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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No.110722404-1073-02]

RIN 0648-BA56

Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery

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

ACTION: Final rule.

SUMMARY: With this final rule, NMFS implements new Federal American lobster regulations that will limit entry into the lobster trap fishery in Lobster Conservation Management Area 1 (Area 1), located in the Federal inshore waters of the Gulf of Maine. Eligibility will be based on specific eligibility criteria designed to identify active Federal Area 1 lobster trap permits. If a permit meets the eligibility criteria, the permit holder will be authorized to fish in the Federal waters of Area 1 with up to 800 lobster traps. The limited entry program responds to the recommendations for Federal action in the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan for American Lobster (ISFMP, Lobster Plan).

DATES: This final rule is effective [Insert date 30 days after date of publication in the FEDERAL REGISTER].

Applicability Dates: Applications for Area 1 Lobster trap fishery eligibility are due by November 1, 2012. Eligibility decisions will become effective no earlier than the start of the

2013 Federal lobster fishing year which begins May 1, 2013; however, those who submit an application prior to September 1, 2012, will be assured, to the extent practicable, of a final decision on their eligibility in time for the 2013 Federal lobster fishing year.

ADDRESSES: Copies of the American Lobster Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this regulatory action are available upon written request to Robert Ross, Supervisory Fishery Policy Analyst, Sustainable Fisheries Division, NMFS, 55 Great Republic Drive, Gloucester, MA 01930, telephone (978) 281-9234. The documents also are available online at <http://www.nero.noaa.gov>

You may submit written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule to the mailing address listed above and by e-mail to OIRA_Submission@omb.eop.gov, or fax to (202) 395-7285.

FOR FURTHER INFORMATION CONTACT: Peter Burns, Fishery Policy Analyst, phone (978) 281-9144, fax (978) 281-9135.

SUPPLEMENTARY INFORMATION: This action will limit access to the lobster trap fishery in the Federal waters of Area 1 by employing qualification criteria similar to those recommended by the Area 1 Lobster Conservation Management Team (LCMT) and by the Commission's Lobster Board in Addendum XV to Amendment 3 of the Commission's Plan (Addendum XV). Specifically, interested applicants will be required to show proof of the following three criteria: 1) Proof that they possess an active Federal lobster permit; 2) proof that the permit contained an Area 1 trap designation during the 2008 fishing season (May 1, 2008 – April 30, 2009); and 3) proof that at least one Area 1 trap tag was purchased under the involved permit during any one of the 2004-2008 fishing years. Interested applicants must apply to NMFS for access on or before November 1, 2012.

Statutory Authority

These regulations will modify Federal lobster fishery management measures in the Exclusive Economic Zone (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, 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. The regulations must be (1) compatible with the effective implementation of an 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

The purpose of this action is to manage the American lobster fishery in a manner that maximizes resource sustainability, recognizing that Federal management occurs in concert with state management. To achieve this purpose, NMFS needs to respond to recently-approved state management measures that control effort within the lobster fishery. Specifically, the Commission's Lobster Plan seeks to limit entry into the Federal Area 1 lobster trap fishery. Of the seven Lobster Conservation Management Areas (LCMAs, Areas) only Area 1 remains open and accessible to all Federal lobster permit holders under the Commission Plan. Commissioners and Area 1 permit holders alike are concerned that restrictions in these other LCMAs could cause a shift of trap fishing effort into Area 1 from other areas, and a shift of non-trap fishing effort in Area 1 to trap fishing effort, potentially flooding Area 1 with new fishers, upsetting

local lobster stock stability, and undermining existing social and cultural lobster fishing traditions in Area 1.

Background

American lobsters are managed within the framework of the Commission. The Commission serves to develop fishery conservation and management strategies for certain coastal species and coordinates the efforts of the states and Federal Government toward concerted sustainable ends. The Commission, under the provisions of the Atlantic Coastal Act, decides upon a management strategy as a collective and then forwards that strategy to the states and Federal Government, along with a recommendation that the states and Federal Government take action (e.g., enact regulations) in furtherance of this strategy. The Federal Government is obligated by statute to support the Commission's ISFMP and overall fishery management efforts (See Statutory Authority). Consistent with these requirements, NMFS published this final rule to cap and control lobster trap fishing effort in Area 1 in support of the Commission's ISFMP.

Area 1, the most productive lobster management area with respect to landings, is within the Gulf of Maine stock area. The most recent lobster stock assessment (2009) indicated that Gulf of Maine lobster stock abundance is relatively high, with stable levels of fishing mortality. Despite favorable conditions, the stock assessment cautioned that unchecked trap fishing effort in Area 1 could negatively impact the sustainability of the Gulf of Maine lobster fishery if lobster abundance declined to long-term median levels.

At this same time, lobster managers and Area 1 lobster fishers became aware that trap fishing effort in Area 1 was indeed relatively unchecked. Some fishers provided anecdotal evidence that Area 1 Federal waters fishing effort might be on the increase. Specifically, the Area 1 LCMT, an advisory group composed of lobster fishermen, worried that limited access

programs in the other lobster management areas might cause, and perhaps were already causing, non-qualifiers to move their businesses into Area 1— the only remaining non-limited access area. They were also concerned that restrictions in other fisheries may lead permit holders who fish for lobster with non-trap gear to convert to trap fishing in Area 1. The Area 1 LCMT recommended that the Commission limit access to the trap fishery in Area 1 Federal waters to those fishers who could document having fished there with trap gear in the past. The Area 1 LCMT worried that speculators will newly declare into Area 1 upon hearing the news and, therefore, the LCMT recommended establishing an immediate control date after which fishing history could not be credited towards qualification.

