DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 021212307–3037–02; I.D. 110602C]

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands; Final 2003 Harvest Specifications for Groundfish; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; Correction.

SUMMARY: This document corrects a typographical error in the docket number of the final rule published in the **Federal Register** on March 3, 2003. This rule implements the final specifications for the groundfish fishery of the Bering Sea and Aleutian Islands management area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 25, 2003, through 2400 hrs, A.l.t., December 31, 2003.

FOR FURTHER INFORMATION CONTACT: Regina L. Spallone, 301–713–2341.

SUPPLEMENTARY INFORMATION:

Need for Correction

An incorrect docket number (No.) was published under the Docket No. heading of the final rule, FR Doc. 03–4815, on March 3, 2003 (68 FR 9907). It is corrected as follows:

On page 9907, column 2, line 5 from the top of the document, the text, ''Docket No. 021212307–3037–3037–02;'' is corrected to read ''Docket No. 021212307–3037–02''.

Dated: March 21, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 03–7366 Filed 3–26–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No.010918229–3033–02;I. D.022301A]

RIN 0648–AP15

American Lobster Fishery

AGENCY: National Marine Fisheries Service (NOAA Fisheries), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NOAA Fisheries amends regulations to modify the management measures applicable to the American lobster fishery. This action responds to the following recommendations made by the Atlantic States Marine Fisheries Commission (Commission):To control fishing effort as determined by historical participation in the American lobster trap fisheries conducted in the offshore Lobster Conservation Management Area (LCMA) 3 (Area 3) and in the nearshore LCMAs of the Exclusive Economic Zone (EEZ) from New York through North Carolina (Areas 4 and 5); to implement a mechanism for conservation equivalency and associated trap limits for owners of vessels in possession of a Federal lobster permit (permit holders) fishing in New Hampshire state waters; and to clarify lobster management area boundaries in Massachusetts waters. NOAA Fisheries includes in this final rule a mechanism for Federal consideration of future Commission requests to implement conservation equivalent measures and a technical amendment to the regulations clarifying that Federal lobster permit holders must attach federally approved lobster trap tags to all lobster traps fished in any portion of any management area (whether in state or Federal waters). This requirement is not new, but was not previously clearly specified in the regulatory text, and this announcement is intended to make the regulations easier to understand.

DATES: This rule is effective April 28, 2003.

ADDRESSES: Copies of a Final Supplemental Environmental Impact Statement/Regulatory Impact Review/ Final Regulatory Flexibility Analysis (FSEIS/RIR/FRFA) can be obtained from Harold Mears, Director, State, Federal and Constituent Programs Office, NOAA Fisheries, One Blackburn Drive, Gloucester, MA 01930. Comments regarding the collection-of-information requirements should be sent to Harold Mears at the above address, and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (ATTN:NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: Robert Ross, NOAA Fisheries, Northeast Region, 978–281–9234.

SUPPLEMENTARY INFORMATION:

Statutory Authority

These final regulations modify Federal lobster conservation management measures in the EEZ under the authority of section 803(b) of the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act), 16 U.S.C. 5101 *et seq.*, which states that, in the absence of an approved and implemented Fishery Management Plan under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U. S. C. 1801 *et seq.*) and after consultation with the appropriate Fishery Management Council(s), the Secretary of Commerce may implement regulations to govern fishing in the EEZ, i.e., from 3 to 200 nautical miles (nm) offshore. These regulations must be (1) compatible with the effective implementation of an Interstate Fishery Management Plan (ISFMP) developed by the Commission and (2) consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act.

Purpose and Need for Management

American lobster experience very high fishing mortality rates throughout their range, from Canada to Cape Hatteras. In 2000, the Commission issued a peer reviewed American lobster stock assessment report that concluded that the resource is overfished. The review concluded that fishing rates are unacceptably high and that a precautionary approach in management of the resource is warranted to sustain future viability of the lobster fishery. The report recommended that reductions in fishing mortality could be achieved through reductions in fishing effort. The 2001 Annual State and Federal Trawl Survey Update to the 2000 lobster stock assessment indicated that resource conditions have not improved since the stock assessment in 2000. For pre-recruit lobsters, which are those lobsters within one-half inch (1.2 cm) of the current Federal legal minimum carapace size of 3–1/4 inches (8.26 cm), the mean number per tow generally declined throughout all stock areas for both sexes. Although harvest and population abundance are near record levels due to high recent

recruitment and favorable environmental conditions, revenue from the 2001 lobster harvest decreased 21.1 percent as compared to 1999. Concerns over the condition of the resource continued into 2003, with reports of a dramatic decline in abundance in Area 2 surrounding Block Island Sound and the state waters of Rhode Island in 2002. A significant decline would have serious implications for the American lobster fishery, which is the most valuable fishery in the northeastern United States. In 2001, approximately 74 million pounds (33,439 metric tons (mt)) of American lobster were landed with an ex-vessel value of approximately 255 million dollars. Additional background information on the status of the stocks was presented in the FSEIS/RIR/FRFA prepared by NOAA Fisheries for this final rule and is not repeated here (see **ADDRESSES**).

The Commission ISFMP Recommendations for Effort Control in Areas 3, 4, and 5

The Commission approved Addendum I on August 3, 1999. The Addendum is principally an effort control measure that determines trap limits based upon historical participation (as opposed to fixed trap limits) in Lobster Management Area 3 (offshore EEZ), and Areas 4 and 5 (inshore EEZ areas south of New York).

Based upon its approval of selected management measures proposed by the Area 3, 4, and 5 LCMTs, the Commission recommended to NOAA Fisheries that access to, and levels of effort in, the lobster trap fishery in EEZ Offshore Area 3 and Nearshore EEZ waters of Areas 4 and 5 be based on historical participation. The Commission recommendations for qualification based on historical participation addressed qualification criteria, allocation of fishing effort, and limitations on vessel upgrades. Qualification criteria are different among the areas and include demonstration of active involvement in the fishery during a specified qualification period through provision of certain documents. The Commission plan for Area 3 proposes that potential participants must meet or exceed both a landing and a fishery intensity threshold in order to qualify and specifically defines that threshold. The Commission plans for Areas 4 and 5 however, although similar, only generally prescribe that qualification and trap limits be based on ''historical levels'' without providing further definition.

The Commission ISFMP Recommendations for New Hampshire Conservation Equivalency

In October 1998, the Commission approved a proposal from the State of New Hampshire for conservation equivalent lobster trap limits that vary from the 800 lobster trap limit in Area 1 (see subsequent text for details on the state program). In keeping with ISFMP procedures, this conservation equivalent proposal was submitted by the State of New Hampshire to the Board with supporting documentation to support the state's contention that the state lobster fishing effort control program would, in fact, be equivalent to the fixed trap limits for LCMA 1. The state proposal and supporting documentation was submitted to the Commission's Lobster Technical Committee (''TC''), composed of lobster scientists from several states and NOAA Fisheries, and following a review of the conservation equivalency proposal and supporting documentation, the TC concurred with the State of New Hampshire that the state's program would be equivalent to the LCMA 1 fixed trap limit of 800 traps. Following the TC review, and the Commission approval, the Commission recommended that NOAA Fisheries implement compatible measures for impacted Federal lobster permit holders.

The State of New Hampshire's lobster management program provides for a two-tier lobster license system:State fishermen who provide documentation of landing more than 12,000 lb (5,443 kg) of lobster in at least 2 years, from 1994 to 1998, receive a full commercial lobster license issued by the State of New Hampshire; those who cannot provide this documentation are issued a limited commercial lobster license. Those fishermen who qualify for a full license may fish up to 1,200 lobster traps in state waters, and those in the limited category may fish a maximum of 600 lobster traps in state waters. Following approval of the New Hampshire proposal under the ISFMP, the Commission recommended that NOAA Fisheries modify Federal regulations to maintain the biological and socio-economic basis of New Hampshire's lobster management program. The Commission requested that NOAA Fisheries modify Federal regulations to allow Federal permit holders who elect to fish in Area 1 and also possess a New Hampshire full commercial lobster license to fish 400 lobster traps in New Hampshire state waters in addition to the 800 lobster traps they may fish in state and Federal waters of Area 1 under current Federal regulations. However, these fishermen would not be allowed to fish more than 800 lobster traps in the Federal waters of Area 1.

The Commission ISFMP Recommendations for Revisions to Area Boundaries

In Addendum I to Amendment 3 of the American Lobster ISFMP, the Commission revised the boundary lines for three of the LCMAs adjacent to Massachusetts, including Area 1, Area 2, and the Outer Cape Area, to bring the area boundaries more in line with traditional fishing practices in those areas and to correct an oversight in the specification of an Area 1 boundary line in Amendment 3 to the ISFMP. Following approval of Addendum I, the Commission recommended that NOAA Fisheries modify Federal regulations to maintain compatible boundary lines in Federal regulations. A copy of charts showing the affected American lobster EEZ management areas is available from NOAA Fisheries (see **ADDRESSES**).

Discussion of the selected management actions includes reference to other recommendations made by the Commission, but not extensively analyzed for this action. These include upgrade limitations for vessels participating in the LCMA 3 trap fishery, an increase in the minimum gauge size in Federal waters, and ''closed areas'' which would prohibit harvest of lobsters taken by trap gear in selected portions of LCMA 4. See subheading ''Commission recommendations considered but rejected'' in this Summary Information section of this final rule for additional information on recommendations considered but rejected. The selected management actions also include a discussion of concerns raised by NOAA Fisheries in two areas relative to the ability of Federal permit holders to compile and provide documentation which will be required to certify historical participation on the basis of the qualification criteria, and the ability of NOAA Fisheries to accommodate recommendations from the Commission for Federal rulemaking responding to conservation-equivalent management measures specific to state jurisdictional waters. See subheading ''Historic participation implementation analysis'' in this Summary Information section of this final rule for additional discussion of documentation requirements for measures specified in this final rule.

Federal Rulemaking for Compatible Measures to the ISFMP

The current Federal lobster management program implemented

with regulations in the Final Rule on December 6, 1999 (64 FR 68228), uses a fishing effort limitation strategy, among other measures, to control lobster fishing mortality. Fishing effort is currently limited by restricting the access of new vessels to the fishery and by limiting the number and size of traps that may be fished by each vessel. The Commission's Addendum I recommendations to NOAA Fisheries were the first attempt in the lobster ISFMP to begin controlling effort through trap limits based on historic participation. To support the Commission, and as a result of the Commission's recommending compatible measures in Federal waters, NOAA Fisheries published an Advance Notice of Proposed Rulemaking (ANPR) in the **Federal Register** on September 1, 1999 (64 FR 47756), to seek public comment on whether there is a need under the Atlantic Coastal Act to restrict access of Federal permit holders in the lobster EEZ fishery on the basis of historical participation. The ANPR also notified the public that NOAA Fisheries established September 1, 1999, the publication date of the ANPR, as a potential control date, or cut-off date, to be used to determine eligibility for future access to lobster management areas, and to discourage shifts into new areas by lobster trap vessels subject to Federal lobster regulations.

NOAA Fisheries subsequently published a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) in the **Federal Register** on December 10, 1999 (64 FR 69227). NOAA Fisheries later published a notice of availability for a Draft Supplemental Environmental Impact Statement (DSEIS) on November 24, 2000 (65 FR 70567). The DSEIS responded to recommendations made by the Commission, and considered the biological, economic, and social impacts of several alternative actions for waters under Federal jurisdiction. The preferred alternatives in the DSEIS included:implementation of a historical participation management regime to control lobster fishing effort and preserve the socio-economic character of the associated lobster fisheries in Lobster Management Areas 3, 4 and 5; modification of trap limit restrictions for Federal Lobster permit holders who also hold a New Hampshire state lobster license, to be consistent with New Hampshire regulations, which were determined by the Commission to be conservation equivalent to the ISFMP; and modifications to the coordinates of lobster management areas in Massachusetts state waters, for clarity, and to be consistent with past fishing practices. In November and December 2000, NOAA Fisheries held public meetings in Maine, Rhode Island, New York, and New Jersey, to receive comments on the biological, economic and social impacts addressed in the DSEIS. A total of 153 individuals attended the public meetings, which were held in November and December 2000, and 225 written comments were received by January 9, 2001, the closing date for public comment on the DSEIS.

NOAA Fisheries published its Proposed Rule in the **Federal Register** on January 3, 2002 (67 FR 282). The Proposed Rule addressed management measures identified in the DSEIS, and included a technical amendment to the regulations to clarify that Federal lobster permit holders must attach federally approved lobster trap tags to all lobster traps fished in any portion of any management area (whether in state or Federal waters). NOAA Fisheries received 190 comments on the American lobster proposed rule during the comment period which ran from January 3–February 28, 2002. The comment period on the proposed rule was extended from February 19, 2002, to February 28, 2002, to ensure all interested parties adequate time for review of the document, and, in part, to allow the Commission opportunity to discuss during the Commission American Lobster Board Meeting held February 20, 2002, in Washington, D. C. All of the public comments were carefully considered and a summary of comments and NOAA Fisheries responses are provided later in this document. On November 8, 2002, NOAA Fisheriespublished a notice of availability for a Final Supplemental Environmental Impact Statement (67 FR 68128). The deadline for acceptance of public comment in response to the biological, economic, and social impacts addressed in the FSEIS was December 9, 2002. NOAA Fisheries received 82 comments on the FSEIS.

Alternatives Evaluated

The DSEIS and FSEIS presented several alternatives for each of the major measures addressed by this regulatory action, within the parameters of the Atlantic Coastal Act and Magnuson-Stevens Act requirements. Four of these (Alternatives 1A - 1D) address alternatives relating to implementation of historical participation as a means to control lobster fishing effort in LCMAs 3, 4, and 5. The preamble and classification section of this final rule summarize the impacts and the cost effectiveness of the selected management actions on small entities and the economy. The FSEIS for this action thoroughly discusses and evaluates the effectiveness of each of the four historic participation alternatives to achieve the ISFMP and Atlantic Coastal Act objectives (see **ADDRESSES**).

Effort Control Alternatives in Areas 3, 4, and 5

Final Measures Selected

NOAA Fisheries will implement measures aligned with alternatives identified in theFSEIS for this action. Note that most measures will apply to Federal permit holders who fish only in specific management areas. The following is a summary of the major actions, each action will be discussed in further detail later in this document.

1. NOAA Fisheries will implement measures to control fishing effort as determined by historical participation in the American lobster trap fisheries conducted in the offshore Area 3 and in the nearshore Areas 4 and 5, but will also establish a maximum trap limit of 1,440 traps for vessels qualifying to fish with traps in LCMA 4 and 5 as outlined in the DSEIS selected Alternative 1D. Although not recommended by the Commission, NOAA Fisheries will implement the trap limit to preclude excessive trap fishing effort to the lobster resource and comment received during this rulemaking. NOAA Fisheries believes the removal of existing trap limits in Areas 4 and 5 (800 lobster traps per vessel under current Federal regulations), without implementation of an alternative trap limit, would likely result in excessive lobster fishing mortality. Implementation of a maximum trap limit in Areas 4 and 5 of 1,440 lobster traps per vessel, in combination with the proposed qualification criteria for participation in the Areas 4 and 5 trap fishery, may preclude excessive trap fishing effort and corresponding levels of lobster fishing mortality. A maximum trap limit in Areas 4 and 5 may also alleviate marine mammal and endangered species interactions with lobster trap gear.

There were three other significant alternative solutions considered for this action in addition to the selected alternative 1D. With non-selected alternative 1A, there would be a maximum trap limit and a sliding scale trap reduction schedule associated with each vessel qualifying to fish with traps in LCMA 3, but this non-selected alternative would not establish a maximum trap limit of 1,440 traps for vessels qualifying to fish with traps in LCMA 4 and 5. Under the No Action non-selected alternative 1B, American

lobster would continue to be managed in Federal waters under the current fixed trap limit provisions of existing regulations of the Atlantic Coastal Act (50 CFR part 697). Under existing regulations (50 CFR 697.4(a)(7)), qualified vessels may elect to fish with traps in any or all LCMAs, and trap allocations are based on this election. If a permit holder elects to fish in any Nearshore LCMA, or any Nearshore LCMA and LCMA 3, the vessel is restricted to a maximum of 800 traps. If a vessel elects to fish only in LCMA 3, or in LCMA 3 and the LCMA 2/3 overlap, the vessel is restricted to a maximum of 1,800 traps. Non-selected alternative 1C, similar in part to the DSEIS alternatives 1A, and 1D, would also require evidence of a history ofactive trap fishing for each elected area (LCMA 3, 4, and/or 5) during the same qualification period, and also includes the Area 3 requirement to demonstrate that at least 25,000 lb (11,340 kg) of lobster were harvested throughout the range of the resource during the qualifying year, however under non-selected alternative 1C, there would be fixedtrap limits of 800 and 1800, the same as those described in the no-action/status quo non-selected alternative 1B.

2. NOAA Fisheries will implement a mechanism for conservation equivalency and associated trap limits for owners of vessels in possession of a Federal lobster permit (permit holders) fishing in New Hampshire State waters. This regulatory action will modify Federal regulations to allow Federal permit holders who elect to fish in Area 1 and also possess a New Hampshire full commercial lobster license to fish 400 additional lobster traps in New Hampshire state waters in addition to the 800 lobster traps they may fish in state and Federal waters of Area 1 under current Federal regulations. However, these fishermen would not be allowed to fish more than 800 lobster traps in the Federal waters of Area 1.

Two alternatives to address LCMA 1 trap limits for Federal lobster permit holders fishing in New Hampshire waters were presented for this action in the SEIS. Under the Atlantic Coastal Act, The selected DSEIS alternative 2A, implement measures to allow Federal permit holders who fish for lobster in LCMA1 and who also possess a New Hampshire full commercial lobster fishing license to fish a maximum of 400 additional traps only in the state waters of New Hampshire as specified in New Hampshire state regulations to complement the ISFMP; or continue the no action/status quo non-selected DSEIS alternative 2B that, under current Federal regulations, restrict Federal permit holders who elect to fish in LCMA 1, or any other Nearshore LCMA and LCMA 3, to a maximum of 800 traps, regardless of whether they fish in state or Federal waters. The selected DSEIS alternative 2A, will allow Federal permit holders who fish for lobster in LCMA1 and who also possess a New Hampshire full commercial lobster fishing license to fish a maximum of 400 additional traps only in the state waters of New Hampshire as specified in New Hampshire state regulations.

3. NOAA Fisheries will clarify lobster management area boundaries in Massachusetts waters. With this action, NOAA Fisheries will implement compatible boundary lines for Area 1, Area 2, and the Outer Cape Area that are compatible to the Commission's American lobster ISFMP.

Due to the unique nature of the alternatives relating to the regulatory actions to address LCMA boundary clarifications, only two alternatives were presented for this action in the SEIS:Implement measures to complement the ISFMP, the selected DSEIS alternative 3A and revise the boundary lines for three of the LCMAs adjacent to Massachusetts, including Area 1, Area 2, and the Outer Cape Area,; or continue the no action/status quo alternative, the non-selected DSEIS alternative 3B and maintain the existing Federal boundary lines for all LCMAs including the three LCMAs adjacent to Massachusetts:LCMA 1, LCMA 2, and the Outer Cape LCMA. NOAA Fisheries selected the DSEIS alternative 3A in keeping with the intention of the Atlantic Coastal Act to implement complementary regulations to maintain consistency with the Commission's American lobster ISFMP and to avoid confusion if the Federal and Commission area boundaries and their associated lobster management measures differ.

4. NOAA Fisheries includes a technical amendment to the regulations clarifying that Federal lobster permit holders must attach federally approved lobster trap tags to all lobster traps fished in any portion of any management area (whether in state or Federal waters). This requirement is not new, but was not previously clearly specified in the regulatory text, and this technical amendment is intended to make the regulations easier to understand.

Area 3, 4, and 5 Fishing Effort Control Program

The Lobster Management Areas are defined at 50 CFR 697.18. A copy of a map showing the American lobster EEZ management areas is available upon request from the Director of the State, Federal and Constituent Programs Office (see **ADDRESSES**).

Area 3—Qualification Criteria

In order to qualify to fish for lobster with traps in Area 3, Federal lobster permit holders will need to meet or exceed both a landing and fishery intensity threshold. With this action, NOAA Fisheries will limit the number of traps fished in Area 3 based on proof of historical participation in the Area 3 fishery and the number of traps fished by a vessel during a qualifying period from March 25, 1991, through September 1, 1999. Qualification criteria for Area 3 are specified in § 697.4(a)(7)(vi) of this rule. Extensive discussion regarding selection of the Area 3 qualification criteria, qualification period, and the landing and fishery intensity threshold, was presented in the FSEIS prepared by NOAA Fisheries for this rule and is not repeated here (see **ADDRESSES**).

