F.R. § 906.16.

⁷⁸ Id. § 906.16(b).