The Commission agreed with the scientists and LCMT that a potential shift of trap fishing effort into Area 1 could jeopardize the sustainability of the Gulf of Maine lobster stock and Area 1 fishery and, consequently, the Commission's Lobster Board began to develop, in 2008, Addendum XV to Amendment 3 of the ISFMP. Addendum XV and Amendment 3 are available at the Commission's website at <http://www.asmf.org>. Addendum XV intends to control lobster trap fishing effort by limiting the transfer of Federal lobster permits into Area 1 from other areas and from the non-trap fishery.

As the Commission developed Addendum XV in October 2008, they asked NMFS to immediately publish a control date to prevent speculators from moving into Area 1. On January 2, 2009, NMFS published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register (74 FR 67) to notify the public that any further investment in the Area 1 trap fishery may not guarantee future access if a limited entry program is implemented and to solicit public comments on the issue (see Comments and Responses). Knowing that Federal action will be needed to restrict the movement of Federal lobster permits into Area 1, the Commission adopted

the publication date of the ANPR (January 2, 2009) as a control date for determination of Area 1 eligibility.

The Commission approved Addendum XV in November 2009 after receiving public input in numerous public meetings. In Addendum XV, the Commission recommended an Area 1 limited access program with the following three eligibility criteria: 1) Possession of a Federal limited access lobster permit; 2) proof of an Area 1 designation on the Federal lobster permit as of the January 2, 2009, control date; and 3) proof of purchase of an Area 1 lobster trap tag during any year from 2004-2008, inclusive. Addendum XV did not recommend making any change to the trap cap in Area 1, currently set at 800 traps.

Description of the Public Process

The actions set forth in this final rule have undergone extensive and open public notice, debate, and discussion both at the Commission and Federal levels.

1. Commission Public Process

Typically, this public discussion of a potential Federal lobster action begins within the Commission process. Specifically, the Commission's Lobster Board often charges its Plan Development Team or Plan Review Team—sub-committees of the Lobster Board—to investigate whether the existing ISFMP needs to be revised or amended to address a problem or need, often as identified in a lobster stock assessment. The Plan Review and Plan Development Teams are typically comprised of personnel from state and Federal agencies knowledgeable in scientific data, stock and fishery condition, and fishery management issues. If a team or teams conclude that management action is warranted, it will so advise the Lobster Board, which would then likely charge the LCMTs to develop a plan to address the problem or need. The LCMTs—

most often comprised of industry representatives—will conduct a number of meetings open to the public wherein they will develop a plan or strategy, i.e., remedial measures, in response to the Lobster Board’s request. The LCMTs then vote on the plan and report the results of their vote back to the Lobster Board. Minutes of the LCMT public meetings can be found at the Commission’s website at <http://www.asmfc.org> under the “Minutes & Meetings Summary” page in the American lobster sub-category of the Interstate Fishery Management heading.

After receiving an LCMT proposal, the Commission’s Lobster Board will often attempt to seek specialized comment from both the Lobster Technical Committee and Lobster Advisory Panel before the proposal is formally brought before the Board. The Technical Committee is comprised of specialists, often scientists, whose role is to provide the Lobster Board with specific technical or scientific information. The Advisory Panel is a committee of individuals with particular knowledge and experience in the fishery, whose role is to provide the Lobster Board with comment and advice. Minutes of the Technical Committee and Advisory Panel meetings can be found at the Commission’s website at <http://www.asmfc.org> under the “Minutes & Meetings Summary” page in the American lobster sub-category of the Interstate Fishery Management heading.

After receiving sub-committee advice, the Lobster Board debates the proposed measures in an open forum whenever the Board convenes (usually four times per year, one time in each of the spring, summer, fall, and winter seasons). Meeting transcripts of the Lobster Board can be found at the Commission’s website at <http://www.asmfc.org> under “Board Proceedings” on the “Minutes & Meetings Summary” page in the American lobster sub-category of the Interstate Fishery Management heading. These meetings are typically scheduled months in advance and the public is invited to comment at every Board meeting. In the circumstance of an addendum,

the Board will vote on potential measures to include in a draft addendum. Upon approving a draft addendum, the Lobster Board will conduct further public hearings on that draft addendum for any state that so requests. After conducting the public hearings, the Lobster Board will again convene to discuss the public comments, new information, and/or whatever additional matters are relevant. After the debate, which may or may not involve multiple Lobster Board meetings, additional public comment and/or requests for further input from the LCMTs, Technical Committee and Advisory Panel, the Lobster Board will vote to adopt the draft addendum, and if applicable, request that the Federal Government implement compatible regulations.

The need for the Federal action, in this case, is based on concerns by the Area 1 lobster trap industry and the Commission, that unchecked lobster trap fishing effort in Area 1 could result in a migration of Federal lobster permits into Area 1. Additionally, there was concern expressed by the Area 1 LCMT and the Commission that lobster fishermen with Federal non-trap gear permits may opt to transition into the lobster trap fishery due to management restrictions in other Federal fisheries, such as the groundfish fishery. Although the number of Federal lobster trap permits in Area 1 has remained stable over the past decade, potential for effort shift exists. Area 1 was, until the publication of this rule, the only lobster management area in the Commission's Lobster Plan that was open to all lobster permits for lobster trap fishing. As other areas become restricted, those permits that do not qualify for trap fishing can be purchased and relocated to Area 1. Further, the most recent stock assessment in 2009 indicated that although the Gulf of Maine lobster stock was in favorable condition, increases in fishing effort could destabilize the fishery.