Area 3—Trap Allocation Criteria

A maximum allocation of 2,656 lobster traps with the associated sliding scale reductions over a 4–year period was recommended by the Commission to NOAA Fisheries as a result of Addendum II to Amendment 3 of the ISFMP. The selection of 2,656 traps and the corresponding matrix of trap allocations as identified in Table 1 specified in § 697.19(b)(2) of this final rule were developed by the Area 3 LCMT. Discussion of the matrix of initial maximum trap allocations was provided in the FSEIS/RIR/FRFA prepared by NOAA Fisheries for this final rule and is not repeated here (see **ADDRESSES**).

Areas 4/5 Fishing Effort Control Program with a Maximum Trap Limit

In order to qualify to fish for lobster with traps in Area 4 or Area 5, Federal lobster permit holders will need to meet or exceed a fishery participation threshold. NOAA Fisheries will limit the number of traps fished in Area 4 and/or Area 5 based on proof of historical participation in the Area 4 and Area 5 fishery and the numbers of traps fished by a vessel during a qualifying period from March 25, 1991, through September 1, 1999. This particular threshold for Area 4 and 5 is identical to the Area 3 qualification threshold specified in § 697.4(a)(7)(vi) of this final rule.

Although establishment of criteria based on a specific minimum number of traps fished by a vessel during the qualifying period was not specifically

recommended by the Commission, the criteria certainly fall within the general recommendation that individuals must prove historical participation. In leaving the details to the Federal Government, the Commission gave NOAA Fisheries the ability to achieve some standardization in its management regime, not only an important practical consideration, but also a relevant consideration under the National Standards, particularly National Standards 3 and 8. Note that this same deliberative process resulted in NOAA Fisheries failing to include a landing requirement in Area 4 or Area 5 as it did in Area 3. NOAA Fisheries received commentary that 25,000 lb (11,340 kg) landed might not, in all circumstances, be a reasonable indicator of historical participation, particularly the further south one fished in the area. Accordingly, NOAA Fisheries did not use that criterion in this area.

Commission recommendations for the Areas 4 and 5 fisheries, unlike those for the Area 3 fishery, do not contain either trap limits or trap reduction schedules. Although not recommended by the Commission, NOAA Fisheries is imposing a trap limit not to exceed 1,440 lobster traps per vessel to preclude excessive trap fishing effort on the lobster resource, and in response to public comment on this action.

Area 3, 4 and/or 5—Qualification and Trap Allotment Process

After an analysis of landings, vessel trip report records, and permit histories, NOAA Fisheries may notify permit holders by letter of information NOAA Fisheries has regarding one or more of the historic participation criteria specified in this final rule. That is, if NOAA Fisheries has its own clear and convincing documentation relating to an element of a vessel's historical participation, the agency may in its discretion relieve the potential applicant of the need to document that element in its initial notice. However, NOAA Fisheries will not automatically issue any pre-qualification permits; any person or entity wishing to receive a historical participation allocation to fish with traps in Areas 3, 4, and/or 5, must submit a signed application and furnish the appropriate documentation necessary to demonstrate eligibility. Potential qualifiers must provide credible documentation as proof of each of the qualifying elements. At the same time, the potential qualifiers must also credibly document the number of traps fished at any one time in Areas 3, 4, and/or 5 during the qualifying year. The documentation and eligibility criteria for Areas 3, 4, and 5 are specified in § 697.4(a)(7)(vi through viii) of this final rule. Discussion concerning selection of appropriate documentation and eligibility criteria was provided in the FSEIS/RIR/FRFA prepared by NOAA Fisheries for this final rule and is not repeated here (see **ADDRESSES**).

NOAA Fisheries anticipates that the submitted documentation will vary in form, content and legibility. However, this documentation must be dated, created on or about the date of the activity described in the document, and must be clearly attributable to the qualifying vessel. A clear relationship may include a vessel name, state or Federal permit number, Coast Guard documentation number, or the name of the owner of the vessel at the time being used as the qualification period. NOAA Fisheries will require that each potential qualifier explain his or her proof in a cover letter to be included along with the submitted documents. Illegible documents will not be considered by NOAA Fisheries. Further, submission of falsified information would subject the applicant both to general sanction, including revocation of his or her federal lobster permit as well as to prosecution under the applicable law.

Area 3/4/5—Qualifying for More Than One Lobster Management Area

Any Federal lobster permit holder applying for access to more than one of the 3 areas (Areas 3, 4, or 5) must use the same qualifying year for all areas in order to avoid a combined allocation greater than the number of traps that the permit holder ever fished with any one vessel at any one time during any one year. In addition, the current requirement that Federal permit holders who elect to fish in multiple areas must abide at all times by the most restrictive regulations, including trap allocations, in any one elected area regardless of the area being fished, will remain in effect. The Commission Lobster Management Board, in consultation with the states and LCMTs, is evaluating alternative options to the most restrictive regulations concerning trap allocations for vessels fishing in multiple Areas. However, no recommendation has been made at this time, and there is no clear consensus on a preferable alternative to the current measures in place. NOAA Fisheries may evaluate this issue further in future rulemaking at such time as the Commission reaches a consensus and provides a recommendation to NOAA Fisheries concerning a waiver of the most restrictive trap allocation.

Areas 3, 4, and/or 5 Appeals.

If NOAA Fisheries denies an Area(s) 3, 4, and/or 5 permit after the potential qualifier undergoes the application process specified in this final rule, that person may appeal the denial to the NOAA Fisheries Regional Administrator. There will only be two grounds for appeal. The first is that NOAA Fisheries erred in concluding that the vessel did not meet the stated criteria for the Area in question. This basis for appeal would provide a mechanism for correcting an improper finding based upon NOAA Fisheries clerical error. The second basis of appeal is that of documentary hardship. In order to appeal on this basis, the appellant must have first applied in the manner set forth in the application for historic participation specified in this final rule and been denied by the NOAA Fisheries Regional Administrator because of an inability to document the qualifying criteria.

An appeal based on documentary hardship must establish two elements:(1) The appellant must document the nature of the hardship; and (2) the appellant must establish the necessary qualification and trap allocation elements by affidavit.

First, as to documenting the nature of the hardship, it is not enough to simply indicate that the applicant no longer possesses the necessary records. The hardship must have been caused by factors beyond the applicant's control. Such a hardship would need to be corroborated by independent documents, such as by insurance claims forms or police and fire reports. Failure to create the document in the first instance, or simple loss of the document, or the intentional destruction or discarding of the document in the past by the appellant would not constitute grounds for a hardship under this action.

Second, after claiming and documenting hardship beyond his or her control, the appellant would then need to submit to NOAA Fisheries affidavits from current Federal permit holders so that three affidavits corroborate each of the qualification criteria specified for Area 3 in § 697.4(a)(7)(vi), for Area 4 in § 697.4(a)(7)(vii), and/or for Area 5 as indicated in § 697.4(a)(7)(viii). The Federal permit holder need not necessarily be a lobster permit holder, although he or she may be. Each affidavit must clearly specify in separate and specific paragraphs:(1) The name, address,Federal permit number and vessel of the person signing the affidavit; (2)that the person signing the affidavit can attest to by personal first-handknowledge that the qualifying vessel set, allowed to soak, hauled back and re-set at least 200 lobster traps

during the 2–month period in the qualifying year in the area being selected by the applicant, identifying those months and that year and further identifying the nature of that knowledge; (3)for Area 3 only, that the person signing the affidavit can attest to by personal first-hand knowledge that the qualifying vessel landed at least 25,000 pounds oflobster during the qualifying year, identifying that year and further identifying the nature of that knowledge; (4) that the person signing the affidavit can attest by personal first-hand knowledge to the total number of traps that the applicant claims his or her vessel fished in the area in question during the qualifying year and further identifying the nature of that knowledge; (5) that the person signing the affidavit also fished in the area being claimed by the applicant during the months in the qualifying year chosen by the applicant; and (6) be signed under the penaltiesof perjury. Further, at least one affidavit must also corroborate the basis for the hardship claimed by the appellant, for example, by a representative of the insurance agency, police, or fire department if the hardship was the result of a flood or fire. The person signing this last affidavit need not be Federalpermit holder, although he or she may be if the individual has personal knowledge of the hardship claimed by the applicant. Hence the potential for four (4) affidavits:if none of the three Federal permit holders can also document the hardship, then the appellant could submit a fourth affidavit from a non-permit holder to do so. Additional affidavits beyond that outlined herein are not necessary and will grant the appellant no advantage. In other words, if three (or four, depending on the circumstances) affidavits establish the required elements, then additional affidavits are superfluous and will be given no extra weight. All affidavits must be signed under the penalties of perjury. As with submissions under the initial qualification process, any person submitting false information, including the permit holders submitting the supporting affidavits, will be subject to general sanction, including revocation of his or her Federal permit and further prosecution under applicable law, including the Magnuson-Stevens Act and the Atlantic Coastal Act.

Historic Participation Implementation Analysis

The stated qualification process for Areas 3, 4, and/or 5 specified by measures in this final rule was the product of considerable deliberation. NOAA Fisheries' challenge was to create a limited access rule in Areas 3, 4, and 5 within the parameters of the Commission's Addendum I historical participation model and consistent with the legal requirements set forth in the Atlantic Coastal Act and other laws. Simply put, NOAA Fisheries' charge was to design a practical process that was flexible enough to qualify permit holders who met the relevant criteria and yet strict enough to keep out those who did not.

Any potential qualification process in the lobster fishery would be complicated by the lack of documentary uniformity in the industry. NOAA Fisheries, in the DSEIS stage of this rulemaking process, noted with concern the lack of uniform mandatory reporting in the industry. The proposed qualification scheme is similar but slightly more rigid in its initial review than that which was identified in the DSEIS for this action. Specifically, the proposed scheme requires specific document types as proof, whereas the DSEIS left the proof open-ended by merely stating that certain types of documents ''may be'' used and leaving it up to the ''discretion'' of the applicant to choose the most appropriate type. NOAA Fisheries made this change because it believed that the less specific DSEIS language provided insufficient guidance and definition to both the applicant and the NOAA Fisheries' reviewer.

NOAA Fisheries did, however, consider that some potential qualifiers may be denied access in this more rigid process because they, through no fault of their own, no longer had the documents specifically required under the proposed scheme. To ameliorate the harshness of such an eventuality, NOAA Fisheries considered an appeal on the basis of documentary hardship. The documentary hardship appeal attempts to soften for some the rigidity of the proposed action's strict documentation scheme, while still maintaining standards that would prevent trap fishing access to those who have not historically fished in Areas 3, 4, and/or 5. An appeal based upon documentary hardship for reasons beyond the applicant's control adds flexibility to the process without undermining the rule's effectiveness. The appellate parameters may have harsh impacts for some—e.g., for applicants lacking documents due to inadvertence, carelessness or excusable neglect—but inclusion of individuals who would qualify but for reasons beyond their control appears to be a just, logical, and reasonable place to draw such a line. On balance, NOAA Fisheries considers the proposed documentation and qualification scheme to be both practical and just, and believes that it otherwise supports the Commission's lobster management regime, is compatible with Addendum I and is consistent with the applicable laws. Additional discussion on the proposed documentation and qualification scheme was provided in the FSEIS/RIR/FRFA prepared by NOAA Fisheries for this final rule (see **ADDRESSES**).

Area 1 Trap Limits for NH Lobster License Holders

With this action, NOAA Fisheries will waive the requirement that Federal lobster permit holders must abide by the stricter of either Federal or state lobster management measures with respect to the number of lobster traps for Federal lobster permit holders who elect to fish in Area 1 and who fish 1,200 traps under a valid New Hampshire full commercial lobster license for Area 1. Specifically, NOAA Fisheries will not make any change in the number of traps allowed to be fished in the Federal waters of Area 1. However, a New Hampshire full commercial lobster licensee fishing aboard a federally permitted vessel will be allowed to fish an additional 400 lobster traps in New Hampshire state waters.

Procedures for Consideration of Conservation Equivalency Measures

The ISFMP includes a provision which allows states to request approval, from the Commission, of management measures different from selected measures which otherwise would be required to satisfy state compliance with the plan. The New Hampshire proposal for conservation equivalent trap limits is a case in point. In October 1998, the Commission approved such a proposal from the State of New Hampshire and, as a result, the Commission has requested NOAA Fisheries to modify Federal lobster regulations. While NOAA Fisheries acknowledges the importance of the conservation equivalency, and the flexibility this provision allows to address unique socio-economic situations in state jurisdictions, complications arise when this results in a divergence between state and Federal regulations affecting operations of fishermen who possess both a state and Federal lobster permit. As in the present case, this will necessitate consideration of complementary regulations in the EEZ through lengthy Federal rulemaking and public comment procedures. Consequently, continued approval of conservation equivalent proposals under the ISFMP which necessitate complementary Federal rulemaking, if

left unchecked, could inadvertently increase the complexity of Federal regulatory involvement and undermine the management of a resource which is harvested predominantly in waters under state jurisdiction.

To address this concern, regulatory action will clarify a procedure by which NOAA Fisheries will consider such recommended conservation equivalent modifications to Federal lobster regulations as they may pertain to the activities of Federal lobster permit holders from the affected state(s). Specifically, NOAA Fisheries will only consider future Commission conservation equivalency recommendations that are formally submitted to the agency in writing by the Commission and that contain supporting information deemed necessary to address federal rulemaking requirements. NOAA Fisheries believes that receiving the supporting information and analyses along with a recommendation for Federal implementation of conservation equivalent measures is necessary to enable NOAA Fisheries to respond to recommendations for Federal rulemaking in a more timely and efficient manner. Procedures to address future conservation equivalency recommendations have not changed from procedures identified in the proposed rule (67 FR 287) completed for this action, and are specified in § 697.25(b) of this final rule.

Lobster Management Area boundary clarification

In Addendum I to Amendment 3 to the American Lobster ISFMP, the Commission revised the boundary lines for three of the LCMAs adjacent to Massachusetts, including Area 1, Area 2, and the Outer Cape Area, to bring the area boundaries more in line with traditional fishing practices in those areas and to correct an oversight in the specification of an Area 1 boundary line in Amendment 3 to the ISFMP. There have been no changes in the boundary descriptions from the proposed rule (67 FR 287) completed for this action. Updated boundary coordinates are specified in § 697.18 of this rule.

Summary of Public Comments Received in Response to the American Lobster Proposed Rule Published on January 3, 2002

The Proposed Rule was published in the **Federal Register** on January 3, 2002, and comments were initially solicited until February 19, 2002. Upon request of the Atlantic States Marine Fisheries Commission (Commission) to allow the Commission's Lobster Board to discuss the rule at their previously scheduled meeting on February 17 and allow ample time to submit written comments, NOAA Fisheries extended the comment period until February 28, 2002. Comments were solicited on potential changes to the Federal lobster regulations as described in the Proposed Rule including the proposed implementation of a program to control fishing effort as determined by historical participation in Lobster Conservation Management Areas (LCMAs/Areas) 3, 4 and 5; a mechanism for conservation equivalency and associated trap limits for owners of vessels in possession of a Federal lobster permit fishing in New Hampshire state waters; and clarification of lobster management area boundaries in Massachusetts waters. The Proposed Rule also included a technical amendment to the Federal regulations clarifying that Federal lobster permit holders must attach federally approved lobster trap tags to all lobster traps fished in any portion of any management area, including state waters.

A total of 190 comments were received by NOAA Fisheries in response to the Proposed Rule. Twelve of these comments were submitted by six state fisheries agencies, four fishermen's associations, one state senator, and one state governor. The remainder of the comments were received from members of the general public.

Of the 190 total comments, 125 favored either the entire Proposed Rule or, specifically,historical participation as a means of limiting future access to fish with traps in LCMAs 3, 4, or 5. Thirty-one commenters expressed general support for the Proposed Rule with 26 generally opposed to it. Seventeen individuals wrote in general opposition to historical participation as a means of limiting future access to fish with traps in LCMAs 3, 4, or 5, and 35 comments were received in opposition to the historical qualification criteria as presented in the Proposed Rule. Of the total comments, those that specifically related, either pro or con, to a particular lobster conservation management area are as follows. Relative to LCMA 3, 91 comments were received in support of the historical participation recommendations of the Area 3 LCMT and seven were received in opposition to historical participation in LCMA 3. Three respondents support historical participation as a means to limit access to fish with traps for either LCMA 4 or LCMA 5 or both. No comments were received in opposition to historical participation in LCMA 4 and 5. Twenty comments were received in support of the New Hampshire conservation equivalent trap allocations while 13 respondents commented in opposition to this measure. One individual commented in opposition to the proposed area boundary changes.

All comments were carefully considered. Specific questions, concerns, opposition to elements of the Proposed Rule, and comments on measures not presented in the Proposed Rule such as gauge increases, maximum size requirements and v-notching, are more thoroughly addressed in this section.

Historical Participation Comments (HP)

HP *Comment 1:* Ninety-one individuals wrote in support of a historical participation program in Area 3 and 78 additional comments were received in support of the Area 3 trap reduction schedule presented in the Proposed Rule. Three respondents support historical participation for either Area 4 or Area 5 or both.

Response: NOAA Fisheries intends to implement a historical participation effort control program in LCMAs 3, 4 and 5 compatible with that recommended by the Commission and developed by the LCMTs and consistent with the National Standards set forth in the Magnuson-Stevens Act (MSA), with some variation. NOAA Fisheries believes that this management program is a fair and equitable means of implementing the necessary management measures in consideration ofLCMT and Commission recommendations.

HP *Comment 2:* Seven comments were received in opposition to historical participation in LCMA 3.

Response: See response to Comment 1.

HP *Comment 3:* Three supporters of historical participation recommend that historical participation be implemented but that flat trap allocations be maintained.

Response: Historical participation with fixed trap limits was analyzed as non-selected alternative 1C of the FSEIS (see Section 3 of the FSEIS for more detail). This non-selected alternative would impose a greater economic impact, compared to the selected action, on those Federal permit holders who have historically derived a higher income from increased lobster harvest from fishing a number of traps in excess of the fixed trap limits. Also, this non-selected action would impact twice as many Federal permit holders by requiring them to fish a reduced number of traps, than would the proposed action. Historical trap allocations under the proposed action can be effectively enforced through a trap tagging

program, similar to what is currently in place coastwide. The non-selected alternative 1C would impose a lower administrative burden since documentation in support of historical trap levels would not need to be submitted or analyzed. On balance, the proposed action is more compatible with the recommendations of the Commission for Federal management.

HP *Comment 4:* One Commenter suggests that the current Federal trap limits be maintained without historical participation.

Response: This scenario was analyzed and rejected in the FSEIS as non-selected DSEIS alternative 1B. (No Action/Status Quo). By not implementing historical participation in Areas 3, 4 and 5, NOAA Fisheries would not be compliant with the mandate to implement measures compatible with the Commission's ISFMP as mandated in the Atlantic Coastal Fisheries Cooperative Management Act (ACA). Further, the process of analyzing the specific options used the best available data and it is NOAA Fisheries' best estimate that trap reductions are likely under the selected action and that an appropriate reduction in fishing effort will be realized when these measures are implemented. Fixed trap limits without historical participation will not cap trap fishing effort and reduce effort shifts to other management areas and will compromise the ability of the ISFMP to rebuild American lobster stocks and end overfishing of the lobster resource.

HP *Comment 5:* Eight respondents are opposed to the qualification period for determining eligibility under historical participation that would require a vessel to have participated in the lobster trap fishery in Areas 3, 4 or 5 during the period from March 25, 1991, to September 1, 1999.

Response: NOAA Fisheries believes this qualification period is fair and will result in the qualification of a set a vessels that reflects the historical nature of this fishery. The first date, March 25, 1991, was recommended by the Commission and was originally established as a control date by the New England Fishery Management Council to determine eligibility for future access to the Federal lobster fishery. The second date, September 1, 1999, is the date of publication of an Advance Notice of Proposed Rulemaking (ANPR) in the **Federal Register** that informed the public that NOAA Fisheries was considering that date as a potential cut-off date for determining eligibility for future access to LCMAs 3, 4 and 5. Accordingly, NOAA Fisheries believes that all had notice of the potential for limited access, that the period is broad enough to include those whose personal circumstances required unavoidable temporary absence (e.g. illness, etc.), and that it will result in the accurate qualification of permit holders based upon historical participation. If the commenters are suggesting that those who fished in these areas prior to 1991 but abandoned the fishery thereafter, NOAA Fisheries disagrees that these permit holders should qualify based on the historical participation model recommended by the Commission. If, however, these commenters are only referring to those who fished both prior to 1991 as well as currently, then NOAA Fisheries believes that these individuals will, in fact, qualify because they likely fished at least one season during the nine years in between. Certainly, NOAA Fisheries received no comments suggesting that long absences were typical, or that they even occurred at all for those who historically fished in these areas.

HP *Comment 6:* One individual commented that he would support historical participation in Area 3 if the 2,656 maximum trap allocation was reduced to 1,800–traps. Offshore lobstermen have been making a living at the 1,800 trap level since the year 2000 and a return to higher trap allocations will increase the gap between large and small operations and create discontent within the fleet.