The Area 1 LCMT held several public meetings in Maine and New Hampshire during 2007 and 2008 to discuss the issue and to develop eligibility criteria. Their proposal was

forwarded to the Commission's Lobster Board as the basis of Addendum XV. Addendum XV was the topic of several public meetings prior to its approval by the Commission in 2009.

2. Federal Public Process

Since the transfer of Federal lobster management in December 1999 from the Magnuson-Stevens Act, with its Federal Fishery Management Councils, to the Atlantic Coastal Act, with the Commission, Federal lobster action has typically been undertaken in response to a Commission action.

The development of this current rulemaking began in 2008 as the Commission's Lobster Management Board began discussing measures to cap lobster trap fishing effort in Area 1 through the development of Addendum XV. The Commission recommended that NMFS publish a control date for potential use as a cut-off date in determining continued eligibility for Federal lobster permits in Area 1. Consequently, NMFS published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal register on January 2, 2009. The ANPR notified the public that NMFS was considering a limited entry program for the Area 1 lobster trap fishery and that the ANPR publication date could be used as a control date for that purpose. The Commission adopted the ANPR publication date as a control date in Addendum XV along with other eligibility criteria for use in determining Federal permits that are considered active trap permits. Addendum XV recommended that NMFS take action to cap the number of Federal lobster trap permits in Area 1 using methods which are compatible with those set forth in Addendum XV.

NMFS published a proposed rule on November 18, 2011 (76 FR 71501). In the proposed rule NMFS recommended liberalizing the eligibility period to the entire 2008 fishing year (May 1, 2008—April 30, 2009). We received numerous public comments in response to the proposed

rule, some of which supported liberalizing the criterion (including the state agencies and Commission), and none of which opposed the liberalization. Comments and responses to the proposed rule are set forth later in this final rule (see Comments and Responses).

NMFS prepared a draft Environmental Assessment (EA) in support of its proposed rule. The draft EA analyzed a status quo alternative; an alternative that employed the Commission's Addendum XV eligibility criteria, including the January 2, 2009, control date; and a third alternative which liberalized the eligibility period to include the entire 2008 fishing year (May 1, 2008 to April 30, 2009), rather than the shorter period offered under the Commission's criteria. The draft EA was made available to the public in November 2011 when the proposed rule was published.

Final Rule

This final rule adopts the qualification measures identified in the proposed rule. At the time of the proposed rule, the draft EA (now final) showed that 1,643 Federal lobster permits will likely qualify under this action. Of this total, approximately 32 qualifiers would benefit from the extension of the qualification cut-off date to the entire 2008 fishing year. Our analysis suggests that these 32 individuals do not represent new effort (the majority of these individuals have fished with traps in Area 1 in the past) and the relative additional effort from these 32 permits holders is negligible when compared to the overall level of trap fishing effort in Area 1. According to the draft and final EA, of the 3,152 Federal lobster permits in existence, 1,509 permit holders will likely not qualify into the Area 1 trap fishery (calculated at 3,152 total permit holders minus the 1,643 permit holders expected to qualify). Of this 1,509 total, the vast majority (1,419 permit holders) are from locales south of Area 1 waters and/or have never sought

to fish with traps in Area 1 in the past.

As previously stated in the proposed rule, this final rule requires that all qualification applications must be submitted by November 1, 2012. Late applications will not be considered. In order to more speedily process applications, NMFS encourages that applicants not wait until fall 2012 to apply. As such, NMFS seeks to alert potential applicants that the agency will be able to render decisions before the close of the 2012 calendar year on all applications submitted on or before September 1, 2012.

To further assist in the application process, NMFS will attempt to exempt permit holders from having to gather and submit documentary proof of their qualification criteria if NMFS already has the proof in its databases. NMFS expects that it already possesses proof of the qualification criteria in its databases for the majority of expected applicants. In such cases, NMFS will notify potential applicants that they need only apply for access, but that they do not need to submit proof of the qualification criteria along with the application. In some circumstances, however, NMFS does not already possess proof that the applicant meets the qualification criteria. In these situations, potential applicants will be required to provide such proof themselves along with their application. The regulatory text of this final rule contains more information on the type of documentary proof required. All Federal lobster permit holders will maintain the opportunity to elect Area 1 for trap gear on their 2012 Federal fisheries permit while NMFS is receiving and processing applications. The 2012 Federal fishing year began on May 1, 2012. All those who elect Area 1 on the 2012 Federal fisheries permit will be able to fish with traps in Area 1 for the entire 2012 fishing year, even if their application for continued access to the Area 1 lobster trap fishery is denied before the end of the 2012 fishing year. In

other words, NMFS's Area 1 trap eligibility decisions will not become effective until the 2013 Federal fishing year, on May 1, 2013. For the 2013 Federal fishing year, those whose applications are approved will be able to elect Area 1 for trap gear on their Federal lobster permit and fish in the Federal waters of Area 1 with traps. Those whose applications for Area 1 eligibility are denied will not be eligible to elect Area 1 for trap gear on their 2013 Federal fisheries permit and may no longer fish with traps in the Federal waters of Area 1; however, they will maintain their Federal limited access lobster permits and may fish for lobster in Federal waters, including the Federal waters of Area 1, with non-trap gear. Individuals who have been denied access, but who have appealed, may be allowed to use trap gear in Area 1 during the pendency of the appeal subject to the discretionary approval of the Regional Administrator. This appeals process is set forth in detail in the Regulatory Text of this final rule. If an application is still under initial review when the permit renewal period begins for the 2013 fishing year (permit applications are normally sent out in February or March in advance of the new fishing year start date of May 1), the permit holder may be authorized to designate Area 1 for trap gear on the 2013 Federal fisheries permit while the application is under review.

Comments and Responses

The proposed rule solicited public comments through January 3, 2012. During the comment period, NMFS received comments from 18 persons and entities, which are broken down as follows: One from the Commission; three from the states of Massachusetts, New Hampshire, and Maine; two from Area 1 lobstermen's associations (Massachusetts Lobstermen's Association and Maine Lobstermen's Association); two from private stakeholder groups (the Humane Society of the United States and the New Jersey Council of Diving Clubs); six from Area 1 fishermen; and four from private citizens. Of that total, 11 comments supported the

proposed rule; 3 comments were neither in support or opposition of the Area 1 Limited Entry Program; and 4 opposed the Area 1 Limited Entry Program. Some persons and entities made multiple comments in a single response. The specific comments and our responses are as follows.

Comment 1: Eleven individuals and entities—including the Commission, state governments, Lobstermen’s Associations, and three Area 1 lobstermen—supported the Area 1 limited entry program proposal set forth in the proposed rule.

Response: NMFS agrees that the proposed rule, now final, will provide the best means of capping trap fishing effort in the Federal waters of Area 1 and that it is well designed to prevent trap fishing effort from increasing in the Federal waters of Area 1. The final rule is substantially identical to the lobster industry’s proposal and Commission recommendations set forth in Addendum XV and will allow NMFS to act in such a way that not only satisfies Federal statutory mandates, but that also allows NMFS to support the Commission’s ISFMP for American lobster in a coordinated fashion.

Comment 2: An Area 1 fisherman supported the proposal for an Area 1 Limited Entry Program in the Federal waters of Area 1 due to the increased regulations in other lobster management areas (such as Area 2 and the Outer Cape Cod Lobster Management Areas) and because of increased regulations in other fisheries (such as new regulations, including sector management in the groundfish fishery). As a result, there exists great potential and incentive for trap fishing effort to be re-directed into Area 1.

Response: NMFS agrees and notes that this potential scenario for trap effort shift into Area 1 provided the genesis for industry’s Area 1 proposal in Commission Addendum XV. NMFS analyzed this potential threat in its EA and agrees that the potential for effort shift is real

and that it could potentially flood the Area 1 trap fishery with new fishers, therein upsetting local lobster stock and fishery stability, and undermining existing social and cultural lobster fishing traditions. This issue is discussed in more detail in the Purpose and Need for Management section and Background section of this final rule.

Comment 3: One respondent supported the proposed rule's Area 1 Limited Entry Program, but also recommended increasing the legal size limit for lobsters and a reducing the standard trap allocation for each vessel from 800 traps to 600 traps to prevent overfishing.

Response: NMFS is implementing the Area 1 limited entry program as described in this final rule. NMFS is not implementing lobster size and trap reductions in this rule. Lobster size limitations and trap restrictions currently exist in Area 1 and remain a management tool that could be modified in the future if scientists, stakeholders, and managers believe it appropriate. At present, however, such limitations and restrictions are not within the scope of this final rule.

Comment 4: The Maine Department of Marine Resources , while strongly supporting the Area 1 limited entry program as set forth in the proposed rule, recommended that we make the eligibility decisions early enough to simplify the issuance of 2013 lobster trap tags by the State, .

Response: The final rule timeline attempts to allow for good coordination between the states and the Federal Government. In response to Maine's recommendation, we adjusted our program to offer an incentive to lobster permit holders to apply early to allow more eligibility review time and improve the chances of finalizing all the eligibility determinations prior to the start of the 2013, fishing year. As such, permit holders who submit an application prior to September 1, 2012, will be given priority review, with the intent of providing them with a final eligibility decision, to the extent practicable, in in time for the 2013, fishing year which begins on May 1, 2013.

The application timeline should allow NMFS to make most application decisions in time to coordinate with Maine and other involved states before the states' fishing year begin in earnest. This final rule will allow applicants to apply for entry into the Area 1 trap fishery almost immediately upon the publication of this rule and subsequent solicitation of applications by NMFS. Although permit holders will have until November 1, 2012, to apply, NMFS is offering an incentive to permit holders who apply on or before September 1, 2012—namely, that the agency will make every effort to make a decision on that permit holder's application in 2012 if the application is received on or before September 1, 2012. Accordingly, NMFS expects that most Area 1 application decisions will be made before January 1, 2013. In addition, because the results of NMFS's application decisions will not take effect until May 1, 2013 (the start of the Federal fishing year), and because January, February, and March are the least active lobster fishing months, NMFS anticipates having sufficient time, prior to the start of the fishing season and the Federal fishing year, to coordinate with the states over the qualification results.