Response: If this Commenter is suggesting that historical participation be implemented in Area 3 with a fixed trap limit of 1,800 traps for all qualified vessels, then this concept is the same as the non-selected alternative 1C analyzed in the FSEIS -historical participation with fixed trap limits (see section 3 of the FSEIS for more detail and note the response to HP Comment 3). This non-selected alternative would impose a greater economic impact, compared to the selected action, on those Federal permit holders who have historically derived a higher income from increased lobster harvest from fishing a number of traps in excess of the current fixed trap limits. Also, this non-selected action would impact twice as many Federal permit holders by requiring them to fish a reduced number of traps than would the selected action. On balance, the selected action is more compatible with the recommendations of the Commission for Federal management.

However, the commenter may be suggesting that the maximum trap allocation associated with historical participation in Area 3 in the NOAA Fisheries selected alternative be substituted with an 1,800–trap maximum subject to annual reductions under the Commission's Area 3 trap reduction schedule. In this case, the commenter's scenario is likely even more restrictive than non-selected alternative 1C in the FSEIS, since it would subject qualifying vessels to even lower maximum trap allocations.

HP *Comment 7:* One trawl fisherman, although an advocate of historical participation in the lobster fishery, believes that otter trawl fishermen with a history of catching lobster should also be included in this program and that all gear types be subject to the same possession and access limits.

Response: The LCMTs for Areas 3, 4 and 5 did not develop, and the Commission did not recommend to NOAA Fisheries that non-trap gear be included in the historical participation program. The NOAA Fisheries selected alternative implemented in this final rule is aimed at reducing trap fishing effort in the lobster trap fishery and will not affect Federal lobster vessels that fish with non-trap gear. Under the selected action, non-trap gear lobster vessels will not be required to qualify for access to LCMAs 3, 4 and 5 and will not be excluded from fishing with non-trap gear for lobster in these areas, or any other portion of the EEZ. NOAA Fisheries previously included in the Federal regulations a landing limit of 100 lobster per day/500 lobster per trip of 5 days or more to address lobster fishing effort in the non-trap sector, consistent with the ISFMP.

HP *Comment 8:* Discrimination against certain gear types is not reasonable, as determined by a recent court decision on monkfish concerning differential trip limits. Therefore, allowing a lower possession limit for non-trap lobster vessels violates this principal established by the court. As such, those who fished non-trap gear during the qualification period and had Federal lobster permits should retain their right to fish traps if they so choose.

Response: This final rule is designed to address trap reductions and no specific recommendations were provided by the Commission concerning Federal action with respect to the lobster non-trap gear sector. See previous response.

HP *Comment 9:* Two individuals suggest that NOAA Fisheries allow those who have always had a Federal lobster permit but do not qualify to fish with traps under historical participation (i.e., trawl gear fishermen) to have a limited level of participation initially and then have full participation in Area 3 once the resource is rebuilt.

Response: Allowing a baseline number of traps for non-trap gear vessels or for non-qualifying trap vessels

would compromise the intent of the Addendum I to Amendment 3 of the ISFMP to reduce trap fishing effort in order to decrease lobster fishing mortality. See previous response.

HP *Comment 10:* One state agency that supports historical participation opposes the transfer of historic trap allocations for Areas 4 and 5 because it may make it more difficult to implement trap reductions through regulations in the future if these permits and associated allocations are transferred (sold). The transfer of history-based trap limits may also create discrepancies between state and Federal regulations if a permit holder who qualifies under the NOAA Fisheries for historical participation program in Area 4, for example, does not qualify under the State's plan which used a 1991–1998 qualification period, which differs from the NOAA Fisheries qualification period.

Response: The comment refers to the concept of individual transferrable quotas (ITQs), a highly controversial management tool and the subject of ongoing Congressional, agency and Commission deliberations. The concept of ITQs was not proposed by the Commission as part of this action and public comment has not yet been proposed by the Commission on this issue. NOAA Fisheries would consider ITQs in future rulemaking if recommended by the Commission at a later time.

HP *Comment 11:* One state recommends that NOAA Fisheries allow all vessels that qualify for access under the historical participation program receive a baseline number of traps and then also be eligible for their historical allocation. If the Federal permit is subsequently transferred, the associated trap allocation reverts to the baseline level. The most restrictive of state or Federal regulations can't be enforced because NOAA Fisheries issues 880 tags to everyone regardless of their state historical allocation. Then, a long-term framework such as a total allowable trap allocation program for each management area should be considered. That total allocation could be distributed equitably as active fishermen divest from the fishery.

Response: NOAA Fisheries acknowledges the concerns raised by this state and is confident that such issues can be resolved through more effective state and Federal coordination, including revisiting the trap tag memorandums of understanding that NOAA Fisheries has with the fisheries agencies of the major lobster harvesting states.

The State's concept of a baseline allocation for all lobster permit holders, while interesting, could compromise the long-term effectiveness of historical participation effort reduction measures by not restricting access to only those fishermen who have historically fished in specific management areas. The Commission has created a task force to research and provide recommendations to the Lobster Board concerning the ''most restrictive'' rule. NOAA Fisheries intends to remain involved in future discussions concerning this and other novel management measures such as total trap allocations and trap transferability as the Commission moves forward in addressing these issues for consideration in the ISFMP. NOAA Fisheries did not extensively analyze the State's proposal because it was largely conceptual and is outside the recommended management regime adopted under Addendum I to Amendment 3 to the ISFMP, the focus of this rulemaking and associated analyses, and is believed to be incompatible with the recommendations made by the Commission.

HP *Comment 12:* One state agency opposed the qualification period for Areas 4 and 5. Since there was no prior notification to the industry prior to the September 1, 1999, control date that a vessel may be restricted from access to certain areas if there was no documented history of fishing in that specific area. Federal lobster permit holders were advised by the New England Fishery Management Council in 1991, that they should purchase a vessel with a documented catch and effort history, could be limited to that history in the future if necessary, and that they could fish anywhere in Federal waters but would be held to the more restrictive of state or Federal regulations.

Response: NOAA Fisheries believes that the qualification period for eligibility under this Final Rule is appropriate and consistent to the Commission's recommendations, to the extent practicable. Even under the State's scenario, a permit holder that followed the Council's recommendation to purchase a vessel with history in a specific area, and if those areas included either one or more of Areas 3, 4 or 5, that vessel would likely qualify for participation under this Final Rule if it actively fished (consistent with the qualification criteria established in this action) in those areas after 1991 and prior to September 1, 1999.

HP *Comment 13:* A state agency commented that with the September 1, 1999, control date vessels with Federal permits that were purchased from an area other than Areas 4 or 5, but are now fishing in those areas may not qualify for access under this final rule. Therefore, NOAA Fisheries should modify the Federal management program to allow any individual who purchased a vessel prior to 1999 and relocated that vessel to a state abutting Area 4 or 5 to qualify for access to those areas based on its fishing and effort history of its previous area. This should not be done for Area 3 since this is a coastwide along the range of the resource and a vessel with an Area 3 fishing history which is relocated to another state at the opposite end of the range and the history would be aptly transferrable to the new state.

Response: NOAA Fisheries believes that the state's suggestion is counter to the intent of the historical participation management regime. The Respondent is stating that vessels that were purchased with a Federal permit with Area 1 history, for example, and began fishing for lobster with traps in Area 4 or 5 after September 1, 1999, be considered eligible for future access in Areas 4 or 5 because they historically fished in Area 1. The historical participation program for lobster in Areas 3, 4 and 5 was crafted by the lobster fishing industry in these areas in response to the need to end overfishing and rebuild stocks of American lobster consistent with the ISFMP and in keeping with the advice of the most current stock assessment. While directed at capping fishing effort to reduce fishing mortality, historical participation is also intended to prevent effort shift into other management areas and allow the historical participants of the fishery in these respective areas to resume fishing their historical trap allocations.

HP *Comment 14:* A commenter referenced information in an industry newspaper regarding NOAA Fisheries' proposed rule. The article indicated that, based on information available to NOAA Fisheries as of June 18, 2001, NOAA Fisheries expected between 53 and 117 vessels to qualify for Area 3, that 769 vessels elected Area 3 as at least one of the areas they desired to fish in, and that 112 vessels selected only Area 3. The commenter interpreted this to mean that only those that designated exclusively Area 3 would qualify since the 112 estimated to qualifyfalls within the expected range of qualifiers (53 - 117), and those electing Area 3 in combination with other areas would not qualify.

Response: The data indicating that 769 vessels had selected Area 3 as at least one of the fishing areas, and the estimate of 112 vessels that elected only Area 3, are derived from actual Federal

fishing permit data from the 2001 Federal fishing year, indicating the area designations of Federal lobster permit holders who indicated traps as a gear type. Prior to that fishing year, Federal lobster permit holders were not required to designate the areas they fished in and, therefore, limited data was available on the actual areas that Federally permitted lobster vessels fished in. Consequently, the newly available area designation information proved useful to NOAA Fisheries in determining a basis for analyzing the potential number of qualifying and non-qualifying vessels based on recent activity and the most current data available. Conversely, the estimate of an expected range of 53 to 117 qualifying vessels was initially used in developing the Draft Supplemental Environmental Impact Statement (DSEIS) in 2000. At that time no Federal permit data was available regarding specific lobster management areas fished on a vessel-specific basis since Federal lobster permit holders were not required to designate lobster management areas. Therefore, this data, provided by the Area 3 LCMT, served as the best available data at that time to determine how many vessels might qualify. The two data sets are, therefore, not mutually exclusive; that is, they support one another in that the LCMT data represent actual fishing activity and the permit data represent both actual and potential fishing activity. Further, NOAA Fisheries will not be basing qualification in Area 3 on the permit area designations as this requirement was established after the September 1, 1999, control date. A vessel that historically fished in LCMA 3 and in, for example, Area 1, will be considered for eligibility under the same criteria as a vessel that historically fished in Area 3 exclusively.

HP *Comment 15:* A small boat operator in Area 3 feels the trap limit is biased in favor of large operators who have historically reaped the greatest amount of the resource.

Response: The proposed action is intended neither to punish nor reward past actions, but is a measure directed to ending overfishing henceforth. Additionally, it does not necessarily correlate that those with larger operations (i.e., bigger boats, more traps) harvest a proportionately larger total of the stock than those who fish less traps because of a number of variables relating to gear efficiencies, tending time, area fished, etc. See FSEIS Section V.1. for more detail. To the extent that a vessel historically fished at high trap levels (e.g., more than 3,000 traps) that vessel, may experience greater cut backs than those vessels fishing less traps, albeit at proportional levels. Finally, allowing eligible vessels to fish their historical trap allocations, up to a maximum level, is compatible with the Commission's recommendations for Federal action in the EEZ.

HP *Comment 16:* One individual opposed historical participation because it will force lobster fishermen to downsize their operations.

Response: NOAA Fisheries acknowledges that some fishermen may have to downsize given that this action is an effort reduction measure recommended by the LCMTs and the Commission. However, if a fisher is allocated less traps than currently allowed, then such a reduction will be both proportional and consistent with that vessel's historical effort. Further, downsizing should not be likely unless that fisher increased effort after the control date. See previous response.

HP *Comment 17:* One supporter of historical participation recommends that qualified permits and the associated trap allocations be published in the **Federal Register** to allow any qualified stakeholder to challenge anyone on the list.

Response: NOAA Fisheries considered but rejected the Commission's recommendation to publish a notice that would specify individual trap allocations for each Federal permit holder that qualifies to fish LCMAs 3, 4 and 5 under the historical participation program because this raises privacy issues, would serve no constructive purpose and may give way to a ''witch trial'' atmosphere. Further, the respondent's comment, if different from that recommended by the Commission in this regard, offers neither protocol for challenging the eligibility of a permit holder nor supporting reasons for incorporating such a measure into the qualification process.

HP *Comment 18:* One commenter believes that all those who qualify for LCMA 3 be subject to the trap reduction schedule, not just those that have allocations above 1,200 traps.

Response: NOAA Fisheries will use the LCMA 3 trap reduction schedule, initially adopted into the ISFMP by the Commission in Addendum I to Amendment 3 and further modified in Addendum II. That schedule did not include provisions for reducing allocations at or below the 1,200–trap mark. This is due to the diminishing utility of returns from such subsequent trap reductions that are not expected to assist in effectively reducing trap fishing effort given the additional economic impacts to qualified fishermen. Further, this measure wasn't recommended by the Commission for Federal action and, therefore, implementation through this final rule would result in inconsistencies with the Commission's approved trap reduction measures.

HP *Comment 19:* One commenter recommended that only logbooks be used as the basis for qualifying permit holders and that no one be admitted based solely on an affidavit to substantiate history.

Response: Due to the varying degree to which certain types of documents were historically used throughout the fishery, the proposed action gives the potential qualifier flexibility in document submission. The use of Federal Vessel Trip Report (VTR) documents to support historical fishing effort (number of traps fished and location) in the lobster fishery will be possible for the majority of the Federal lobster permit holders (e.g., those holding other Federal species permits that, unlike lobster permits, require mandatory reporting). A review by NOAA Fisheries indicates that of 3,153 Federal lobster permit holders in 1997, 1,984 (approximately 62percent) held Federal permits for other fisheries requiring mandatory reporting. The utility of these reports for documenting lobster fishing effort would be further restricted to those permit holders who accurately noted, on the reports, the number of individual lobster traps fished on an area-by-area basis. Similarly, an informal review of the utility of official state reports for determination of lobster trapping effort concludes that such documents may be relevant only to Connecticut and Massachusetts residents (approximately 34 percent of Federal lobster permit holders). Therefore, allowing more than just logbooks to be submitted will provide more flexibility for Federal permit holders given the inconsistencies in logbook reporting requirements, will avoid bias on those who held only a Federal lobster permit during the eligibility period, and will result in a more accurate qualification process.

HP *Comment 20:* Seventy-eight comments were received in support of the accelerated trap reduction schedule for LCMA 3.

Response: NOAA Fisheries incorporated the revised Area 3 trap allocations and the accelerated 4–year sliding scale trap reduction schedule into the final rule to be compatible with the trap reduction schedule as updated in Addendum II to Amendment 3 of the ISFMP. The updated schedule reduces the maximum trap allocation in Year 1 from 2,920 to 2,656 traps and accelerates the sliding scale trap

reduction schedule from five years to four years.

HP *Comment 21:* One supporter of historical participation states that historical trap allocations are needed because uniform trap limits will create latent effort and compromise the conservation benefits of historical participation.

Response: NOAA Fisheries believes that historical participation in Areas 3, 4 and 5 is the best means for controlling trap fishing effort in these management areas since it is expected to, at least, cap and potentially reduce levels of trap fishing in Areas 4 and 5 and reduce trap fishing levels in Area 3. Effort reductions as a consequence of this action are expected to result in decreased lobster fishing mortality, contributing to the fulfillment of the goals of the ISFMP to end overfishing and rebuild American lobster stocks. Further, this management regime is compatible with the recommendations of the Commission in Addendum I to Amendment 3.

HP *Comment 22:* One comment was received expressing concern that the State of New Jersey's rules weren't coordinated with Addendum I and that some who qualified under the State of New Jersey's historical participation eligibility program will be allowed different numbers of traps under the Federal plan which will cause confusion.

Response: NOAA Fisheries will continue to cooperate with state agencies to the extent practicable and legal to determine the eligibility of Federal permit holders to fish in Areas 3, 4 and or 5. However, NOAA Fisheries' determination of eligibility for each applicant will be based on the specific qualifying criteria and documentation as identified in Section III.(2). of the FSEIS, and codified, by way of this final rule, in the Federal regulations at 50 CFR 697.4(a)(7)(vi), (vii) and (viii). These requirements are compatible with those proposed by the LCMTs and recommended for EEZ implementation by the Commission, of which the State of New Jersey is an active participant and voting member.

HP *Comment 23:* One proponent of historical participation in Area 4 recommends a trap cap at 2,400 traps rather than the proposed 1,440 traps.

Response: NOAA Fisheries established a 1,440 maximum trap limit as a safeguard against trap proliferation. NOAA Fisheries believes the removal of existing 800 traps per vessel limit in Areas 4 and 5 without implementation of an alternative maximum trap limit, could result in excessive lobster fishing mortality and limit the ability of historical participation to reduce trap fishing effort. A maximum trap limit in Areas 4 and 5 of 1,440 lobster traps per vessel was selected utilizing data provided by the State of New Jersey that indicated the majority of participants fished less than 1,440 traps (32 of 46 Federal permit holders who responded to New Jersey's lobster industry survey). Additionally, the 1,440–trap limit corresponds proportionately to the relationship between the existing fixed trap limits (800 traps in Areas 4 and 5, and 1,800 traps in Area 3) and the LCMA 3–maximum trap limit proposed by the Area 3 LCMT in Addendum I.

HP *Comment 24:* One person stated that New Jersey fishermen need more traps in general because there are less lobsters spread over a larger area and recommends a 1,500–trap allocation.

Response: The 1,500–trap allocation recommended by this respondent is generally consistent with the maximum trap limit of 1,440 traps per qualified vessel in Areas 4 or 5 implemented with this final rule. NOAA Fisheries believes that establishing a maximum trap cap will prevent a potential escalation of future trap fishing effort and associated lobster fishing mortality in Areas 4 and 5, while allowing qualified vessels to fish their historical trap allocations as evidenced in data provided by the State of New Jersey lobster industry survey. See previous response.

HP *Comment 25:* Two individuals recommend that NOAA Fisheries limit every vessel to 800 traps in Area 4 and 1,200 traps in Area 3.

Response: The scenario suggested by these individuals runs counter to the management recommendations of the Commission and the LCMTs and could result in more traps being fished than would be expected under the selected alternative, if these commenters are suggesting that historical participation not be implemented under this scenario. Further, if these commenters are suggesting that historical participation not be implemented in these management areas, then the potential for effort shift into other lobster management areas could occur. Additionally, it is likely that not all vessels are fishing up to the current allowable fixed trap limits and, while the selected management action would cap effort at historical levels, this suggested action (similar to status quo) could allow vessels fishing below the current fixed trap limits to expand their trap fishing effort.

HP *Comment 26:* One fisherman recommends a 600–trap limit be imposed in the Federal waters off the Maine coast.

Response: Assuming the commenter is referring to Area 1, NOAA Fisheries disagrees. This topic is outside the scope of this rulemaking and Addendum I and inconsistent with the recommendations for lobster management in Area 1 provided by the Area 1 LCMT, the Commission, and the ISFMP.

HP *Comment 27:* One LCMA 2 lobsterman opposes historical participation and recommends that every lobsterman be allocated 500 traps.

Response: The Commission has yet to adopt a historical participation program for LCMA 2 and has not made any recommendations to the Secretary of Commerce that such action be taken in the EEZ portions of LCMA 2. Therefore, this measure was not considered in this rulemaking action and associated analyses.

HP *Comment 28:* A Federal lobster permit holder who has never fished for lobster believes that historical participation is unfair and that all Federal lobster permit holders should have unlimited access to the lobster resource in Federal waters.

Response: This final rule is the result of extensive public comment and is based upon the Commission's ISFMP for American Lobster which also underwent extensive public comment. All have had the opportunity to engage in and influence deliberations on this matter. Ultimately, the LCMTs, comprised of industry representatives, and the Commission, made up of a number of politically accountable members, chose a management plan that would reflect the historical make-up of the fishery. This final rule is based on that decision and conforms with the applicable law. The intent of the historical participation component of this final rule is to implement a system that caps fishing effort at historical levels, likely reduces effort from current levels, and reflects the traditional fishing practices of the offshore fishing fleet. This selected action considers the recommendations of the industry's LCMTs and the Commission aimed at decreasing fishing effort and increasing egg production in accordance with the ISFMP. This selected action intends to limit participation in LCMAs 3, 4 and 5 to those permits with a demonstrated lobster trap fishing history, consistent with the eligibility criteria in this final rule and that recommended by the Commission in Addendum I to Amendment 3 of the ISFMP.

HP *Comment 29:* Three individuals request that NOAA Fisheries execute the plan as fairly as possible so that no single type of business operation benefits over another. Trap allocations

for qualifiers into Area 3 should be of a smaller range to avoid a disadvantage to smaller operations that will have to work harder to be competitive against those with larger allocations.

Response: NOAA Fisheries intends to execute the historical participation program fairly and to not give any single type of business an unfair competitive advantage over another. Regarding the commenter's point concerning Area 3 trap allocations, NOAA Fisheries points out that number of traps fished, not necessarily vessel size, is the factor that will determine the initial trap allocation of a qualified vessel. The historical participation program will not discriminate against small vessels. It will allow any vessel with demonstrated participation during the qualification period to fish its historical allocation of traps up to 1,440 in LCMAs 4 and 5, and up to 2,656 (with subsequent reductions) in LCMA 3, in order to most accurately represent the historical aspects of the trap fishery. See previous response. Further, NOAA Fisheries notes that it does not necessarily follow that smaller operators have to work harder to compete against larger operations that may have higher business overhead and other expenses.

HP *Comment 30:* A 25–year lobster diver with a state and Federal lobster permit believes that history in the fishery should be based on participation in general, not just on numbers of traps fished. This fisherman is concerned that as age forces him to move from diving, his opportunityto fish with trap gear may be lost since he has no trap fishing history.