Comment 5: One state agency suggests that NMFS utilize the relevant data on-hand to make a determination on each permit's Area 1 eligibility and then simply notify permit holders and inform them as to whether or not they are qualified to fish with traps in the Federal waters of Area 1. A different state agency expressed concern that automatic qualification would qualify permits that have since left the Area 1 trap fishery and thus create incentive for effort shift back into Area 1.

Response: While NMFS does not intend to automatically qualify permit holders, the final rule authorizes the Regional Administrator, at his or her discretion, to waive documentary obligations for certain elements of the qualification criteria for an applicant if NMFS itself has clear and credible evidence that will satisfy that qualification criteria for the applicant, as

explicitly stated in the regulatory text in this final rule.

Nevertheless, this final rule requires potential applicants to affirmatively apply for entry. In choosing this application procedure, NMFS seeks a balance. Although there would be no burden to the permit holder were NMFS to automatically determine the eligibility of each permit, NMFS does not think it overly burdensome for otherwise qualified permit holders to fill out the one-page application form by checking the appropriate box, signing the application, and mailing it to NMFS. NMFS is reluctant to automatically qualify permit holders into the Area 1 trap fishery because some of those qualifiers might have no interest in fishing in Area 1. NMFS is aware that there are some permits with qualified history that, for whatever reason, are either inactive or have been sold out of the Area 1 trap fishery. Automatically qualifying permits that are no longer in the Area 1 trap fishery and have no interest in fishing in Area 1 will increase latent effort by allowing the automatic re-introduction of effort into the fishery that may have migrated elsewhere, which does not advance the overall spirit of the Lobster Plan's Area 1 Limited Entry Program. As a result, the final rule application procedure requires some effort, albeit minimal, for an otherwise qualified applicant, but advances the overall objectives of the Area 1 Limited Entry Program better than if NMFS were to automatically qualify individuals.

Comment 6: An Area 1 fisherman commented on whether he will be able to buy a Federal lobster permit after 2012; and if a person bought a permit in 2011, will they be able to use it after 2012?

Response: The final rule limits Area 1 trap fishing access to permits that have a certain history of Area 1 trap fishing. Any Federal lobster permit holder who wishes to fish for lobster with traps in Area 1 beginning May 1, 2013, must submit an application under this program prior to November 1, 2012, and be deemed eligible for future participation in the Area 1 lobster trap

fishery. If the purchased permit's fishing history meets the criteria set forth in this final rule, then it would qualify and an individual would be able use it to fish with traps in the Federal waters of Area 1 on May 1, 2013, when the rule takes effect. If the purchased permit's history does not meet the rule's criteria, then a person would not be able to use it to fish with traps in Area 1 as of May 1, 2013. Such a permit, however, would still authorize lobster fishing in Area 1 without traps. Finally, the rule does not regulate, much less restrict, the purchase, sale, or transfer of those permits.

Comment 7: The Humane Society stated that the Area 1 800-trap limit may lead to excessive vertical lines in the water that pose a threat to endangered large whales. This commentator suggests that NMFS coordinate internally with its Protected Resources Division to reduce traps and thus further reduce vertical lines in the water.

Response: NMFS staff has coordinated internally regularly throughout this rulemaking process. Although reducing vertical lines is not the purpose of this final rule and is beyond its scope, NMFS is and has been very much aware of the Protected Resources Division's efforts in this regard, and NMFS's EA suggests that the Area 1 limited entry program will have some ancillary, albeit unquantifiable, benefits to whales, threatened, and endangered species.

Comment 8: The New Jersey Council of Diving Clubs recommended that the Area 1 Limited Entry Program should pertain to commercial fishermen and not divers who are recreational fishermen. Further, the respondent commented that unless the Area 1 lobster population shows a decline, then a limited entry program should not be put in place due to economic complications and unfairness. Finally, the respondent commented that the potential effort restrictions on the southern New England stock should apply only to Area 2 (nearshore EEZ from southern Massachusetts to Rhode Island), and Area 6 (Long Island Sound), because

those are the only areas that have shown a decline due to environmental conditions.

Response: The final rule applies to all Federal lobster permit holders who fish with traps. As such, it is not anticipated to impact divers and it in no way suggests, as the respondent was concerned, that trap fishing is the only allowable way to catch lobster. The rule itself was originated from the Area 1 lobster trap fishing industry specifically because they did not want to wait until they were in the midst of decline before protecting their fishery. The genesis and rationale of the rule are discussed in greater detail in the Supplementary Information section of this final rule. The southern New England lobster stock problem is the subject of ongoing deliberation and development of mitigation measures by the Commission and is beyond the scope of this present rulemaking.

Comment 9: One respondent opposes the Area 1 limited entry program in the Federal waters of Area 1 on grounds that it may limit the environmental, economic, and social significance of lobster in Maine. The respondent commented that the impact on small quantity lobster catchers could have a big impact on small businesses in the area and recommends that the fishery remain unregulated and trap levels increased.

Response: It is for those very reasons—i.e., the environmental, economic, and social significance of lobster in Maine—that the Area 1 trap lobster fishery requested that the Commission, and thereafter NMFS, cap trap fishing effort and implement this final rule. Specifically, many members of the Area 1 lobster trap fishery became concerned that restrictions in other fisheries (e.g., restrictions in other lobster management areas and restrictions in other commercial fisheries, like groundfish) might squeeze new trap effort into Area 1. This new trap fishing effort could have the potential to upset local lobster stock stability, and undermine existing social and cultural traditions. NMFS analyzed the final rule’s potential impact on small

businesses and concluded that the rule would not have a significant impact, largely because this rule is expected to maintain the existing economic structure of the fishery. In other words, those who fished for lobster with traps in Area 1 in the past are expected to qualify to fish for lobsters with traps in the future. These economic impacts are discussed in greater detail in this final rule in the section entitled “Economic Impacts of the Proposed Rule on Small Entities.” NMFS disagrees with the respondent’s statement that the fishery is unregulated—with or without this rule, the lobster fishery is and would remain highly regulated. In fact, lobster has been regulated for well over a century—regulations prohibiting the harvest of egg-bearing lobsters (similar to present regulations) date back to 1872. The respondent gives no reason in support of her suggestion to increase trap levels, which would, in any case, be beyond the scope of this particular rule.

Comment 10: One lobsterman stated that the economy is not good and that the proposed rule could impact local economies by putting people out of business.

Response: NMFS has taken a hard look at the LCMT’s and Lobster Board’s recommended criteria and concluded that its economic impacts should be minimal. As a preliminary matter, NMFS analysis suggests that the number of permits actively fishing with traps in Area 1 has remained relatively static from 2000 to 2010, including during the 2008 Federal fishing year, which is one of the criteria. As such, the analysis confirms that the LCMT and Lobster Board criteria did not focus on an anomalous year or capture aberrant data in its proposal. Accordingly, although there may be a few individual instances where a specific permit was active one year but not the next, the data suggests that most of the Area 1 permit holders who fished with traps in the recent past will likely qualify under the final rule criteria. Further, NMFS analysis of its Confirmation of Permit History (CPH) database (where inactive permits

can be stored) suggests that no permits existed in CPH during the 2008 fishing year that were otherwise active in the Area 1 trap fishing immediately before and after that year. In other words, permits with Area 1 trap fishing history existed in CPH in 2008, but those permits were inactive for longer periods of time than that 1 year (e.g., they went into CPH before 2008 and/or still remain in CPH, or were taken out of CPH after 2008). A more detailed analysis is set forth in NMFS EA for this action, as well as the section entitled “Economic Impacts of the Final Rule on Small Entities.”

Comment 11: One lobsterman stated that the notification of the proposed rule was not widespread. A different lobsterman counters that the Area 1 limited entry proposal was well known, publicly debated, and “...should not be news to anyone.”

Response: The Commission’s Area 1 limited entry program, including the control date, was the subject of much public debate both before and after January 2, 2009. As a preliminary matter, the Area 1 LCMT, which is made up of lobstermen from Maine, New Hampshire, and Massachusetts (including representatives from the Maine Lobstermen’s Association, New Hampshire lobster industry, and Massachusetts Lobstermen’s Association), initially proposed the idea of a limited access program with a control date. More specifically, the industry-based Area 1 LCMT had numerous public meetings and discussions on the issue and ultimately voted on and approved the concept in the summer of 2008. Next, the LCMT forwarded their proposal to the Commission’s Lobster Board. The Lobster Board is made up of three members from each of the involved states, including a state’s director of marine fisheries, as well as an appointee of the state governor, and a member of the state legislature, all of whom are politically accountable to the respondent. In October 2008, after public discussion at the Lobster Board’s public meeting, the Board voted to recommend the use of a control date suggested by the LCMT. The vote was

unanimous and included all members of the respondent's state delegation. Media coverage of the Lobster Board's approval appeared in the Commercial Fisheries News in November 2008. NMFS published notice of the control date in the Federal Register on January 2, 2009. The Area 1 LCMT and the Commission's Lobster Board continued to conduct public meetings on the issue after the January 2009 control date publication. Ultimately, the Lobster Board adopted the Area 1 limited access plan at a public meeting on November 3, 2009, which was also reported in the media. Public comments on the specific dates and criteria used were sought and received throughout this time period. The final rule, in fact, liberalizes the control date cut-off used in this rule based upon information that it has received during this time period in consideration of those permit holders who did not renew their 2008 Federal lobster permits prior to the control date.

Comment 12: One lobsterman commented that while the proposed rule accomplishes its objectives in preventing trawl vessels and non-Area 1 trap fishers from fishing with traps in Area 1, it "changes course" and over-reaches its objectives by also restricting latent (inactive) permits with Area 1 fishing history.

Response: Activation of latent effort is and has always been a concern of the LCMTs, Lobster Board and NMFS, not only in Area 1, but in the lobster fishery in general. Latent effort is potential effort. It is effort that was dormant at the time in question (regardless of whether it was active some time beforehand) but that could become active in the future. Although latency is fluid, constantly changing, and impossible to precisely calculate given existing data, industry and managers alike know it exists and that latency may represent a relatively high percentage of existing permits in certain management areas in any one year. Accordingly, even if draggers and non-Area 1 trap permits were restricted, effort in Area 1 could still increase precipitously simply by activation of this latent effort. The LCMT and Lobster Board decided that increased trap

effort is a threat regardless of its origin, i.e., be it from draggers or non-Area 1 permits or latent Area 1 permits. See response to Comment 9 for additional detail on the effort shift threat. In choosing its criteria, the Area 1 LCMT and Lobster Board attempted to address this threat by recommending that effort be capped, not at past levels, nor at future levels, but at current levels as it actively existed in 2008 when the decision was made. NMFS liberalizes these criteria somewhat by extending the proposed January 2, 2009, control date to April 30, 2009, but NMFS nevertheless understands the rationale behind the LCMT and Lobster Board recommendation and finds it reasonable.