Response: The selected action is intended to cap effort in the lobster trap fishery in LCMAs 3, 4 and 5 in order to rebuild growth-overfished stocks of American lobster, while reflecting the historical make-up of the trap fishery as such occurs. Non-trap fishermen, such as those in the otter trawl and dive fisheries, have been, alternatively, regulated by possession limits and will continue to have access to any or all LCMAs. Further, present information suggests that there is a market for vessels and their accompanying Federal lobster permits. Therefore, non-qualifiers into the trap fishery in Area 3, 4 and 5 still have the option to purchase a permit that has previously qualified to fish trap gear in these areas.

HP *Comment 31:* One individual commented that consideration should be given to permit holders who could not fish during the qualification period due to illness.

Response: Comments received by NOAA Fisheries do not indicate that long absences in the trap fishery, particularly for 8 or more years, were typical. Regardless, the intent of the historical participation management program is to decrease fishing mortality by capping and reducing trap fishing effort, while allowing those permits that currently, and have historically, fished for lobster with trap gear in these areas to continue to do so. NOAA Fisheries believes its qualification period to be quite fair and will result in qualification based upon historical participation in the area fisheries. The first date of the qualification period, March 25, 1991, was recommended by the Commission and was originally established as a control date by the New England Fishery Management Council to determine eligibility for future access to the Federal lobster fishery. The second date, September 1, 1999, is the date of publication of an ANPR in the **Federal Register** that informed the pubic that NOAA Fisheries was considering that date as a potential cut-off date for determining eligibility for future access to LCMAs 3, 4 and 5. Accordingly, NOAA Fisheries believes that all had notice of the potential for limited access, that the period is broad enough to include those whose personal circumstances required unavoidable temporary absence (i.e., illness, etc.), and that it will result in the accurate qualification of permit holders based upon historical participation.

HP *Comment 32:*One individual and a state agency commented that the 25,000 lb (11,340 kg) landing requirement for Area 3 is too high.

Response: The 25,000 lb (11,340 kg) landing requirement is intended to be used as an eligibility requirement for LCMA 3 only, and was specifically recommended as an appropriate measure of economic reliance on lobstering by the industry experts on the Commission's Area 3 LCMT. In opposition, NOAA Fisheries notes that the commenters did not indicate why they disagree with these experts. Under the NOAA Fisheries proposed action, these landings may have occurred from anywhere within the range of the lobster resource, not just LCMA 3. NOAA Fisheries has not included a landing requirement for determining eligibility in LCMAs 4 and 5. Available information indicates that LCMA 4 and 5 fishermen generally participate in a directed trap fishery for lobster on a seasonal basis and rely on other fisheries throughout the year in addition to lobster. For example, only a relatively small percentage of the lobster resource has been historically harvested from LCMAs 4 and 5, which is consistent with seasonal fishing activity. Accordingly, a 25,000 lb (11,340 kg) landing threshold may unnecessarily restrict and not accurately reflect the historical nature of the fishery in those areas. Such is not the case, generally, for historical participants of the Area 3 offshore fishery who tend to fish directly for lobster on a more full-time basis throughout the year.

HP *Comment 33:* An Area 6 Federal permit holder opposes historical participation because it will prevent him from being able to shift into Federal waters especially now after Long Island Sound lobster die-off has substantially reduced lobster abundance in that area. Other gear types can move freely, and lobster trappers should be able to do the same.

Response: NOAA Fisheries sympathizes with all those affected by the Long Island Sound lobster die-off and notes that it helped administer Federal funds to assist those affected who sought assistance. However, NOAA Fisheries intends to adhere to the control dates and qualification periods as proposed in the FSEIS to decrease fishing mortality by reducing fishing effort in LCMAs 3, 4 and 5. To do otherwise as the commenters suggest would create an unmanageable exemption incompatible with the lobster ISFMP that could significantly undermine the effectiveness of the proposed action. These control dates provided notice and are, in fact, more liberal than those dates originally proposed by the Commission.

HP *Comment 34:* One commenter states that several fishermen who fished for lobster in Long Island Sound purchased Federal lobster permits in 1999 after the die-off, now will not be able to fish in LCMAs 3, 4 and 5 because they won't meet the eligibility criteria.

Response: NOAA Fisheries believes that the selected action set forth in this final rule is fair, legal and appropriate. Further, depending on when, and the extent to which these individuals began fishing in Areas 3, 4 or 5 in 1999, there still remains the potential to qualify based upon historical participation depending on the individual circumstances. See previous response.

HP *Comment 35:* One state agency (New Jersey) recommends an extension of the NMFS September 1, 1999, control date and disagrees with the proof of fishing 200 lobster traps over a 2–consecutive month period as an eligibility criterion for historical participation and recommends documentation by annual landings instead.

Response: As to the control date, see response to HP Comment 31. With regard to the 200 lobster traps fished over a 2–consecutive month period

criterion, the LCMTs recommended, and the Commission adopted this criterion as part of Addendum I. NOAA Fisheries is required to implement regulations that are compatible with the Commission's ISFMP. Third, the State of New Jersey offers no evidence to suggest that landings would be a more accurate indicator of trap fishing effort, which is the focus of New Jersey's criterion. See responses to HP Comments 12, 13 and 31.

HP *Comment 36:* A state recommends that NOAA Fisheries replace the 1,440–maximum trap allocation in Areas 4 and 5 with 3,250–maximum trap allocation since many vessels that historically fished in those areas had fished more than 1,440 lobster traps.

Response: See responses to HP Comments 23 and 24.

HP *Comment 37:* Historical participation will negatively affect value of vessels and permits for those who don't qualify and will benefit only the few fishermen that have access to the resource in certain areas.

Response: This comment is hypothetical and engages in characterizations, although NOAA Fisheries acknowledges that any limited access program could, in certain instances, negatively affect the value of non-qualifying permits and positively affect the value of qualifying permits. However, the commenter is implying an element of unfairness, which NOAA Fisheries disagrees with (see HP Comments 28 and 29).

HP *Comment 38:* One commenter stated that current fixed trap limits are working and only more effective enforcement of the trap limits is needed.

Response: Fixed trap limits in the EEZ portions of Areas 3, 4 and 5 were implemented as an interim measure by NOAA Fisheries to cap effort in these areas until the concept of historical participation could be adequately analyzed and to allow for public comments on the issue. The latest stock assessment information indicates that the lobster resource is overfished and the measures adopted in the ISFMP, including historical participation in Areas 3, 4 and 5, were adopted to end overfishing and rebuild the lobster resource. Further, the Commission has adopted a trap tagging requirement to enforce trap limits coastwide. NOAA Fisheries has implemented this measure and will carry this forward as a means of enforcing historical trap allocations, with effective results expected. NOAA Enforcement has consistently cooperated with state marine enforcement agencies to enforce the trap limits with commendable results and will continue to do so.

HP *Comment 39:* Two individuals commented that NOAA Fisheries should cooperate more with state agencies in an effort to better enforce trap limits.

Response: As stated in the previous response, NOAA Fisheries intends to continue to cooperate with state and other Federal agencies in enforcing trap limits. NOAA Fisheries has proactively pursued such a relationship by initiating and continuing communications with state agencies and the Commission regarding the implementation and enforcement of trap limits through the coastwide trap tag program. This action has resulted in the development of memorandums of understanding between NOAA Fisheries and several of the lobster producing states to facilitate the issuance and enforcement of trap tags and to promote the exchange of the resulting data between agencies. However, NOAA Fisheries believes that this issue extends beyond the mere state/Federal relationship. The states must also cooperate with each other and with the Commission to ensure that both the stated directives and unstated intents of Amendment 3 and Addenda I-III are carried out.

HP *Comment 40:* The owner of a Federal lobster permit with Area 3 history may not qualify because although history was retained, he does not have the records to document it since he did not own the vessel at that time and previous owner will not authorize NOAA Fisheries to release any related documentation. This permit holder recommends that NOAA Fisheries use data from previous permit holders to qualify vessels while keeping that information confidential, allow affidavits from fishermen and dealers, implement less restrictive documentation requirements for vessels purchased at state or Federal auctions between 1991 to 1999, consider a hardship clause in consideration of years fished, capital investments, and economic impact on the community, use port agent data or sworn statements from Port Agents regarding permit activity during the qualification period.

Response: NOAA Fisheries acknowledges that, due to a lack of mandatory reporting for all Federal lobster vessels and in consideration of confidentiality, some permit holders who should qualify may have difficulty obtaining the necessary documentation. As a preliminary matter, NOAA Fisheries urges permit holders in this situation to work with the permit's previous owners to get the necessary documentation. NOAA Fisheries, however, is developing a moratorium rights qualification system to track the history of a permit that submitted Federal VTR data. That information may be disseminated to the current permit holder without breaching confidentiality and may be used by the current permit holder to substantiate the permit's eligibility. As a result of this final rule, the Federal lobster regulations at 50 CFR 697.4(a)(7)(vi)(vii) and (viii) identify the explicit types of documentation for Areas 3, 4 and 5, respectively, that are acceptable to demonstrate the permit's lobster trap fishing history, and consider the recommendations of the industry and recognize the inconsistent reporting requirements amongst Federally permitted vessels. With respect to consideration of hardship, NOAA Fisheries has addressed this in the Final Rule by implementing a documentary hardship provision as a basis for appeal. This would apply in such cases where a permit holder applies for access to Areas 3, 4 or 5 and is denied because insufficient documentation in support of the qualification criteria is provided. If the necessary documentation no longer exists due to no fault of the permit holder, he/she may submit affidavits from Federal permit holders attesting to the permit's fishing activity and the nature of the loss of the documentation as specified in 50 CFR 697.4(a)(7)(x).

HP *Comment 41:*Two commenters suggest that NOAA Fisheries assure that those who bought a vessel with history but the associated documentation is not available be able to get the vessel's full historical allocation.

Response: NOAA Fisheries devised a qualification program that would consider the potential difficulties that some permit holders may have in locating and compiling existing documents. First, the final rule incorporates flexibility as to the type of documentation allowable, thus increasing the likelihood that an applicant will have one category of document if not another. Second, the final rule establishes a long qualification period (1991–1999), thereby increasing the opportunity that a qualified applicant will have documents for at least one of the years. Third, the application submission and extension timeline is purposefully broad to provide applicants ample time to compile and submit documentation during the application period if they do not have ready access to the necessary information. Additionally, frequent and timely notification has been provided to permit holders and the public since September 1, 1999, that NOAA Fisheries was considering a historical

participation program that would require submission of documentation and given such notice, NOAA Fisheries anticipates that most applicants have already been gathering their application information.

NOAA Fisheries also has been reviewing its own data and has incorporated into this final rule the ability of an applicant to request and use NOAA Fisheries data in the application to the extent that the data can establish a qualification criterion. Further, to the extent that an applicant is seeking qualification based upon vessel history from the activity of a former holder of that permit, NOAA Fisheries may be able to review such confidential data without its release -- NOAA Fisheries cannot release economic information to unrelated entiitles, without consent, due to confidentiality mandates -- in an effort to qualify the vessel if the data clearly establishes a criterion.

If the documentation no longer exists, then NOAA Fisheries believes that the historical participation qualification process established in this final rule aptly addresses this as well. This final rule establishes an appeals measure whereby a Federal lobster permit holder who once possessed the necessary documentation to support historical participation but no longer is in possession of that documentation due to no fault of the permit holder, can appeal under and ultimately qualify under a documentary hardship provision (see previous response and 50 CFR 697.4(a)(7)(x) of the Federal regulations as set forth by this final rule).

HP *Comment 42:* A permit holder whose permit has history in Area 3 bought the vessel after the fishing activity in that area had occurred and had only a lobster permit. Therefore, no Federal vessel trip reports exist. Coast Guard boarding reports and IRS records are only retained for 3 years and are, therefore, no longer available. Catch reports from dealers do not have vessel specific landings and small vessels like his had their landings grouped together. Therefore, NMFS should not be able to take away the right to fish in an area because of unavailable documentation originating from as far back as 10 years ago.

Response: This final rule does not require an applicant to have saved 10 years of documentation to qualify, although in order to provide flexibility, NOAA Fisheries allows that applicant to use 10–year old data if such establishes the necessary criteria. The ability to use 10–year old data should, therefore, be considered a benefit to applicants, not a burden. See Response to HP Comment 41. NOAA Fisheries gave formal notice of the need to retain documents in publishing its control date in the **Federal Register** in September, 1999. Certainly, informal notification was available in advance of that date as the qualification criteria were created in the Commission's earlier public process in developing Addendum I. In any event, if the commenter kept 3 years of Coast Guard boarding reports and IRS records as indicated in the comment, then, as of the control date when participants were formally notified to retain records, the commenter would have already had documentation for 1996, 1997, and 1998 and would reasonably be expected to have saved those documents plus whatever documentation was ultimately created in 1999. Under this final rule, the commenter could potentially use documentation for any one of those years to qualify.

HP *Comment 43:* The years 1999 and 2000 should not be used as qualifying years because the lobsters were on the decline and fishermen were fishing less gear than normal. Trap fishing activity for the years 1994 - 1998 is more indicative of traditional numbers of traps fished by the lobster fleet in LCMA 2.

Response: NOAA Fisheries intends to use the portion of 1999 up to September 1, for qualification purposes. The remainder of the 1999 calendar year and the calendar year 2000, in its entirety, will not be considered valid periods for demonstrating historical participation in LCMAs 3, 4 and 5. The calendar years 1994 through 1998 fall within the qualification period implemented by this final rule, but, the commenter is reminded that historical participation does not pertain, specifically, to LCMA 2 in this action. However, lobster landings in LCMA 2 may be used to establish the 25,000 lb (11,340 kg) of lobster landed during the qualifying year if the vessel is attempting to qualify for access to LCMA 3.

HP *Comment 44:* Eleven individuals recommend that for appeals, NOAA Fisheries require the applicant to provide an affidavit signed by five previously qualified Federal lobster permit holders to document the validity of the applicant's claim for either the location for his traditional fishing grounds and/or the numbers of traps he claims to historically fish.

Response: NOAA Fisheries recognizes that some potential qualifiers may be denied access to the lobster fishery in Areas 3, 4 or 5 due to the rigid, but necessary, qualification scheme because they, due to no fault of their own, no longer possess the documentation necessary to support their eligibility. Accordingly, NOAA Fisheries sought to craft an appeal process that is just and allows flexibility in the process without diminishing the effectiveness of the final rule. Consequently, NOAA Fisheries incorporated a documentary hardship appeal option into this rulemaking, whereby the appellant must provide affidavits from three Federal permit holders and one affidavit from an individual, although not necessarily a Federal permit holder, who can attest to the nature of the loss of the documents (See Section III.(2).(C) of the FSEIS and 50 CFR 697.4(a)(7)(x) of the Federal regulations as set forth by this final rule). The documentary hardship appeals process is intended to soften the qualification requirements without compromising the ability of the historical participation program to effectively allow only historical participants into the Area 3, 4 and 5 lobster trap fishery. NOAA Fisheries is sensitive to the potential use of fraud as a means to exploit the proposed qualification system. In choosing affidavits from three Federal permit holders, NOAA Fisheries sought a balance. Requiring just one or two affidavits would be insufficient while requiring five affidavits as the commenter suggests, may be too difficult to achieve for an appellant from a remote port. NOAA Fisheries also broadened the supporting affidavit requirement by allowing affidavits from Federal permit holders who are not necessarily Federal lobster permit holders, but further defined the requirements by requiring proof and corroboration of the hardship through one of the affidavits, and potential revocation of the appellant's Federal permit in the event of fraud. NOAA Fisheries believes that this is a reasonable just and appellate process.

HP *Comment 45:* One individual is opposed to requiring an appealing applicant to provide affidavits from five qualified permit holders in order to substantiate participation.

Response: See previous response.

Closed Area Comments (CA)

CA *Comment 1:* An individual wrote that offshore lobstermen have depleted the large lobsters and the inshore New Jersey lobster boats no longer catch 5–15 lb (2.3–6.8 kg) lobsters. Therefore, offshore closed areas should be established in the Canyons and a maximum size limit implemented on lobsters of 5 lb (2.3 kg) or more.

Response: NOAA Fisheries' analysis of closed areas in the FSEIS focused on the LCMA 4 closed areas adopted in Addendum I. The Commission did not recommend that NOAA Fisheries

implement closed areas in other LCMAs that contain deep water canyon environments, such as in LCMAs 3 and 5. Therefore, closed areas were not further analyzed as a potential management option outside the scope of the Commission's recommendations in Addendum I and are not incorporated as an element in this Final Rule. Addendum III to Amendment 3 of the ISFMP does contain provisions for a maximum size requirement in LCMAs 4 and 5 if deemed necessary. NOAA Fisheries will analyze these measures under a separate rulemaking action.

New Hampshire Conservation Equivalency Comments (NH)

NH *Comment 1:* Twenty comments were received in support of the New Hampshire conservation equivalent trap allocations and thirteen respondents commented in opposition to this measure.

Response: The best available information supports the Commission's finding that New Hampshire's proposal is a conservation equivalent to current management measures. In fact, available information suggests that it will actually reduce effort. As such, this action satisfies NOAA Fisheries' legal obligations insofar as it is consistent with the National Standards and is supportive of the Commission's ISFMP that allows conservation equivalency. Accordingly, the NOAA Fisheries' final action will allow a New Hampshire full commercial license holder fishing aboard a federally permitted lobster vessel to fish an additional 400 lobster traps in New Hampshire state waters. This action will not result in more traps fished in the Federal waters of LCMA 1.

NH *Comment 2:* Three individuals stated that the New Hampshire two-tiered trap limit that would allow full commercial lobster license holders in New Hampshire to fish up to 1,200 traps in New Hampshire state waters violates National Standard 4 of the Magnuson-Stevens Fishery Conservation and Management Act.

Response: As a preliminary matter, New Hampshire full commercial license holders can fish 1,200 traps irrespective of Federal action because the ASMFC's Lobster Board has already approved New Hampshire's conservation equivalency request and the state has already implemented the program. In any event, National Standard 4 is not triggered because this final rule involves no Federal allocative measures. That is, this final rule does not create New Hampshire's equivalency program, but merely waives the most restrictive Federal regulatory language in order to prevent the potential for trap proliferation that would result if NOAA Fisheries took no action. In other words, this final rule simply reflects the Federal Government's conservation response to a formal conservation equivalency recommendation made by the ASMFC pursuant to the Atlantic Coastal Act. Put another way, this final rule does not endorse or advance the program's measures so much as it deals with them.

The current 800–trap limitation existing in the EEZ in Area 1 remains unchanged and would not allow any additional lobster traps in Federal waters. In fact, analysis of available information suggests an actual decrease in traps fished in Area 1, both in the EEZ and in New Hampshire State waters. As such, the state measure is self-contained and reflects an internal repositioning of traps within New Hampshire borders that is not expected to have any extraterritorial impacts or to impact citizens of other states. In other words, to the extent, if at all, that the increase to 1,200 traps benefits some New Hampshire permit holders (see FSEIS Section V.1. for discussion on economic effects of trap limitations), then that benefit is not excessive and is internally counterbalanced by the New Hampshire permit holders whose trap limits will decrease to 600 traps. Accordingly, the measure does not differentiate among citizens in different states (which could also seek conservation equivalency from the Lobster Board) or advantage the citizens of one state over another. Overall, conservation benefits are expected in furtherance of National Standard 1 with no corresponding degradation of the standards set forth in National Standard 4.

NH *Comment 3:* One commenter opposed the New Hampshire conservation equivalent trap measures because it will benefit only 22 Federal permit holders from New Hampshire and questions its effectiveness in contributing toward rebuilding lobster stocks.

Response: The New Hampshire two-tiered trap allocation program was determined to be conservation equivalent to the fixed trap limits in LCMA 1 by the Commission's Lobster Board. NOAA Fisheries' analysis concurs with this finding. In fact, analysis suggests that the measure will not simply be equivalent, but will actually benefit the resource by decreasing the overall number of traps in the water. As such, those not participating in this program also gain potential relative benefit. The most recent information provided by New Hampshire Fish and Game Department supports this premise:Recent data indicates that this measure is accountable for a reduction in the number of traps fished by New Hampshire fishermen to date, compared to what would currently be allowed under the fixed trap limits in area 1, despite the absence of a cap on limited licenses. Specifically, according to updated information provided by New Hampshire Department of Fish and Game for the period between 2000 and 2002, the number of limited licenses increased by approximately 11 percent, or 30 licenses. However, since these licenses are capped at only 600 traps, it resulted in 1,800 additional traps into the fishery, rather than 2,400 that would otherwise have been allowed if the limited license category was allowed the standard 800 traps. In any event, NOAA Fisheries recognizes that any state can utilize the adaptive management provisions of the ISFMP to present a conservation equivalent alternative to the approved management scenario, as applicable.

NH *Comment 4:* A Maine lobsterman stated that he had to reduce his traps by 400 three years ago when the state of Maine implemented a trap limit and now would not want to see a New Hampshire fisherman be able to fish that extra 400 traps under New Hampshire's conservation equivalent trap allocation program.

Response: The Federal trap limit in Area 1 remains at 800 traps regardless of whether an individual resides in the State of Maine or the State of New Hampshire. Individual states may, however, choose to implement more restrictive measures or conservationally equivalent measures, which is the scenario currently described by the commenter. The New Hampshire measure is a state measure approved by the Commission's Lobster Board of which the State of Maine is a member. In any event, NOAA Fisheries' best information suggests that the measure will result in an overall reduction of traps being fished by New Hampshire lobster fishers. Accordingly, while a very few New Hampshire permit holders may choose to fish 400 extra traps, an overall reduction in traps in the area should result that would benefit Maine lobster fishers. Certainly, if NOAA Fisheries did not approve the measure, New Hampshire's conservation equivalency program would nonetheless exist. That is, the Lobster Board already approved New Hampshire's conservation equivalent measure and the State of New Hampshire already promulgated regulations consistent therewith before issuance of this final rule. As such,

disallowance of the measure in this final rule could result in trap proliferation if New Hampshire full license holders retained their 1,200–trap state permit and sold their Federal permit to another.

NH *Comment 5:* A state commented that with the uncertainty surrounding the impact of the proposed New Hampshire trap limit conservation equivalency on the resource, the negative socio-economic impact on Maine and Massachusetts fishermen should become the deciding factor. Allowing this measure to go forward will undermine support for the Area 1 plan and may lead to additional requests for exemptions that may reverse progress to date.

Response: NOAA Fisheries acknowledges the right of New Hampshire or any other state to utilize the process for alternative state management regimes outlined in the law and Amendment 3 of the ISFMP to address specific socio-economic or industry-related situations. Importantly, New Hampshire's conservation equivalency proposal is a self-contained measure that is not expected to create extra-territorial responsibilities for her sister states or the Federal Government, nor is it expected to have any extra-territorial impacts. Overall, if there is an impact as a result of the measure, it should be positive for Maine and Massachusetts fishers since overall trap usage should decrease. However, NOAA Fisheries does note that continued creation and approval of conservation equivalent measures by the Commission could, depending on the measure, unintentionally increase the complexity of the present management system, burdening all parties, including sister states, industry and the Federal Government, and thereby greatly decreasing the efficiency and effectiveness of the overall ISFMP.

NH *Comment 6:* Allowing the New Hampshire conservation equivalency plan would be waiving the most restrictive rule in the ISFMP that requires lobstermen to fish the most restrictive of trap limits regardless of whether they fish in state or Federal waters.

Response: The Commission has created a task force to research and provide recommendations to the Lobster Board concerning the ''most restrictive'' rule. NOAA Fisheries intends to remain involved in future discussions concerning this and other novel management measures such as total trap allocations and trap transferability as the Commission moves forward in addressing these issues for consideration in the ISFMP. In the meantime, NOAA Fisheries acknowledges the right of New Hampshire to implement an alternative trap allocation system in state waters only, as approved by the Commission's Lobster Management Board, and consistent with the adaptive management measures set forth in the ISFMP.

NH *Comment 7:* The New Hampshire plan has greatly limited the number of traps fished by New Hampshire lobstermen. If it hadn't been implemented there would be about 20,000 traps fished by New Hampshire lobstermen compared to the approximately 10,000 that are currently estimated to be fished.

Response: Recent data from the New Hampshire Fish and Game Department indicate the state's plan reduces the potential number of traps fished in New Hampshire waters. See response to NH Comment 4.

Area Boundary Changes (AB)

AB *Comment 1:* One individual wrote in opposition to the proposed revisions to the Area 1, Area 2, and Outer Cape Area boundary lines as recommended by the Commission.

Response: NOAA Fisheries will implement compatible boundary lines for Area 1. Area 2 and the Outer Cape Area to maintain consistency with the ISFMP and to avoid confusion if the Federal and Commission area boundaries and their associated lobster management measures differ.

Gauge Size Comments (GS)

GS *Comment 1:* Nine individuals support some manner of a gauge increase.

Response: NOAA Fisheries will analyze minimum gauge size increases along with other measures adopted by the Commission in Addenda II and III to Amendment 3 of the ISFMP in a future Federal rulemaking package. The impacts of a gauge increase in Federal waters will require a thorough examination of the biological and socio-economic impacts of such a measure, including the interstate and U. S.-Canada trade implications.

GS *Comment 2:* Three individuals support a maximum carapace size requirement.

Response: The Federal lobster regulations currently do not allow a vessel fishing in or permitted to fish in LCMA 1 to possess lobster larger than 5 inch (13 cm) carapace length. Potential implementation of maximum gauge sizes as they pertain to those measures adopted in Addenda II and III to Amendment 3 of the ISFMP will be addressed by NOAA Fisheries in a separate rulemaking action.

GS *Comment 3:* One individual is opposed to a gauge increase in Area 1.

Response: Currently, the ISFMP does not include a requirement for gauge increases in LCMA 1 so this issue is not addressed in this Final Rule.

Vessel Upgrade Comments (VU)

VU *Comment 1:* One person suggested that NOAA Fisheries allow a 10–20 percent increase in vessel length and horsepower.

Response: NOAA Fisheries does not intend to limit lobster vessel size or horsepower requirements since these parameters are not indicative of fishing effort, as are numbers of traps.

General Comments (GC)

GC *Comment 1:* One commenter suggests a closed lobster season beginning December 1 rather than January 1. Another commenter suggests closed seasons from December 1 through March 1.

Response: Closed seasons were not included in the Commission's recommendations for Federal action in the EEZ in Addendum I and, therefore, were not analyzed as part of this rulemaking action. An annual closed season from January 1 through March 31 was adopted by the Commission in Addendum III to Amendment 3 of the ISFMP for the Outer Cape Management Area only. The Commission has recommended that NOAA Fisheries implement compatible measures into the Federal regulations, however, this will be addressed in future rulemaking.

GC *Comment 2:* Two individuals believe the rule violates the Magnuson-Stevens Act.

Response: NOAA Fisheries notes that the commenters make no specific reference as to how the proposed rule violates the MSA. Federal American lobster management is authorized under the Atlantic Coastal Act which requires that NOAA Fisheries, acting on behalf of the Secretary of Commerce, implement management measures that are compatible with the Commission's ISFMP and consistent with the National Standards set forth in the MSA. The manner in which this final rule addresses all 10 of the National Standards is detailed in the Classification section of this final rule and in section V.(5) of the FSEIS, Relationship to Other Applicable Law.

GC *Comment 3:* One commenter recommends that NOAA Fisheries implement a buy back program to allow industry members a way out of the business.

Response: Under section 312(a) and (b) of the MSA, the Secretary of Commerce may make funds available to

assist the fishing industry, such as a buy back program. This may only occur if the Secretary, at his or her discretion, or at the request of the Governor of an affected state, declares that a commercial fishery failure has occurred as the result of a fishery resource disaster. This was done in 1999 to alleviate impacts to commercial lobster fishermen in Connecticut and New York due to the Long Island Sound lobster fishery disaster (see responses to HP Comments 33 and 34). Although all three stocks of American lobster are overfished, it is not evident that a commercial fishery failure is occurring in the lobster fishery in Areas 3, 4 or 5, which are the subject of this final rule. The Secretary of Commerce may consider such an option if warranted under the requirements of Section 312(a) of the MSA. Regardless, current Federal lobster permits remain transferrable if the permitted vessel is soldto another individual or entity. Therefore, there is nothing that would prohibit, under current Federal regulations, a permit holder from selling his or her vessel and Federal lobster permit and gear to a willing buyer.

GC *Comment 4:* One opponent of historical participation states that the LCMTs don't represent the entire body of lobstermen.

Response: The LCMTs were established under Amendment 3 of the ISFMP, each acting in an advisory role to the Commission's Lobster Management Board. Their participation in the lobster management process is intended to ensure that the industry has a voice in how the resource is managed and allows the diverse nature of individual fishing operations, economic considerations and the unique issues of the specific areas to be addressed in the lobster management program. As mandated by the ISFMP, each LCMT must be comprised of a specific number of members from the associated states that represent the fleet in that particular management area. NOAA Fisheries is obliged under the Atlantic Coastal Act to implement regulations that are compatible with Commission recommendations as they relate to the ISFMP and includes acknowledging the LCMT's as a legitimate advisory body of the Commission. NOAA Fisheries suggests that any member of the lobster industry interested in becoming involved in the LCMT process contact their state fisheries agency or the Commission's American Lobster ISFMP Coordinator to inform them of that interest.

GC *Comment 5:*One individual commented that there is no scientific data to suggest that the lobster stock is depleted .

Response: The latest lobster stock assessment conducted in March 2000 indicates that all three stocks of American lobster are growth overfished and overfished according to the overfishing definition in the ISFMP. A subsequent peer review of that assessment by an external stock assessment peer review panel supported the conclusions of the 2000 stock assessment and determined that additional regulatory measures are necessary. The review panel also concluded that, although the resource is not recruitment overfished, recruitment overfishing is occurring, which could result in recruitment failure. The panel further noted that shifts in fishing effort from nearshore areas to offshore areas has occurred. Allowing such effort shifts t continue could negatively impact lobster egg production. Refer to FSEIS Section I.1, Science, and Section IV.3.(B)., Stock Assessment. The measures in the Commission's ISFMP, including historical participation for Areas 3, 4 and 5, have been determined to be effective in ending overfishing and rebuilding the lobster resource. Further, more recent anecdotal information and reports from state agencies indicate that lobster catches in southern New England are on the decline and the presence of shell disease is increasing. A massive die-off in Long Island Sound in 1999, although not proven to be directly related to overfishing, has substantially reduced lobster abundance, especially in western Long Island Sound.

Marine Mammal Comment (MM)

MM *Comment 1:* One individual cannot understand why NOAA Fisheries would allow a significant number of vessels to double their trap allocations compared to current allocations, given the increasing concern for protecting right whales.

Response: The selected action is anticipated to at least cap, and potentially reduce, levels of trap fishing in Areas 4 and 5 and reduce trap fishing levels in Area 3. Therefore, this should diminish the effects of trap gear on right whales. Further, the Atlantic Large Whale Take Reduction Plan is a major component of NOAA Fisheries' activities to cetaceans listed under the Endangered Species Act using a multi-faceted approach that includes fishing gear modifications and time-area closures, supplemented by gear research to reduce the risk of entanglement of whales in fixed fishing gear.

V-notching Comments (V-notch)

V-notch *Comment 1:* Six comments were received in favor of v-notching.

Response: Current Federal lobster regulations at 50 CFR 697. 7 prohibiting the retention, landing or possession of any v-notched female American lobster. Based on recommendations by the Commission in Addenda II and III to Amendment 3 of the ISFMP, NOAA Fisheries is in the process of analyzing the mandatory v-notching requirement for Areas 1 and 3, and the zero-tolerance v-notch definition for Area 3, adopted in the ISFMP. These measures will be addressed in a separate rulemaking action.

V-notch *Comment 2:* NOAA Fisheries should rectify the discrepancy between the Maine V-notch regulation and the Federal v-notch regulation. The Federal regulation is too broad and encompassing and only applies to lobsters that have recently been notched.

Response: NOAAFisheries believes that the current Federal definition of v-notch is sufficient and is enforceable since it provides specifics on what is recognized as a v-notch. This definition is consistent with that adopted by the Commission in the ISFMP. NOAA Fisheries may look more closely at this issue in future rulemaking actions when Commission recommended measures such as zero-tolerance v-notching and mandatory v-notch requirements are analyzed.

Changes from the Proposed Rule

Changes were made to several sections of the proposed rule to clarify the qualification and appeals process for determination of historical participation in Areas 3, 4, and 5; to respond to public comments; and to increase the period, from 30 to 45 days, during which appeals may be made subsequent to any associated notice of denial of permits for trap fishing in these lobster management areas. Changes were made as follows:

In § 697.2, definitions are added for ''Conservation equivalency'' and ''Qualifying year.''

In § 697.4, paragraph (a)(7)(ii) is revised to describe how qualification for historical participation will impact annual permit renewal procedures for fishing with traps in Lobster Conservation Management Areas 3, 4, and 5.

In § 697.4, paragraphs (a)(7)(vi), (a)(7)(vii), and (a)(7)(viii) were revised to clarify and restrict the type and nature of documentation that is required to meet qualification and trap allocation criteria for participation in the Area 3,

Area 4, and Area 5 lobster trap fishery; to extend the timeframe during which applicants can submit associated applications to qualify for trap allocations; to re-align qualification criteria and documentary proof under two major sub-headings; to require the submission of an affidavit (previously proposed to apply only to the certification of the number of traps fished in Area 3, Area 4, and/or Area 5 during the qualifying year) that attests that the applicant meets the qualification and trap allocation criteria for participation in the Area 3, Area 4, and/or Area 5 trap fishery, and that the supporting information being provided is truthful, accurate, and was created contemporaneously in the qualifying year; and to allow the submission of tax returns and sales receipts to the extent that such documents support the requested trap allocation(s) - to help demonstrate the number of traps fished in each lobster management area during the qualifying year.

In § 697.4, a new provision at (a)(7)(vi)(C)(5), (a)(7)(vii)(C)(4) and (a)(7)(viii)(C)(4), was added to require a signed cover letter along with the needed documentation which potential qualifiers must provide for explaining the nature of proof being submitted for qualification in the lobster trap fishery in Area 3, Area 4, and/or Area 5.

In § 697.4, paragraph (a)(7)(x) was deleted, and associated provisions for notification by NMFS were moved to paragraphs (a)(7)(vi)(C)(8), (a)(7)(vii)(C)(7), and (a)(7)(viii)(C)(7).

In § 697.4, paragraph (a)(7)(xi) is redesignated as (a)(7)(x) and revised to modify procedures for appeal of denial of an American lobster limited access request for use of trap gear in Area 3, Area 4 and/or Area 5, to allow only two grounds for appeal and to change the period of appeal from 30 days to 45 days from the date of the notice of denial.

In § 697.19, paragraphs (a) and (b) were revised to change the implementation date for limited access changes in the Area 3, Area 4, and Area 5 lobster trap fishery from May 1, 2002 to August 2, 2003.

In § 697.19, paragraph (b)(2) was revised to change the implementation period for the referenced Area 3 trap reduction schedule from fishing years 2002–2003 to fishing years 2003–2006.

In § 697.19, the cross reference to lobster trap allocations approved by the Regional Administrator for qualifiers in Area 3 in paragraph (b)(2) was changed from 697.4(a)(7)(vii), incorrectly referenced in the proposed rule, to § 697.4 (a)(7)(vi) and the sliding maximum trap limits identified in Table 1.

In § 697.19, paragraphs (e) through (g) were redesignated as paragraphs (f) through (h), respectively, and a new paragraph (e) was added to explain that the Regional Administrator may issue temporary interim permits prior to completion of NMFS review of qualification applications for the Area 3, Area 4, and/or Area 5 lobster trap fishery, and how this may affect allowable levels of trap fishing effort prior and subsequent to the NMFS review.

In § 697.25, the definition for ''Conservation equivalency'' is moved to § 697.2, and requires that, for consideration by the Regional Administrator of associated recommendations by ASMFC for American lobster, specific supporting information be provided.

Classification

The Assistant Administrator for NOAA Fisheries determined that the measures specified in this final rule are necessary for the conservation and management of the American lobster fishery and that these measures are consistent with the Atlantic Coastal Act, the Magnuson-Stevens Act, and other applicable laws.

The selected management actions in this final rule have been determined to be significant for the purposes of Executive Order 12866.

National Environmental Policy Act

NMFS prepared a Draft Supplemental Environmental Impact Statement, Regulatory Impact Review, and an Initial Regulatory Flexibility Analysis(DSEIS/RIR/IRFA) for this action; a notice of availability was published in the **Federal Register** on November 24, 2000 (65 FR 70567). Public comments on the DSEIS/RIR/IRFA were addressed, and NMFS prepared a Final Supplemental Environmental Impact Statement/Regulatory Impact Review/Final Regulatory Flexibility Analysis (FSEIS/RIR/FRFA) following publication of a proposed rule on lobster management in Federal waters in the **Federal Register** on January 3, 2002 (67 FR 282). A notice of availability for the FSEIS/RIR was published in the **Federal Register** on November 8, 2002 (67 FR 68128). NOAA Fisheries determined that implementation of this action is environmentally preferable to the status quo. The FSEIS/RIR/FRFA demonstrates that, notwithstanding potential, yet unknown, changes in fishing practices and behavior, this action contains management measures able to mitigate, to the extent possible, overfishing and begin to rebuild stocks of American lobster; protect marine mammals and sea turtles; and provide economic and social benefits to the lobster industry in the long term.

The Final Regulatory Flexibility Analysis (FRFA), prepared in compliance with the Regulatory Flexibility Act, describes the economic impacts of the management measures on small entities. A summary of the FRFA follows. Reasons why the action is considered, as well as the objectivesfor this final rule, are described in the FRFA and the preamble to this final rule and are not repeated here. All participants in the lobster fishery are considered to be small entities. A description of and an estimate of the number of small entities to which this final rule will apply is discussed below.

Public Comments

One hundred and ninety comments were received on the measures contained in the proposed rule. Because all entities affected by this final rule are small entities, all of the comments and responses are considered to pertain to small entities. While none of the comments specifically referred to the IRFA, there are eight comments that discuss economic impacts on small entities in the Comments and Responses portion of this final rule (see commentsnumbered - HP Comment 6, HP Comment 18, HP Comment 32–34, HP Comment 37, NH Comment 2, and NH Comment 5).

In this section, the economic impacts of the selected regulatory action and the non-selected alternatives potential economic effects are examined from the perspective of the individual firm or business. For purposes of this section, a small entity is defined as being any vessel with gross sales not exceeding $3.5 million annually, consistent with that of the size standards of the Small Business Administration. Under this definition, all entities that are permitted to fish and that participate in the American lobster fishery are small. The economic impacts associated with the selected management actions and the non-selected alternatives are described in the FSEIS, and are incorporated herein by reference. The selected regulatory action and the non-selected alternatives would affect only those entities that hold a Federal lobster permit.

Number of Small Entities

Based on permit application records analyzed at the time the environmental impacts of this action were completed, a total of 2,901 vessels held Federal lobster permits. Of these vessels, 18 held only charter or head boat non-trap

commercial permits, 6 held both charter/head boat and non-trap commercial permits, and 2065 vessels held Federal commercial lobster trap permits. Due to a lack of mandatory data collection in the lobster fishery, activity data to discern between vessels that merely hold a permit and vessels that have participated or are currently participating in the fishery cannot be determined with any degree of reliability. All Federal lobster permit holders must be considered as potential industry participants; therefore, a regulatory flexibility analysis was conducted. The regulatory flexibility analysis provides information on the expected economic impacts of the selected regulatory action and the non-selected alternatives on affected small entities, i.e. Federal permit holders engaged in the lobster fishery to the extent possible.

Economic Effects on Historic Participation Qualifiers

Based on data provided by the LCMA 3 participants, at least 64 vessels are expected to qualify for historic participation in LCMA 3. No such data is available for LCMA 4 and 5 nor does the information on the proportion of vessels fishing in each trap category provided by the Area 3 LCMT mean that the number of eventual qualifiers for historic participation will be limited to 64. Due to the lack of any mandatory data collection for Federal lobster permit holders, the actual number of qualifiers will not be known with certainty until after plan implementation. However, using available permit and activity data and adopting some simple decision rules an estimate of the potential number of qualifiers may be figured.

LCMA 3 and LCMA 4 and 5 qualifiers were estimated by matching permit application data to identify all vessels that have a current lobster permit against combined dealer and logbook to estimate qualification based on poundage and trap history requirements (Table 1). In the latter case, trap history was approximated by assuming some minimum poundage that may be expected to be produced from at least 200 traps on a given trip. If, for example, average catch per trap were 2 lb (0.9 kg) and if 200 traps were hauled on a given trip then at least 400 lb (181 kg) would be produced. Any vessel with at least one trip in excess of 400 lb (181 kg) of lobster in two consecutive calendar months in the appropriate LCMA was deemed to meet the trap history requirement for that calendar year.

An upper bound and lower bound estimate of historic participation qualifiers was estimated by using a sensitivity analysis on the catch per trip assumption and by adopting two different delineations for trips taken in the required LCMA. In the latter case, statistical area was used to delineate trips that took place in LCMA 3 and LCMA 4 and 5. Since statistical areas overlap the LCMA boundaries a lower bound estimate of participants was developed by dropping all statistical areas that had any overlap with either LCMA 3 or LCMA 4 and 5 boundaries. An upper bound estimate was developed by including statistical area overlaps. This procedure was necessary due to a lack of more precise latitude and longitude data in dealer data.