Comment 13: One lobsterman from Maine commented that he knew of individuals that recently purchased Federal Area 1 permits that might have been latent (inactive) during the time-period set forth in this final rule's criteria, and that it is unfair for these individuals to have wasted their money purchasing a permit without knowing that a new regulation might render the permits "worthless."

Response: NMFS has reviewed and analyzed the recommended criteria and has concluded that it is reasonable and rationally related to the objectives it seeks. In short, the LCMT and Lobster Board sought to cap effort at existing levels, with the term "existing" meaning permits that were active in 2008. NMFS even liberalized the criteria in an attempt to accommodate permit holders who were in the midst of permit transactions when the control date ANPR was published in the Federal Register in January 2009. Nevertheless, the possibility of this rule was well known, or should have been well known, to all permit holders years before NMFS published its proposed rule. Lobster regulations have existed in the commentator's home state for well over 100 years and it remains amongst the most highly regulated of all fisheries. The final rule's criteria were developed by local lobster fishers, including lobstermen from

Maine, and approved unanimously in public meetings by the Commission's Lobster Board including politically-appointed, and thus accountable, members of the commentator's state delegation. For additional public notice information, see response to Comment 10.

Unfortunately for the commentator, rules by their very nature draw lines that include some and exclude others. That is, in fact, the very purpose of this rule – to include trap fishing effort that was active in 2008 and to exclude trap fishing effort that was not. While NMFS expects that some applicants will not qualify for trap fishing access, NMFS's analysis suggests that very few permit holders will be impacted and none impacted in a way that has not been previously considered. Non-qualified permits will not be worthless; they simply will not allow trap fishing in the Federal waters of Area 1. All other attributes of the permit—including lobster fishing in Area 1 without traps—will remain.

Comment 14: The New Hampshire Department of Fish and Game commented that some New Hampshire lobstermen have purchased “state-only” tags, even though they were authorized to fish in Federal waters, and were concerned that New Hampshire's administrative process might unintentionally prevent its lobstermen from qualifying.

Response: In an effort to avoid duplication, NMFS and several lobster fishing states agreed that trap fishers with dual state and Federal permits did not need to have both state trap tags and Federal trap tags on the same trap. Depending on the circumstances, the lobsterman could get his trap tags from his state or from NMFS and either entity would recognize and accept a trap tag from the other. The specifics of these agreements are set forth in various Memoranda of Agreements (MOA) between NMFS and the states. Given that differing entities (i.e., the various state and Federal governments) issue trap tags, NMFS is aware that the issued trap tags, although quite similar, are not identical in the information they convey. Accordingly, NMFS is

not surprised to learn that a state might issue trap tags to a dual state/federal permit holder under its MOA with NMFS, yet have those trap tags contain little Federal information. NMFS does not intend this present rule to elevate form over substance and NMFS would not deny access to an otherwise qualified Federal Area 1 trap fishers based upon the circumstances described in this comment.

Comment 15: One person commented that he was confused about the purpose of this action and, if the intent is to reduce the number of lobsters taken from Area 1, then limiting the number of fishermen will not be effective.

Response: The intent of this final rule is not to limit the number of lobster taken out of Area 1. The intent is to maintain the sustainability of the Area 1 lobster stock and fishery by preventing the migration of trap fishing effort from other areas and other gear types into Area 1. We assert that capping effort at recent levels, as recommended by the Area 1 lobster industry and the Commission, will effectively control effort in the fishery by maintaining the economic structure in the fishery while continuing to allow opportunities for others to purchase existing Area 1 trap permits. This action does not strive to reduce the lobster harvest in Area 1. The most recent assessment of the Gulf of Maine lobster stock, conducted in 2009, indicates that the stock, overall, is in favorable condition. However, the assessment cautioned that uncontrolled access into the trap fishery could lead to an increase in trap fishing effort which could be detrimental to the long-term sustainability of the stock. It was that advice, and the potential for migration of permits into Area 1 from other areas and other fisheries due to a lack of controls on the number of Federal trap permits in Area 1, that initiated action by the industry and the Commission to recommend a limited entry program for the Area 1 trap fishery.

Comment 16: One Area 1 lobsterman from Maine who supports the proposal,

recommends that an apprenticeship program be established for the Federal fishery to facilitate participation by those who are responsible stewards of the resource.

Response: Most, if not all Federal permit holders hold some type of state lobster license, either a fishing or landing license. The majority of Area 1 Federal permit holders reside in Maine and are subject to the apprenticeship requirements and other regulations that control entry into the fishery. Since Federal lobster permits are issued to vessels and not people, an apprenticeship program would be difficult to implement, especially because the permit holder is not necessarily the operator of the permitted vessel. We contend that the state-implemented controls on fishermen, including the apprenticeship program in Maine, are sufficient to instill a level of responsible stewardship among lobstermen. This concept is outside the scope of this action and is best addressed at the state level.

Changes from the Proposed Rule

There are no changes in substance from the proposed rule. There are, however, four minor changes to the text of the final rule where clarifying language was added. In § 697.4(a)(7)(vi), the words “after April 30, 2013,” and “or have an open pending application to fish in the area” were added to clarify that if an application was still under initial review the applicant would be able to designate Area 1 for trap gear on their Federal fisheries permit application for the 2013 fishing year.