TABLE 1.—SUMMARY OF NUMBER OF QUALIFYING VESSELS FOR HISTORIC PARTICIPATION

	Catch-per-trap = 4		Catch-per-trap = 3		Catch-per-trap = 2		Catch-per-trap = 1	
	Upper	Lower	Upper	Lower	Upper	Lower	Upper	Lower
LCMA 3	99	53	106	55	111	55	117	58
LCMA 4 and 5	47	47	50	50	54	54	60	60

The analysis using available data suggests that the number of qualifiers could be as many as 117 vessels for the LCMA 3 fishery and 60 vessels for LCMA 4 and 5. Of the qualified vessels for LCMA 3, the majority had home ports in either Rhode Island or Massachusetts. For LCMA 4 and 5, the majority of qualified vessels were from home ports in the states of New York and New Jersey. These data are consistent with known patterns of participation in both LCMA 3 and LCMA 4 and 5 (Table 1). Nevertheless, given problems with data collection for the lobster fishery these qualification estimates are likely to under-estimate the number of vessels that will qualify for historic participation.

TABLE 2.—SUMMARY OF HOME PORT OF HISTORIC PARTICIPATION QUALIFIERS BY LCMA

Home Port State	LCMA 3		LCMA 4 and 5	
	Lower Bound	Upper Bound	Lower Bound	Upper Bound
DE	1	1	1	1
MA	52	58	2	3
MD	0	0	0	1
NH	1	1	0	0
NJ	7	7	24	31
NY	1	7	14	16
RI	35	41	3	3
VA	0	0	0	1
OTHER	2	2	3	4
Total	99	117	47	60

The effect of limiting access to historic participants will have several economic effects. Limiting access will protect qualifiers from effort expansion in the impacted offshore and nearshore LCMA's of Areas 3 ,4, and 5. The

selected management action will result in a closed system, restricting future participation in these areas to a known universe of qualified vessels that fished in these areas prior to the access control date of September 1, 1999. A closed universe of participants will effectively cap effort in Areas 4 and 5 at historic levels and, in Area 3, is intended to result in an estimated 20 percent reduction in gear after a 4–year trap reduction period compared to 1991–1993 estimated fishing. However, due to the ability of fishermen to compensate for a reduction in traps by increased fishing intensity, i.e.; more frequent trips and more frequent trap hauls per trip, landings and revenue are likely to be unaffected. A reduction in participants will also reduce the likelihood of gear conflicts and reduce associated loss of gear, while allowing the remaining trap gear to fish more efficiently since it will be possible to set gear in the more productive lobster grounds. A halt in effort expansion will effectively prevent a shift in effort by non-qualifiers from non-trap to trap gear in the impacted areas, and prevent a geographic shift by non-qualifiers from other areas that may be attracted to participate in the impacted areas for a variety of reasons, including potential financial incentives, localized overcrowding, or a resource decline such as that experienced in Long Island Sound.

A major economic effect of trap allocations based on historical participation will be to preserve the competitive position of fishing businesses in the offshore fishery. Vessels that have historically fished a greater volume of gear will be able to more effectively set gear to hold productive ground or claim seasonally productive lobster territory rather than always setting gear to maximize catch levels. It will also, to some unknown extent, increase the relative share of landings in these LCMAs for those who are able to meet the qualification criteria. However, increased trap usage may correlate into increased costs for qualifiers since increasing the numbers of traps fished brings with it increases in cost in purchasing and maintaining those extra traps, additional costs for bait, as well as the added time and fuel expenses necessary to tend the extra gear.

It is difficult to provide a more concrete statement of benefits associated with implementation of limited access in LCMA 3, 4, and 5, to historic participants for reasons described in this analysis. However, the lobster resource in these LCMAs is overfished and available data evaluated for this action indicates the number of traps will decrease. Notwithstanding data limitations, quantifiable impacts are discussed in greater detail in this regulatory flexibility analysis if possible. Additional benefits are described in the FSEIS (see **ADDRESSES**).

Assuming that the data provided by the Area 3 LCMT on the proportion of vessels fishing in each trap category is representative of the majority of vessels that currently fish and that may eventually qualify for historic participation, the economic effect of the selected regulatory action may be viewed in contrast to the trap caps under the non-selected status quo alternative and that of non-selected Alternative 1C.

Under the fixed trap cap identified in the non-selected status quo alternative and that of non-selected Alternative 1C, nearly half of the 64 vessels reporting trap numbers would be forced to reduce their traps by at least 100 traps and 16 vessels would have to reduce their traps fished by at least 500 traps. By contrast, under the fixed trap cap alternatives, 27 vessels would be able to increase trap numbers by at least 200 traps and 10 vessels would be able to increase trap numbers by at least 600 traps. Under the non-selected status quo and Alternative 1C, the potential for increased trap usage by 27 vessels and possible decreased trap usage by 30 vessels does not necessarily correlate to increased or decreased vessel profits for these respective vessels. That is, increasing the numbers of traps fished brings with it increases in cost in purchasing and maintaining those extra traps, additional costs for bait, as well as the added time and fuel expenses necessary to tend the extra gear. Similarly, decreases in traps usage will result in savings in time and costs. In fact, some have observed that decreases in traps do not result in decreases in harvest. (Acheson, 1997). Reasons for such include increased trap efficiencies—e.g. the same number of lobsters are caught, but concentrated in fewer traps and increased time and ability to more frequently tend the traps existing. Where a lack of data resolution prevents a quantifiable analysis of the potential economic benefits, qualitative benefits are provided. Certainly, based upon available data, many vessels fish below their current cap limit, presumably in order to maximize the economic efficiencies of their own circumstances. NOAA Fisheries anticipates this practice to continue, further ameliorating the expected financial impacts and disparity of the proposed action. In any event, trap allocations based on historical participation is not designed to create new financial positioning so much as it will preserve the historical competitive position and structure of the offshore fishery.

Among the regulatory alternatives considered in this action, the non-selected Alternative 1C would compromise the historic competitive balance of the offshore fishery by allowing vessels that currently fish below the existing fixed trap limits to increase effort and would permit some room for growth among the small entities (in terms of numbers of traps fished). Vessels currently fishing below the current cap may be able to use surplus gear above their current effort level and below the current trap cap to more effectively set gear to hold productive ground or claim seasonally productive lobster territory rather than always setting gear to maximize catch levels. It will also increase the relative share of landings in these LCMAs for vessels fishing below the current cap at the expense of reducing industry share for entities that have historically fished above the trap cap. Vessels that have historically fished above the current trap cap may find increased competition for seasonally productive lobster territory. On balance, however, both the selected regulatory action and the non-selected Alternative 1C would have the same general economic effect among qualifiers. Given the similarities, ultimately the selected actions are intended to implement Federal regulations that are compatible with the Commission's lobster ISFMP.

Economic Effects on Historic Participation Non-qualifiers

Given the relatively small number of historic participation qualifiers there will be a large number of vessels that will not qualify. Note, however, that the number of vessels that have participated in the offshore fishery has historically been low so the selected regulatory action will primarily affect vessels that may currently be actively pursuing entry into the offshore fishery (i.e.; Permit holders who have a vessel under construction or agreement, for example), vessels that began trap fishing effort after the qualification period ended, and other vessels that have participated in the offshore fishery but may not qualify due to one or more of the qualification criteria. However, as explained in detail in the FSEIS/RIR/FRFA (see **ADDRESSES**), NOAA Fisheries believes that potentially displaced fishers, having been given ample notice, are expected to have already diversified prior to the time the measures in this final rule take effect.

Under current Federal regulations, Federal lobster permit holders may elect to fish in any LCMA, but must abide by the most restrictive measures in effect for any LCMA elected. Based on an upper bound estimate of 60 qualifiers in LCMA 4 and 5, there is a total of 2,189 vessels that may not qualify to fish for lobster with traps under the selected regulatory action. This number, however, is potentially misleading because it represents all Federal permit holders across the range of the fishery, from Maine to North Carolina. As such, the number includes permit holders who have never fished in Areas 3, 4 or 5 and who have no intention of ever doing so, but who could potentially put Areas 3, 4 or 5 on their permit because current regulations do not prohibit such. Accordingly, the figure represents a theoretical upper boundary useful for analysis, but not intended to suggest the actual suspected impact set.

More realistic, however, is that of the 2,000 plus potential qualifiers, only 185 vessels designated at least area 4 or area 5 (or both) on their permit application records analyzed at the time the environmental impacts of this actions were completed. These vessels represent the set of permit holders that are most likely to be potentially impacted by historic participation in LCMA 4 and 5 (Table 3). Similarly, of the total theoretical upper boundary set of non-qualifiers for LCMA 3, 566 permit holders elected area 3 on the permit application. This set of 566 can be further reduced because many permit holders declare into an area even if they have no intention of fishing in that area. Reasons for this include maintaining fishing flexibility and the idea that in declaring an area one is preserving his or her right to fish there in the future if access to that area is limited. Certainly commenters have suggested that the number of vessels that actually fish in Area 3 is quite limited. Consistent with the findings for qualifying vessels, the majority of LCMA 4 and 5 non-qualifiers would be from home ports in New York and New Jersey. However, vessels from home ports in Maine would comprise the majority of LCMA 3 non-qualifiers and are believed to be predominantly Area 1 fishers.

To examine the restrictiveness of the qualification criteria, the alternative levels of qualification were developed to determine how many vessels might qualify under less restrictive requirements. Specifically, qualification for LCMA 3 historic participation for alternative poundage qualification levels of 10,000, 15,000 and 20,000 lb (4,536, 6,804, and 9,072 kg) was estimated. The various levels of assumed catch per trap were also retained. Note that since qualification for LCMA 4 and 5 historic participation has no poundage requirement, the number of qualifiers would only be affected by the ability to demonstrate historic levels of trap fishing. The sensitivity for LCMA 4 and 5 qualifiers to the assumed level of catch per trap was reported in Table 1.

The lower bound estimates for the LCMA 3 historic participation program were similarly insensitive to the poundage qualification criteria and were not particularly sensitive to the assumption of average catch per trap. By contrast, the upper bound estimates for LCMA 3 were sensitive to the poundage qualification criterion and this sensitivity increased as the assumed average catch per trap was reduced. Nevertheless, lowering the poundage criterion would result in, at most, a 37 vessel increase in LCMA 3 qualifiers.

TABLE 3.—SUMMARY OF HOME PORT STATE FOR HISTORIC PARTICIPATION NON-QUALIFIERS FOR PERMIT APPLICATIONS SELECTING LCMA 3 OR LCMA 4 AND 5

Home Port State	LCMA 4 and 5 Non-Qualifiers	LCMA 3 Non-Qualifiers
CT	2	0
DE	6	4
MA	29	161
MD	4	4
ME	11	269
NC	1	0
NH	2	18
NJ	49	43
NY	49	21
RI	27	38
OTHER	5	8
Total	185	566

TABLE 4.—SENSITIVITY ANALYSIS OF QUALIFIERS BY POUNDAGE CRITERION

Poundage Requirement(number)	CPU = 4 Pounds (number)	CPU = 3 Pounds (number)	CPU = 2 Pounds (number)	CPU = 1 Pounds (number)
Upper Bound Estimate for Area 3				
25000 lbs	99	106	111	117
20000 lbs	105	114	124	131
15000 lbs	110	121	133	144
10000 lbs	111	127	140	154
Lower Bound Estimate for Area 3				
25000 lbs	53	55	55	58
20000 lbs	55	57	57	59
15000 lbs	57	59	59	62
10000 lbs	57	60	60	64

The results reported in the Table 3 - Sensitivity Analysis of Qualifiers by Poundage Criterion are based upon limited data. Vessel history that may not be fully represented in NOAA Fisheries data may increase the number of qualifiers. Nevertheless, vessels that will not qualify for either LCMA 3 or LCMA 4 and 5 historic participation, will not be able to expand their businesses into these areas. The economic effects will be more severe for those vessels that are currently fishing some portion of their traps but will not qualify for historic participation because they could not meet one or more of the qualification criteria. These vessels will either have to:sell their Federal permit and fish their allowable number of traps in state waters, assuming they qualify under their individual state program; move their trap fishing effort to other management areas not requiring historic participation; or, use their vessel and gear in some alternative fishery. Thus, non-qualifying vessels will likely be able to offset some of their losses by fishing other areas or in other fisheries, but associated operations may not be as profitable as before.

A less obvious economic effect is that the value of the non-qualifier's Federal lobster permit might be eroded while

that of qualifying vessels could increase in certain hypothetical situations. Thus, while there may be no distinct operational effect the equity position of the business could be affected. The normal cost associated with baiting and hauling traps may not change but if the value of the lobster permit is capitalized into the value of the vessel, then the value of the owners' business could similarly be reduced. Since owner equity is an important component of obtaining favorable loan conditions non-qualifiers may be put at some competitive disadvantage when seeking business loans. If nothing else, the resale value of the business could be affected in certain circumstances.

Impacts of Historic Participation Alternatives on Small Entities

On balance, the non-selected Alternatives 1A and 1C would not have significant differential impacts on non-qualifiers. Thus, under alternative 1A and 1C, non-qualifiers that are participants in the offshore fishery would still be forced to seek alternative fishing locations. These vessels would suffer some loss in profitability since alternative areas would likely already have been heavily fished. Non-qualifiers might also suffer a decline in the value of their business affecting resale and possibly putting them at a competitive disadvantage when seeking business loans.

Non-selected Alternative lA would have approximately the same impact as that of the selected regulatory action except that vessels in LCMA 4 and 5 might be less negatively affected relative to the selected regulatory action. The possible negative effect of the selected action is due to the imposition of a cap on initial trap allocations. Such a cap would require some portion of qualifying vessels to reduce the number of traps fished proportionally more than vessels that will qualify for initial allocations at or below the cap.

Non-selected Alternative 1C might have mixed effects on qualifying vessels in LCMA 3 and LCMA 4 and 5. Vessels that are operating above the cap would have to reduce traps while vessels below the cap would be able to increase their traps. On balance, approximately the same number of vessels would be forced to reduce as would be able to increase their traps. At an industry level, this non-selected alternative might result in an equalization of competitiveness but would do so by negatively impacting relatively larger businesses.

Rationale for Selecting this Regulatory Action

Based on information available at this time, NOAA Fisheries concludes that the selected regulatory action is the best among the considered alternatives. The reader is referred to the preamble of this final rule and Section III of the FSEIS completed for this action (see **ADDRESSES**) for a detailed description of the selected regulatory action and its rationale and environmental consequences.

Impacts of New Hampshire Conservation Equivalency on Small Entities

Selected Action—New Hampshire Conservation Equivalency

Under New Hampshire conservation equivalency measures contained in this final rule, Federal permit holders with New Hampshire full licenses may be able to increase their relative share of landings compared to New Hampshire limited license holders and other non-New Hampshire LCMA 1 Federal participants because full license holders will be allowed to fish up to 400 more traps in New Hampshire state waters than is allowed under the current trap cap. Gross revenues for New Hampshire full license holders fishing above the current 800 maximum trap limit in the state waters of New Hampshire may be increased. To the extent that revenue increases are offset by equipment expenses (i.e. the procurement, tending, and maintenance of more gear), profits may remain unchanged. New Hampshire full license holders may also be able to more efficiently ''hold ground'' or claim seasonally productive lobster territory. However, gear conflicts may increase and offset the benefits of increased landings. Limited license holders fishing below the current maximum trap limit may experience reduced landings, and, since prices are expected to remain unchanged, gross revenues may decrease. However, reduced equipment expenses and the ability to increase efficiencies through an increase in the number of trips and more frequent trips may offset revenue losses and profits may remain unchanged. However, the State of New Hampshire has already implemented this conservation equivalency program notwithstanding the coordinated Federal measures contained in this rule. Accordingly, the financial impacts associated with fishing 1,200 traps would be encountered regardless of Federal action (see NH Comment 4).

Non-Selected No Action/Status Quo Alternative 2B—New Hampshire

Under the non-selected status quo alternative, Federal permit holders with New Hampshire full license would be restricted to the current 800–maximum trap limit. This non-selected alternative might result in a variety of responses on the part of impacted Federal permit holders. If NOAA Fisheries did not implement the selected action to allow fishers who qualify to use 1,200 traps in New Hampshire state waters, the impacted fisher could relinquish his Federal permit, sell the vessel and associated Federal permit, or continue to fish for lobster with traps under the existing Area 1 trap limit (800 traps) in both state and Federal waters. Relinquishment of the Federal permit would result in less gear being fished in Federal waters although the 1,200 traps would still be fished, but entirely in state waters, potentially greatly increasing line density in state waters. However, given the economic value of a vessel with an associated Federal limited access lobster permit, it is unlikely that a fisher would simply relinquish the Federal permit. Sale of the vessel and associated Federal limited access lobster permit to a fisher who did not possess a New Hampshire lobster permit would not be expected to result in a reduction in trap gear. It is likely that a sale would result in increased effort under the assumption that the seller would continue to fish the 1,200 traps entirely in state waters, thereby potentially greatly increasing fishing effort, traps, and trap line density in state waters, while the buyer of the vessel and Federal lobster permit could fish up to the maximum trap limit in Federal waters for the area(s) elected. If the impacted fisher were to elect to continue to fish for lobster with traps under the existing Area 1 trap limit (800 traps) in both state and Federal waters, vessels unable to increase efficiencies and make adjustments to fishing practices to compensate for trap reductions might experience a reduction in profits. Not taking action to establish a 600–trap ceiling for Federal limited license holders, a more conservative limit than the 800–trap limit required by the ISFMP, might result in an increase in lobster landings for license holders actually fishing above the 600–trap limit. However, an absence of information on the actual number of traps actively fished by New Hampshire lobstermen makes it impossible to quantify the impact on landings.

Impacts of Compatible Management Area Boundaries

Selected Action 3A

The selected action will implement compatible boundary lines for Area 1, Area 2, and the Outer Cape Area to maintain consistency with the Commission's lobster ISFMP. Impacted vessels will benefit from compatible boundary lines, by the elimination of potential regulatory differences between state and Federal area specific regulations, and the elimination of differential enforcement as interpreted by state and Federal agencies.

Non-selected No Action Status Quo Alternative 3B—Boundaries

This non-selected alternative would result in incompatible boundary lines for Area 1, Area 2, and the Outer Cape Area. Incompatible boundaries could result in differential enforcement of area specific management measures as interpreted by state and Federal agencies as well as confusion on the part of impacted Federal permit holders.

Reporting and Recordkeeping Requirements

Small entities applying under the historic participation application process for LCMAs 3, 4, or 5, would be required to comply with the new collection-of-information requirements described in the Classification section of this final rule under the Paperwork Reduction Act section. No professional skills are necessary to comply with any of the reporting requirements associated with this action.

Paperwork Reduction Act

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The following collection-of-information requirements are being restated and have already been approved by the Office of Management and Budget (OMB) as shown:vessel permit applications approved under OMB control number 0648–0202 with the response times per application of 30 minutes for a new application, and 15 minutes for renewal applications; the Area 5 Waiver program approved under OMB control number 0648–0202 with the response times per application of 15 minutes to initiate a permit category change and select the LCMA 5 Trap Waiver Permit category, 2 minutes per response to return a suspended limited access lobster trap permit, and 15 minutes per response to initiate cancellation of a LCMA 5–Trap Waiver Permit and re-activate a suspended limited access lobster trap permit; and a lobster trap tag requirement approved under OMB control number 0648 0351 with a response time of 1 minute per tag.

This final rule contains new collection-of-information requirements subject to the PRA. The collection of this information has been approved by OMB under OMB control number 0648–0450. These requirements include the compilation of information by Federal permit holders pertaining to historical fishing operations in the lobster fishery, and the submission of one or more affidavits to NOAA Fisheries, certifying the information provided to qualify based on the area specific qualification criteria number in LCMAs 3, 4, and 5. The public reporting burden for each collection of information per response is indicated in the following list of new requirements, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The new requirements are as follows: (1) Provision of a cover letter intended to describe the types of documentation included in the application and the relevance of the documentation to the application process with a response time per application of 15 minutes; (2) Provision of documentation of possession of a current valid Federal lobster permit with a response time per application of 5 minutes; (3) Provision of documentation to demonstrate at least 200 lobster traps were set, allowed to soak, hauled back, and re-set in Areas 3, 4, or 5 during a 2–consecutive calendar month period in any calendar year during the qualification periodfrom March 25, 1991, through September 1, 1999 with a response time per application of 15 minutes; (4) (For Area 3 only) Provision of documents pertaining to the sale of lobsters indicating the landing of at least 25,000 lb (11,340 kg) of lobster from any location during the year used as the qualifying year from March 25, 1991, to September 1, 1999 with a response time per application of 10 minutes;(5) Provision of documentation for proof of historical participation in two rather than one lobster management area with a response time per application of an additional 17 minutes if different consecutive two-month periods of trap fishing are used; (6) Provision of documentation for proof of historical participation in three rather than one lobster management area with a response time per application of an additional 34 minutes if three different consecutive 2–month periods are used; (7) Completion of lobster trap fishing area eligibility application form with a response time per application of 2 minutes for each area selected; (8) Provision of affidavit stating total number of individual lobster traps the permit holder set, allowed to soak, hauled back, and re-set in Areas 3, 4, or 5 at any one time during the qualifying year with a response time per application of 15 minutes; (9) Provision of a written appeal request to the Regional Administrator by non-qualifying permit holders with a response time per application of 15 minutes; and10. Provision of affidavits in support of documentary hardship written appeal request to the Regional Administrator by non-qualifying permit holders with a response time per application of 3.25 hours if three affidavits are required and 4.25 hours per application if four affidavits are required.

Send comments regarding these burden estimates or any other aspect of the data requirements, including suggestions for reducing the burden, to the Director, State, Federal and Constituent Programs Office, NOAA Fisheries, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection-of-information displays a currently valid OMB control number.

Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA)

Section 7(a)(2) of the Endangered Species Act (ESA) (16 U. S. C.1531 *et seq.*) requires that each Federal agency shall ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. When the action of a Federal agency may affect species listed as threatened or endangered, that agency is required to consult with either the National Marine Fisheries Service (NOAA Fisheries) or the U. S. Fish and Wildlife Service (FWS), depending upon the species that may be affected. In instances where NOAA Fisheries or FWS are themselves proposing an action that may affect listed species, the agency must conduct intra-service consultation. Management measures described in this final rule resulted in the initiation of an informal

and a formal intra-service section 7 consultation with NOAA Fisheries' Northeast Region Protected Resources Division.

Informal consultation on the actions described in this final rule concluded on March 1, 2001, that parts of the action, as proposed, were likely to adversely affect ESA-listed right whales, humpback whales, fin whales, sei whales, sperm whales, leatherback sea turtles and loggerhead sea turtles as a result of displacement of lobster trap gear from LCMAs 3, 4, and 5 to nearshore lobster management areas where these species are known to occur.

Formal intra-service ESA section 7 consultation on NOAA Fisheries' implementation of new management measures described in this final rule was initiated on July 11, 2001. The most recent section 7 consultation for this action is based on information developed byNOAA Fisheries' State, Federal and Constituents Programs Office, and other sources of information.

The formal section 7 consultation concluded on October 31, 2002, that the selected management measures described in this final rule are not likely to jeopardize the continued existence of right whales, humpback whales, fin whales, sei whales, or sperm whales, loggerhead or leatherback sea turtles. Critical habitat for right whales has been designated within the action area, but the action is not likely to affect that critical habitat. Therefore, the management measures described in this final rule are not likely to destroy or adversely modify designated critical habitat.

The management measures described in this final rule are expected to result in a reduction of effort as a result of limiting participation in LCMAs 3, 4 and 5 and requiring trap reductions over a 4–year period for LCMA 3. Protected species known to become entangled in lobster trap gear, namely right, humpback, and fin whales as well as leatherback sea turtles, are expected to benefit from trap gear reductions in LCMAs 3, 4, and 5. Historic participation in LCMAs 3, 4, and 5 may also result in a shift in effort to nearshore areas. However, additional entanglements of ESA-listed cetaceans and sea turtles are not expected given that the overall effort in the fishery will decrease and there are management measures in place to reduce the number and severity of large whale entanglements in lobster gear. Some of these management measures are expected to be of benefit to sea turtles as well, such as by reducing the amount of line in the water. Sperm whales, and sei whales are not expected to occur in sufficient numbers in affected nearshore areas such that an increase in lobster gear in these areas will result in the addition of adverse affects to these species.

The management measures described in this final rule for conservation equivalency for New Hampshire, while likely reducing the combined overall number of traps fished by state and Federal permit holders combined, could potentially result in the addition of lobster trap gear fished solely by these few Federal permit holders in New Hampshire state waters. The Biological Opinion for this action has identified that the activity for implementation of conservation equivalency for federal lobster fishers who also possess a full-time commercial New Hampshire lobster license will directly affect leatherback sea turtles as a result of entanglement in lobster trap gear set in New Hampshire waters. NOAA Fisheries has determined that this level of anticipated take is not likely to jeopardize the continued existence of leatherback sea turtles. Reasonable and Prudent Measures and Terms and Conditions are provided with the opinion to minimize the take of sea turtles in the lobster trap fishery.

For additional discussion on the most recent ESA section 7 consultation for this action, a complete administrative record of this consultation is on file at the NOAA Fisheries, Northeast Regional Office, Office of Protected Resources, One Blackburn Drive, Gloucester, Massachusetts, 01930 [Consultation No. F/NER/2001/01263].

List of Subjects in 50 CFR Part 697

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 19, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR chapter VI, part 697, is amended as follows:

PART 697—ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

■ 1. The authority citation for part 697 continues to read as follows:

Authority: 16 U. S. C. 5101 *et seq.*

■ 2. In § 697.2, definitions for ''Conservation equivalency'' and ''Qualifying year'' are added in alphabetical order to read as follows:

§ 697.2 Definitions.

* * * * *

Conservation equivalency means a measure adopted by a state that differs from the specific requirements of an interstate fishery management plan, but achieves the same level of conservation for the resource under management.

* * * * *

Qualifying year means any calendar year during the period from March 25, 1991, through September 1, 1999, excluding the time periods in calendar years 1991 and 1999 that are outside the qualification period (i.e., January 1, 1991 through March 24, 1991, and September 2, 1999, through December 31, 1999), and refers to the specific year selected by the applicant for the purposes of qualifying for access to the lobster trap fishery in Areas 3, 4 and/or 5 under the requirements set forth in 697.4(a)(7)(vi-x).

* * * * *

■ 3. In § 697.4, paragraph (a)(7)(ii) is revised and paragraphs (a)(7)(vi) through (x), and (f)(1)(v) are added to read as follows:

§ 697.4 Vessel permits and trap tags.

(a) * * *

(7) * * *

(ii) Each owner of a fishing vessel that fishes with traps capable of catching American lobster must declare to NMFS in his/her annual application for permit renewal which management areas, as described in § 697.18, the vessel will fish in for lobster with trap gear during that fishing season. The ability to declare into Lobster Conservation Management Areas 3, 4 and/or 5, however, will be first contingent upon a one time initial qualification as set forth in paragraphs (a)(7)(vi) through (a)(7)(viii).

* * * * *

(vi) *Participation requirements for EEZ Offshore Management Area 3 (Area 3).* To fish for lobster with traps in Area 3, a Federal lobster permit holder must initially qualify into the area. To qualify, the permit holder seeking initial qualification must satisfy the following requirements in an application to the Regional Administrator:

(A) *Qualification criteria.* To initially qualify into Area 3, the applicant must establish with documenting proof the following:

(*1*) That the applicant possesses a current Federal lobster permit;

(*2*) That at least 200 lobster traps were set, allowed to soak, hauled back, and re-set in Area 3 by the qualifying vessel during a period of two consecutive calendar months in any calendar year during the period from March 25, 1991, through September 1, 1999, excluding the time period in calendar years 1991

and 1999 that are outside the qualification period (i.e., January 1, 1991 through March 24, 1991 and September 2, 1999 through December 31, 1999);

(*3*) That at least 25,000 lb (11,340 kg) of lobster were landed by the qualifying vessel from any location during the qualifying year selected in paragraph (9)(7)(vi)(A)(*2*).

(B) *Trap allocation criteria.* A qualified applicant must also establish with documentary proof the number of lobster traps fished by the qualifying vessel in Area 3 during the qualifying year. To the extent that the documentation so establishes, the Regional Administrator will then allocate a maximum number of lobster traps with which to fish in Area 3 as it relates to the sliding scale set forth in § 697.19.

(C) *Documentary proof.* To satisfy the Area 3 Initial Qualification and Trap Allocation Criteria set forth in paragraphs (9)(7)(vi)(A) and (B) of this section, the applicants will be limited to the following documentary proof:

(*1*) As proof of a valid Federal lobster permit, the applicant must provide a copy of the vessel's current Federal lobster permit. The potential qualifier may, in lieu of providing a copy, provide NMFS with such data that would allow NMFS to identify the current permit holder in its data base, which would at a minimum include:the applicant's name and address, vessel name and permit number;

(*2*) As proof of 200 trap/two consecutive month criterion, the applicant must provide - to the extent that the document(s) clearly and credibly establishes this criterion - one or more of the following types of documentation: copies of Federal Fishing Vessel Trip Reports (NOAA Form 88–30), Federal Port Agent Vessel Interview forms (NOAA Form 88–30), Federal Sea Sampling Observer Reports or a Federal Fishing Vessel and Gear Damage Compensation Fund Report (NOAA Form 88–176); personal vessel logbooks; state permit applications; and/or official state reporting documentation showing the number of lobster traps fished, including, but not limited to, state report cards, state vessel interview forms, license application forms, state sea sampling observer reports, and catch reports. These documents must have been created on or about the time of activity stated in the document. NMFS will not accept recent vessel log book entries or other recently created documents identified in this part as proof of fishing activity that occurred in prior years;

(*3*) As proof that 25,000 lb (11,340 kg) of lobster were landed the applicant must provide - to the extent that the document(s) clearly and credibly establishes this criterion - one or more of the following types of documentation:copies of Federal Fishing Vessel Trip Reports (NOAA Form 88–30), Federal Port Agent Vessel Interview forms (NOAA Form 88–30) or Federal Sea Sampling Observer Reports; personal vessel logbooks; official state reporting documentation showing the pounds of lobster landed, including, but not limited to, state report cards, state vessel interview forms, state sea sampling observer reports, and catch reports; and/or sales receipts or landing slips. These documents must have been created on or about the time of activity stated in the document. NMFS will not accept recent vessel log book entries or other recently created documents identified in this part as proof of fishing activity that occurred in prior years;

(*4*) As proof of the number of traps fished during the qualifying year, NOAA Fisheries will accept to the extent that the document(s) clearly and credibly establishes this criterion one or more of the following types of documentation:copies of Federal Fishing Vessel Trip Reports (NOAA Form 88–30); Federal Port Agent Vessel Interview Forms (NOAA Form 88–30); Federal Sea Sampling Observer Reports; Federal Fishing Vessel and Gear Damage Compensation Fund Reports (NOAA Form 88–176); personal vessel logbooks; tax returns and sales receipts; state permit applications; and/or official state reporting documentation showing the number of traps fished, including, but not limited to, state report cards, state vessel interview forms, license application forms, state sea sampling observer reports, and catch reports. Documentation may represent the number of traps fished during any point in the qualifying year and does not necessarily need to represent the 2–consecutive month period used in paragraph (a)(7)(vi)(C)(*2*) of this section. These documents must have been created on or about the time of the activity stated in the document. NMFS will not accept recent vessel log book entries or other recently created documents identified in this part as proof of fishing activity that occurred in prior years;

(*5*) All applicants must further provide a signed cover letter that identifies the documents provided and which qualifying and trap allocation criteria the documents are being used to establish;

(*6*) All applicants must further provide an affidavit attesting under the penalties of perjury that each aspect of each of the qualification and trap allocation criteria has been met and the submitted supporting documentation is truthful, accurate and created contemporaneously with the dates identified on the documents. Specifically, each affidavit must attest in separate and specific paragraphs:

(*i*) The name, address, lobster permit number and vessel of the applicant;

(*ii*) That at least 200 lobster traps were set, allowed to soak, hauled back and re-set during the 2–month period in the qualifying year in the area being selected by the applicant, identifying those months and that year and further identifying which documents are being offered as proof of such;

(*iii*) That at least 25,000 lb (11,340 kg) of lobster were landed during the qualifying year by the vessel, identifying that year and further identifying which documents are being offered as proof of such;

(*iv*) The total number of traps set in the qualifying area during the qualifying year, identifying that area and year, and further identifying which documents are being offered as proof of such; and

(*v*) That the submitted documents in support of these claims are truthful, accurate and created during the qualifying year.

(*7*) All documents and submissions must be legible. Illegible documents or submissions will not be considered;

(*8*) The Regional Administrator may, at his or her discretion, waive documentary obligations for certain elements of the qualification criteria for an applicant if NMFS itself has clear and credible evidence that would satisfy that qualification criteria for the applicant;

(*9*) At the discretion of the Regional Administrator, all submitted documentation must be accompanied by a completed NMFS Lobster Historical Participation Application Form.

(*10*) Applicants must retain copies of all the application materials and documentation submitted to NMFS while the application is pending.

(D) *Application period.* The time period for submitting a historical qualification and trap allocation application begins on the date 30 days after publication of this final rule (application period start date) and ends December 31, 2003.

(*1*) *Earlier submissions.* Applicants who submit their applications to the Regional Administrator by July 31, 2003 (or in less than 60 days after the application period start date, whichever is later) will be eligible to receive a temporary interim permit that would allow the vessel to continue fishing with

traps in Area 3 at existing levels during the 2003 fishing season while NMFS processes the application. After processing and reaching a decision on this earlier submitted application, the Regional Administrator may then issue a revised permit that will indicate the vessel's Area 3 eligibility and trap allocation. This revised permit will supersede the temporary interim permit and be effective immediately.

(*2*) *Later submissions.* Applicants who submit their applications to the Regional Administrator after July 31, 2003 (or more than 60 days after the application period start date, whichever is later), will not be eligible to receive a temporary interim permit that would allow continued fishing in Area 3 while NMFS processes the application. Even though they may be deemed qualified, applicants submitting applications in this later time period will not be eligible to fish in Area 3 until the 2004 fishing season.

(vii) *Participation requirements for EEZ Nearshore Management Area 4 (Area 4).* To fish for lobster with traps in Area 4, a Federal lobster permit holder must initially qualify into the area. To qualify, the permit holder seeking initial qualification must satisfy the following requirements in an application to the Regional Administrator:

(A) *Qualification criteria.* To initially qualify into Area 4, the applicant must establish with documenting proof the following:

(*1*) That the applicant possesses a current Federal lobster permit;

(*2*) That at least 200 lobster traps were set, allowed to soak, hauled back, and re-set in Area 4 by the qualifying vessel during a period of two consecutive calendar months in any calendar year during the period from March 25, 1991, through September 1, 1999, excluding the time period in calendar years 1991 and 1999 that are outside the qualification period (i.e., January 1, 1991 through March 24, 1991 and September 2, 1999 through December 31, 1999).

(B) *Trap allocation criteria.* A qualified applicant must also establish with documentary proof the number of lobster traps fished by the qualifying vessel in Area 4 during the qualifying year. To the extent that the documentation so establishes, the Regional Administrator will then allocate a maximum number of lobster traps with which to fish in Area 4, not to exceed 1,440 traps.

(C) *Documentary proof.* To satisfy the Area 4 Initial Qualification and Trap Allocation Criteria set forth in paragraphs (A) and (B) of this section, the applicants will be limited to the following documentary proof:

(*1*) As proof of a valid Federal lobster permit, the applicant must provide a copy of the vessel's current Federal lobster permit. The potential qualifier may, in lieu of providing a copy, provide NMFS with such data that would allow NMFS to identify the current permit holder in its data base, which would at a minimum include: the applicant's name and address, vessel name and permit number;

(*2*) As proof of 200 trap/two consecutive month criterion, the applicant must provide - to the extent that the document(s) clearly and credibly establishes this criterion - one or more of the following types of documentation:Copies of Federal Fishing Vessel Trip Reports (NOAA Form 88–30), Federal Port Agent Vessel Interview forms (NOAA Form 88–30), Federal Sea Sampling Observer Reports or a Federal Fishing Vessel and Gear Damage Compensation Fund Report (NOAA Form 88–176); personal vessel logbooks; state permit applications; and/or official state reporting documentation showing the number of lobster traps fished, including, but not limited to, state report cards, state vessel interview forms, license application forms, state sea sampling observer reports, and catch reports. These documents must have been created on or about the time of activity stated in the document. NMFS will not accept recent vessel log book entries or other recently created documents identified in this part as proof of fishing activity that occurred in prior years;

(*3*) As proof of the number of traps fished during the qualifying year, NOAA Fisheries will accept to the extent that the document(s) clearly and credibly establishes this criterion - one or more of the following types of documentation:Copies of Federal Fishing Vessel Trip Reports (NOAA Form 88–30); Federal Port Agent Vessel Interview Forms (NOAA Form 88–30); Federal Sea Sampling Observer Reports; Federal Fishing Vessel and Gear Damage Compensation Fund Reports (NOAA Form 88–176); personal vessel logbooks; tax returns and sales receipts; state permit applications; and/or official state reporting documentation showing the number of traps fished, including, but not limited to, state report cards, state vessel interview forms, license application forms, state sea sampling observer reports, and catch reports. Documentation may represent the number of traps fished during any point in the qualifying year and does not necessarily need to represent the 2–consecutive month period used in paragraph (a)(7)(vii)(C)(2) of this section. These documents must have been created on or about the time of the activity stated in the document. NMFS will not accept recent vessel log book entries or other recently created documents identified in this part as proof of fishing activity that occurred in prior years;

(*4*) All applicants must further provide a signed cover letter that identifies the documents provided and which qualifying and trap allocation criteria the documents are being used to establish;

(*5*) All applicants must further provide an affidavit attesting under the penalties of perjury that each aspect of each of the qualification and trap allocation criteria has been met and the submitted supporting documentation is truthful, accurate and created contemporaneously with the dates identified on the documents. Specifically, each affidavit must attest in separate and specific paragraphs:

(*i*) The name, address, lobster permit number and vessel of the applicant;

(*ii*) That at least 200 lobster traps were set, allowed to soak, hauled back and re-set during the two month period in the qualifying year in the area being selected by the applicant, identifying those months and that year and further identifying which documents are being offered as proof of such;

(*iii*) The total number of traps set in the qualifying area during the qualifying year, identifying that area and year, and further identifying which documents are being offered as proof of such; and

(*iv*) That the submitted documents in support of these claims are truthful, accurate and created during the qualifying year.

(*6*) All documents and submissions must be legible. Illegible documents or submissions will not be considered;

(*7*) The Regional Administrator may, at his or her discretion, waive documentary obligations for certain elements of the qualification criteria for an applicant if NMFS itself has clear and credible evidence that would satisfy that qualification criteria for the applicant;

(*8*) At the discretion of the Regional Administrator, all submitted documentation must be accompanied by a completed NMFS Lobster Historical Participation Application Form.

(*9*) Applicants must retain copies of all the application materials and documentation submitted to NMFS while the application is pending.

(D) *Application period.* The time period for submitting a historical qualification and trap allocation application begins on the date 30 days

after publication of this final rule (application period start date) and ends December 31, 2003.

(*1*) *Earlier submissions.* Applicants who submit their applications to the Regional Administrator by July 31, 2003 (or in less than 60 days after the application period start date, whichever is later) will be eligible to receive a temporary interim permit that would allow the vessel to continue fishing in Area 4 at existing levels during the 2003 fishing season while NMFS processes the application. After processing and reaching a decision on this earlier submitted application, the Regional Administrator may then issue a revised permit that will indicate the vessel's Area 4 eligibility and trap allocation. This revised permit will supercede the temporary interim permit and be effective immediately.

(*2*) *Later submissions.* Applicants who submit their applications to the Regional Administrator after July 31, 2003 (or more than 60 days after the application period start date, whichever is later), will not be eligible to receive a temporary interim permit that would allow continued fishing in Area 4 while NMFS processes the application. Even though they may be deemed qualified, applicants submitting applications in this later time period will not be eligible to fish in Area 4 until the 2004 fishing season.

(viii) Participation requirements for EEZ Nearshore Management Area 5 (Area 5). To fish for lobster with traps in Area 5, a Federal lobster permit holder must initially qualify into the area. To qualify, the permit holder seeking initial qualification must satisfy the following requirements in an application to the Regional Administrator:

(A) *Qualification criteria.* To initially qualify into Area 5, the applicant must establish the following:

(*1*) That the applicant possesses a current Federal lobster permit;

(*2*) That at least 200 lobster traps were set, allowed to soak, hauled back, and re-set in Area 5 by the qualifying vessel during a two consecutive calendar month period in any calendar year during the period from March 25, 1991, through September 1, 1999, excluding the time period in calendar years 1991 and 1999 that are outside the qualification period (i.e., January 1, 1991 through March 24, 1991 and September 2, 1999 through December 31, 1999).

(B) *Trap allocation criteria.* A qualified applicant must also establish with documentary proof the number of lobster traps fished by the qualifying vessel in Area 5 during the qualifying year. To the extent that the documentation so establishes, the Regional Administrator will then allocate a maximum number of lobster traps with which to fish in Area 5, not to exceed 1,440 traps.

(C) *Documentary proof.* To satisfy the Area 5 Initial Qualification and Trap Allocation Criteria set forth in paragraphs (9)(7)(viii)(A) and (B) of this section, the applicants will be limited to the following documentary proof:

(*1*) As proof of a valid Federal lobster permit, the applicant must provide a copy of the vessel's current Federal lobster permit. The potential qualifier may, in lieu of providing a copy, provide NMFS with such data that would allow NMFS to identify the current permit holder in its data base, which would at a minimum include: the applicant's name and address, vessel name and permit number.

(*2*) As proof of 200–trap/2–consecutive month criterion, the applicant must provide - to the extent that the document(s) clearly and credibly establishes this criterion - one or more of the following types of documentation:copies of Federal Fishing Vessel Trip Reports (NOAA Form 88–30), Federal Port Agent Vessel Interview forms (NOAA Form 88–30), Federal Sea Sampling Observer Reports or a Federal Fishing Vessel and Gear Damage Compensation Fund Report (NOAA Form 88–176); personal vessel logbooks; state permit applications; and/or official state reporting documentation showing the number of lobster traps fished, including, but not limited to, state report cards, state vessel interview forms, license application forms, state sea sampling observer reports, and catch reports. These documents must have been created on or about the time of activity stated in the document. NMFS will not accept recent vessel log book entries or other recently created documents identified in this part as proof of fishing activity that occurred in prior years.

(*3*) As proof of the number of traps fished during the qualifying year, NOAA Fisheries will accept to the extent that the document(s) clearly and credibly establishes this criterion - one or more of the following types of documentation:copies of Federal Fishing Vessel Trip Reports (NOAA Form 88–30); Federal Port Agent Vessel Interview Forms (NOAA Form 88–30); Federal Sea Sampling Observer Reports; Federal Fishing Vessel and Gear Damage Compensation Fund Reports (NOAA Form 88–176); personal vessel logbooks; tax returns and sales receipts; state permit applications; and/or official state reporting documentation showing the number of traps fished, including, but not limited to, state report cards, state vessel interview forms, license application forms, state sea sampling observer reports, and catch reports. Documentation may represent the number of traps fished during any point in the qualifying year and does not necessarily need to represent the 2–consecutive month period used in paragraph (a)(7)(viii)(C)(2) of this section. These documents must have been created on or about the time of the activity stated in the document. NMFS will not accept recent vessel log book entries or other recently created documents identified in this part as proof of fishing activity that occurred in prior years;

(*4*) All applicants must further provide a signed cover letter that identifies the documents provided and which qualifying and trap allocation criteria the documents are being used to establish;

(*5*) All applicants must further provide an affidavit attesting under the penalties of perjury that each aspect of each of the qualification and trap allocation criteria has been met and the submitted supporting documentation is truthful, accurate and created contemporaneously with the dates identified on the documents. Specifically, each affidavit must attest in separate and specific paragraphs:

(*i*) The name, address, lobster permit number and vessel of the applicant;

(*ii*) That at least 200 lobster traps were set, allowed to soak, hauled back and re-set during the two month period in the qualifying year in the area being selected by the applicant, identifying those months and that year and further identifying which documents are being offered as proof of such;

(*iii*) The total number of traps set in the qualifying area during the qualifying year, identifying that area and year, and further identifying which documents are being offered as proof of such; and

(*iv*) That the submitted documents in support of these claims are truthful, accurate and created during the qualifying year.

(*6*) All documents and submissions must be legible. Illegible documents or submissions will not be considered;

(*7*) The Regional Administrator may, at his or her discretion, waive documentary obligations for certain elements of the qualification criteria for an applicant if NMFS itself has clear and credible evidence that would satisfy that qualification criteria for the applicant;

(*8*) At the discretion of the Regional Administrator, all submitted documentation must be accompanied by

a completed NMFS Lobster Historical Participation Application Form.

(*9*) Applicants must retain copies of all the application materials and documentation submitted to NMFS while the application is pending.

(D) *Application period.* The time period for submitting a historical qualification and trap allocation application begins on the date 30 days after publication of this Final Rule (application period start date) and ends December 31, 2003.

(*1*) *Earlier submissions.* Applicants who submit their applications to the Regional Administrator by July 31, 2003 (or in less than 60 days after the application period start date, whichever is later) will be eligible to receive a temporary interim permit that would allow the vessel to continue fishing in Area 5 at existing levels during the 2003 fishing season while NMFS processes the application. After processing and reaching a decision on this earlier submitted application, the Regional Administrator may then issue a revised permit that will indicate the vessel's Area 5 eligibility and trap allocation. This revised permit will supercede the temporary interim permit and be effective immediately.

(*2*) *Later submissions.* Applicants who submit their applications to the Regional Administrator after July 31, 2003 (or more than 60 days after the application period start date, whichever is later), will not be eligible to receive a temporary interim permit that would allow continued fishing in Area 5 while NMFS processes the application. Even though they may be deemed qualified, applicants submitting applications in this later time period will not be eligible to fish in Area 5 until the 2004 fishing season.

(ix) *Qualifying year for vessels seeking to fish for lobster with traps in more than one area of Areas 3, 4, and 5.* Any Federal lobster permit holder applying for a lobster trap allocation in more than one area amongst Areas 3, 4 and 5 must use the same qualifying year for all areas.

(x) *Appeal of denial of permit.* Any applicant having first applied for initial qualification pursuant to § 6 paragraphs (a)(7)(vi), (a)(7)(vii) and/or (a)(7)(viii) of this section, but having been denied a limited access American lobster permit for Areas 3, 4, and/or 5, may appeal to the Regional Administrator within 45 days of the date indicated on the notice of denial. Any such appeal must be in writing.

(A) *Grounds for appeal.* There shall be two grounds for appeal:

(*1*) *Clerical error.* It shall be grounds for appeal that the Regional Administrator erred clerically in concluding that the vessel did not meet the criteria in paragraphs (a)(7)(vi), (a)(7)(vii), and/or (a)(7)(viii) of this section. Errors arising from oversight or omission such as ministerial, mathematical or typographical mistakes would form the basis of such an appeal. Alleged errors in substance or judgment do not form a sufficient basis of appeal under this paragraph. The appeal must set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error.

(*2*) *Documentary hardship.* It shall be grounds for appeal that an otherwise qualified applicant is unable to produce qualification evidence due to documentary hardship. The hardship must have been caused by factors beyond the applicant's control, such as documents lost in a flood or fire. Failure to create the documents in the first instance, or simple loss of the document, or the intentional destruction or discarding of the document in the past by the appellant, or lacking the appropriate qualification documents due to inadvertence, carelessness or excusable neglect, do not constitute grounds for hardship under this paragraph. Appeals based on documentary hardship must establish the following:

(*i*) *Nature of the hardship.* The appellant must identify the hardship and submit to the Regional Administrator a document corroborating the hardship, such as by insurance claims forms or police and fire reports; and

(*ii*) *Affidavits.* The appellant must submit affidavits from current Federal permit holders so that three affidavits corroborate each of the qualification criteria for Area 3 as indicated in paragraph (a)(7)(vi) of this section, Area 4 as indicated in paragraph (a)(7)(vii) of this section, and/or for Area 5 as indicated in paragraph (a)(7)(viii) of this section. Each affidavit must clearly specify in separate and specific paragraphs:The name, address, Federal permit number and vessel name of the affiant; that the affiant can attest to by personal first-hand knowledge that the qualifying vessel set, allowed to soak, hauled back and re-set at least 200 lobster traps during the 2–month period in the qualifying year in the area being selected by the applicant, identifying those months and that year and further identifying the nature of that knowledge; for Area 3 only, that the affiant can attest to by personal first-hand knowledge that the qualifying vessel landed at least 25,000 lb (11,340 kg) oflobster during the qualifying year, identifying that year and further identifying the nature of that knowledge; that the affiant can attest to by personal first-hand knowledge to the total number of traps that the applicant claims his or her vessel fished in the area in question during the qualifying year and further identifying the nature of that knowledge; that the affiant also fished in the area being claimed by theapplicant during the months in the qualifying year chosen by the applicant; and be signed under the penaltiesof perjury. The requirement that each qualification criteria must be independently affirmed by three Federal permit holders does not restrict the appellant to using the same three affiants for each qualification criterion, although the appellant is encouraged to do so. The term personal first-hand knowledge in this paragraph means information directly gained by the affiant and would not include information gained from word of mouth or hearsay.

(B) *Appellate timing and review.* All appeals must be in writing and must be submitted to the Regional Administrator postmarked no later than 45 days after the date on NMFS' Notice of Denial of Initial Qualification application. Failure to register an appeal within 45 days of the date of the Notice of Denial will preclude any further appeal. The appellant may notify the Regional Administrator of his or her intent to appeal within the 45 days and request a time extension to procure the necessary affidavits and documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 45–day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadlines stated herein will not be accepted. Upon receipt of a complete written appeal with supporting documentation in the time frame allowable, the Regional Administrator will then appoint an appeals officer who will review the appellate documentation. After completing a review of the appeal, the appeals officer will make findings and a recommendation, which shall be advisory only, to the Regional Administrator, who shall make the final agency decision whether to qualify the applicant.

(C) *Status of vessels pending appeal.* The Regional Administrator may authorize a vessel to fish in Areas 3, 4 or 5 during an appeal. The Regional Administrator may do so by issuing a letter authorizing the appellant to fish up to 800 traps in Areas 4 or 5, or up to 1,800 traps in Area 3 during the pendency of the appeal. The Regional

Administrator's letter must be present onboard the vessel while it is engaged in such fishing in order for the vessel to be authorized. If the appeal is ultimately denied, the Regional Administrator's letter authorizing fishing during the appeal will become invalid 5 days after receipt of the notice of appellate denial or 15 days after the date on the notice of appellate denial, whichever occurs first.

* * * * *

(f) * * *

(1) * * *(v) The application is for initial qualification for access to Area 3, 4 or 5 pursuant to the historical participation process in paragraphs(a)(7)(vi)(D), (a)(vii)(D), and (a)(viii)(D) of this section.

* * * * *

■ 4. In § 697.18, paragraphs (a), (b), and (h) are revised to read as follows:

§ 697.18 Lobster management areas.

* * * * *

(a) *EEZ Nearshore Management Area 1.* EEZ Nearshore Management Area 1 is defined by the area, including state and Federal waters that are nearshore in the Gulf of Maine, bounded by straight lines connecting the following points, in the order stated, and the coastline of Maine, New Hampshire, and Massachusetts to the northernmost point of Cape Cod:

Point	Latitude	Longitude
A	43°58′N.	67°22′W.
B	43°41′N.	68°00′N.
C	43°12′N.	69°00′W.
D	42°49′N.	69°40′W.
E	42°15.5′N.	70°40′W.
F	42°10′N.	69°56′W.
G	42°05.5′N.	70°14′W.
G1	42°04.25′N.	70°17.22′W.
G2	42°02.84′N.	70°16.1′W.
G3	42°03.35′N.	70°14.2′W.

(1) From point ''G3'' along the coastline of Massachusetts, including the southwestern end of the Cape Cod Canal, continuing along the coastlines of Massachusetts, New Hampshire, Maine, and the seaward EEZ boundary back to Point A.

(2) [Reserved]

(b) *EEZ Nearshore Management Area 2.* EEZ Nearshore Management Area 2 is defined by the area, including state and Federal waters that are nearshore in Southern New England, bounded by straight lines connecting the following points, in the order stated:

Point	Latitude	Longitude
H	41°40′N.	70°05′W.
I	41°15′N.	70°05′N.
J	41°21.5′N.	69°16.5′W.
K	41°10′N.	69°06.5′W.
L	40°55′N.	68°54′W.
M	40°27.5′N.	71°14′W.
N	40°45.5′N.	71°34′W.
O	41°07′N.	71°43′W.
P	41°06.5′N.	71°47′W.
Q	41°11.5′N.	71°47.25′W.
R	41°18.5′N.	71°54.5′W

(1) From point ''R'' along the maritime boundary between Connecticut and Rhode Island to the coastal Connecticut/Rhode Island boundary and then back to point ''H'' along the Rhode Island and Massachusetts coast, including the northeastern end of the Cape Cod Canal.

(2) [Reserved]

* * * * *

(h) *EEZ Nearshore Outer Cape Lobster Management Area.* EEZ Nearshore Outer Cape Lobster Management Area is defined by the area, including state and Federal waters off Cape Cod, bounded by straight lines connecting the following points, in the order stated:

Point	Latitude	Longitude
F	42°10′N.	69°56′W.
G	42°05.5′N.	70°14′W.
G1	42°04.25′N.	70°17.22′W.
G2	42°02.84′N.	70°16.1′W.
G4	41°52.′N.	70°07.49′W.
G5	41°54.46′N.	70°03.99′W.

(1) From Point ''G5'' along the outer Cape Cod coast to Point ''H'':

Point	Latitude	Longitude
H	41°40′N.	70°05′W.
H1	41°18′N.	70°05′W.

(2) From Point ''H1'' along the eastern coast of Nantucket Island to Point ''I'':

Point	Latitude	Longitude
I	41°15′N.	70°00′W.
J	41°21.5′N.	69°16′W.

(3) From Point ''J'' back to Point ''F''.

* * * * *

■ 5. Section 697.19 is revised to read as follows:

§ 697.19 Trap limits and trap tag requirements for vessels fishing with lobster traps.

(a) *Trap limits for vessels fishing or authorized to fish in any Nearshore Management Area.* (1) Through August 31, 2003, vessels fishing in or issued a management area designation certificate or valid limited access American lobster permit specifying one or more EEZ Nearshore Management Area(s), whether or not in combination with the Area 2/3 Overlap, shall not fish with, deploy in, possess in, or haul back from such area more than 800 lobster traps.

(2) Beginning September 1, 2003, vessels fishing in or issued a valid limited access American lobster permit specifying one or more of EEZ Nearshore Management Areas 1, 2, or the Outer Cape Management Area, regardless of whether it is in combination with the Area 2/3 Overlap, shall not fish with, deploy in, possess in, or haul back from such area(s) more than 800 lobster traps, except as noted in paragraph (d) of this section.

(3) Beginning September 1, 2003, vessels fishing in or issued a management area designation certificate or valid limited access American lobster permit specifying EEZ Management Area 4 may not fish with, deploy in, possess in, or haul back from such areas more than the number of lobster traps allocated by the Regional Administrator pursuant to the qualification process set forth at § 697.4(a)(7)(vii), which will not exceed 1,440 lobster traps, except as noted in paragraphs (c) and (e) of this section.

(4) Beginning September 1, 2003, vessels fishing in or issued a management area designation certificate or valid limited access American lobster permit specifying EEZ Management Area 5 may not fish with, deploy in, possess in, or haul back from such areas more than the number of lobster traps allocated by the Regional Administrator pursuant to the qualification process set forth at § 697.4(a)(7)(viii), which will not exceed 1,440 lobster traps, except as noted in paragraphs (c) and (e) of this section unless the vessel is operating under an Area 5 Trap Waiver permit issued under § 697.26.

(b) *Trap limits for vessels fishing or authorized to fish in the EEZ Offshore Management Area.* (1) Through August 31, 2003, vessels fishing only in or issued a management area designation certificate or valid limited access American lobster permit specifying only EEZ Offshore Management Area 3, or, specifying only EEZ Offshore Management Area 3 and the Area 2/3 Overlap, may not fish with, deploy in, possess in, or haul back from such areas more than 1,800 lobster traps.

(2) Beginning September 1, 2003, for fishing years 2003, 2004, 2005, 2006, and beyond until changed, vessels fishing only in or issued a management area designation certificate or valid limited access American lobster permit specifying only EEZ Offshore Management Area 3, or, specifying only EEZ Offshore Management Area 3 and the Area 2/3 Overlap, may not fish with, deploy in, possess in, or haul back from such areas more the number of lobster

traps allocated by the Regional Administrator pursuant to the qualification process set forth at § 697.4(a)(7)(vi) and the sliding maximum trap limits identified in Table 1 to part 697, except as noted in paragraphs (c) and (e) of this section.

(c) *Lobster trap limits for vessels fishing or authorized to fish in more than one EEZ Management Area.* A vessel owner who elects to fish in more than one EEZ Management Area may not fish with, deploy in, possess in, or haul back from any of those elected management areas more lobster traps than the lowest number of lobster traps allocated to that vessel for any one elected management area.

(d) *Conservation equivalent trap limits in New Hampshire state waters.* Notwithstanding any other provision, any vessel with a Federal lobster permit and a New Hampshire Full Commercial Lobster license may fish up to a maximum of 1,200 lobster traps in New Hampshire state waters, to the extent authorized by New Hampshire lobster fishery regulations. However, such vessel may not fish, possess, deploy, or haul back more than 800 lobster traps in the Federal waters of EEZ Nearshore Management Area 1, and may not fish more than a combined total of 1,200 lobster traps in the Federal and New Hampshire state waters portions of EEZ Nearshore Management Area 1.

(e) *Potential Modifications to Area 3, Area 4, and/or Area 5 Trap Limits in Fishing Year 2003.* The Regional Administrator may issue temporary interim Federal American lobster trap fishing permits pursuant to § 697.4 for Areas 3, 4 and/or 5 prior to completion of NMFS' review of the Area 3, Area 4 and/or Area 5 qualification applications, if the applicant has designated one or more of those areas on their 2003 Federal lobster permit. These temporary permits will become effective on September 1, 2003, for those applicants who have applied in the manner set forth in § 697.4(a)(7)(vi)(D)(*1*), (a)(7)(vii)(D)(*1*), and/or (a)(7)(viii)(D)(*1*). Any vessel issued a temporary trap fishing permit for Area 3 may fish up to 1,800 lobster traps, except as noted in paragraph (c) of this section. Any vessel issued a temporary trap fishing permit for Area 4 and/or 5 shall not fish more than 800 traps. The temporary interim permit will remain valid during fishing year 2003 until such time the Regional Administrator has reviewed and either approved or denied the temporary permitee's historical participation application. If approved, the Regional Administrator may issue a revised permit and/or management area designation certificate, depending on whether the applicant designated that area on his or her 2003 Federal permit at the beginning of the year. Any traps being fished, deployed, or possessed by the qualified Federal permit holder in excess of the number of traps as described in paragraphs (a)(3), (a)(4), and (b)(2) of this section must be removed from the water within 14 days after receipt of the revised permit, or 30 days after the date it is sent, whichever comes first. Revised Federal lobster permits must be retained aboard the fishing vessel at all times.

(f) *Trap tag requirements for vessels fishing with lobster traps.* Any lobster trap fished in Federal waters must have a valid Federal lobster trap tag permanently attached to the trap bridge or central cross-member. Any vessel with a Federal lobster permit may not possess, deploy, or haul back lobster traps in any portion of any management area that do not have a valid, federally recognized lobster trap tag permanently attached to the trap bridge or central cross-member.

(g) *Maximum lobster trap tags authorized for direct purchase.* In any fishing year, the maximum number of tags authorized for direct purchase by each permit holder is the applicable trap limit specified in paragraphs (a) and (b) of this section plus an additional 10 percent to cover trap loss.

(h) *EEZ Management area 5 trap waiver exemption.* Any vessel issued an Area 5 Trap Waiver permit under § 697.4(p) is exempt from the provisions of this section.

■ 6. In § 697.25, paragraphs (b) and (c) are redesignated as paragraphs (c) and (d), respectively and new paragraph (b) is added to read as follows:

§ 697.25 Adjustment to management measures.

* * * * *

(b) *Conservation equivalency measures.* The Regional Administrator may consider future recommendations for modifications to Federal regulations based on conservation equivalency for American lobster that are formally submitted to him/her in writing by the ASMFC. These recommendations must, for consideration by the Regional Administrator, contain the following supporting information:

(1) A description of how Federal regulations should be modified;

(2) An explanation of how the recommended measure(s) would achieve a level of conservation benefits for the resource equivalent to the applicable Federal regulations;

(3) An explanation of how Federal implementation of the conservation equivalent measure(s) would achieve ISFMP objectives, be consistent with the Magnuson-Stevens Act national standards, and be compatible with the effective implementation of the ISFMP; and

(4) A detailed analysis of the biological, economic, and social impacts of the recommended conservation equivalent measure(s). After considering the recommendation and the necessary supporting information, NMFS may issue a proposed rule to implement the conservation equivalent measures. After considering public comment, NMFS may issue a final rule to implement such measures.

* * * * *

BILLING CODE 3510–22–S

Table 1 to Part 697 - Area 3 Trap Reduction Schedule

Number of Traps* Approved by the Regional Administrator	Trap Allocation by Fishing Year			
	2003	2004	2005	2006 and beyond
1200- 1299	1200	1200	1200	1200
1300-1399	1200	1200	1200	1200
1400-1499	1290	1251	1213	1200
1500-1599	1388	1337	1297	1276
1600-1699	1467	1423	1380	1352
1700-1799	1548	1498	1452	1417
1800-1899	1628	1573	1523	1482
1900-1999	1705	1644	1589	1549
2000-2099	1782	1715	1654	1616
2100-2199	1856	1782	1715	1674
2200-2299	1930	1849	1776	1732
2300-2399	2003	1905	1836	1789
2400-2499	2076	1981	1896	1845
2500-2599	2197	2034	1952	1897
2600-2699	2218	2107	2008	1949
2700-2799	2288	2169	2063	2000
2800-2899	2357	2230	2117	2050
2900-2999	2425	2291	2171	2100
3000-3099	2493	2351	2225	2150
3100-3199	2575	2422	2288	2209
≥3200	2656	2493	2351	2267
* Trap allocations below 1,200 will not be subject to further reductions.				

[FR Doc. 03–7067 Filed 3–24–03; 4:42 pm]
BILLING CODE 3510–22–C