In § 697.4(a)(7)(vi), the words “the Federal waters of” were added to make clear in the regulatory text that the limited access program relates only to the Federal waters of Area 1. In § 697.4(a)(7)(vi)(A)(3), the term “Area 1” was added to make it clear that trap tag criterion related specifically to an Area 1 trap tag and not a trap tag from a different area. In

§ 697.4(a)(7)(vi)(B)(3), the term “Area 1” was added to make it clear that the documentary proof requires evidence of a trap tag from Area 1. None of these additions are changes in substance—the Background section of the proposed rule makes clear that the program relates to the Federal waters of Area 1 and that the trap tag criterion relates to the purchase of an “Area 1 lobster trap tag during any year from 2004-2008.” The additions were simply added for the purpose of clarity.

Changes to Existing Regulations

This final rule enacts regulations that will require any Federal lobster permit holder who wishes to maintain access to the lobster trap fishery in the Federal waters of Area 1, to submit an application to NMFS by November 1, 2012. Each applicant must meet the eligibility requirements to retain the ability to fish with up to 800 lobster traps in Area 1 beyond the 2012 Federal fishing year. Those eligibility requirements are provided under SUPPLEMENTARY INFORMATION and are fully discussed throughout this final rule.

Those permits that meet the eligibility requirements will be issued an Area 1 lobster trap permit for the 2013 Federal fishing year which begins on May 1, 2013. Those that do not meet the requirements will maintain a limited access Federal lobster permit, but the permit will no longer be eligible to fish with trap gear in the Federal waters of Area 1.

This final rule also provides the opportunity for a permit holder whose application for Area 1 trap fishery access is denied to appeal the decision. The process for this provision is detailed in the Regulatory Text of this final rule.

Classification

This proposed rule has been determined to be consistent with the provisions of the Atlantic Coastal Act, the National Standards of the Magnuson-Stevens Act, and other applicable

laws, subject to further consideration and public comment. Paragraphs (A) and (B) of section 803(b)(1) of the Atlantic Coastal Act authorize the Secretary of Commerce to issue regulations in the EEZ that are compatible with the effective implementation of an Interstate Fishery Management Plan developed by the Commission and consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act.

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866.

This final rule does not contain policies with federalism implications as defined in E.O. 13132. These measures are based upon the lobster ISFMP that was created by and is overseen by the states. These measures are a result of Addendum XV, which was approved by the states, recommended by the states through the Commission for Federal adoption, and is in place at the state level. Consequently, NMFS has consulted with the states in the creation of the ISFMP, which makes recommendations for Federal action. Additionally, this final rule will not pre-empt state law and will do nothing to directly regulate the states.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This final rule contains a collection of information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). A PRA analysis, including a revised Form 83i and supporting statement have been reviewed and approved by OMB under control number 0648-0642. The PRA analysis evaluates the burden on Federal lobster permit holders and the Federal Government resulting from the Area 1 application and appeals process.

There are two types of applicants evaluated in the PRA analysis as summarized here—those for whom NMFS already has sufficient documentary information to satisfy the proof

required and thus will need only to sign and remit an application form, and those for whom NMFS does not presently have sufficient documentary information and thus will need to remit an application form along with documentation to support the qualification criteria. For those permit holders in the former category, NMFS will notify the approximately 1,643 permit holders for whom there is sufficient evidence to show that the permit will qualify for Area 1 access, should the permit holder decide to return a pre-printed letter with his/her signature. The estimated burden for each of these applicants is 2 minutes, and the cost is estimated at \$0.74 to mail the letter. NMFS expects all such permit holders to submit an application, with a total burden of 54.8 hours (hr) and \$1,216 to the permit holders.

The remaining 1,509 permit holders, those whose permits for which NMFS does not have pre-existing documentary evidence, will be sent a letter indicating that insufficient information is on-hand to qualify the permit. NMFS estimates that 288 of the 1,509 permit holders for which NMFS does not have pre-existing documentary evidence, will apply for Area 1 trap fishery access. These 288 permit holders represent the 224 whose permits had an Area 1 trap gear designation during the 2008 fishing year, but did not have a record of purchasing a trap tag between 2004-2008. The additional 64 permit holders are the estimated 5 percent of the 1,285 Federal lobster permit holders who did not have either an Area 1 designation in 2008 or a trap tag purchase record, but whom may submit an application anyway. The burden is estimated at 22 minutes for each applicant considering the time estimated to locate documents to support the qualification criteria and sign the application. The estimated cost per applicant is \$1.14. The cumulative cost for this category of applicants is 105.6 hr and \$328. NMFS hypothesizes that roughly 28 applicants who are denied might appeal. The estimated appeals burden on each appellant is 30 minutes and \$4.22. The cumulative burden for all appellants is 14 hr and \$118.

Overall, the total program burden on the combined number of affected Federal permit holders is calculated at 174 hr and \$1,662.

Burden on the Federal Government to implement the program includes the labor and material costs of communicating with the applicants, reviewing and making a determination on the applications, and processing appeals. The total burden of the program on the Federal Government is 941 hr of labor, calculated to cost \$26,815. Material costs to the Federal Government include those for paper, envelopes, postage and other supplies associated with mailings, processing the applications, and appeals. When the estimated material costs of \$3,678 are considered, the overall total costs to the Federal Government to implement this program are estimated at \$30,493.

The proposed rule for this action solicited public comments on the burden estimates of this action. In response, a state fisheries agency suggested that NMFS utilize the relevant data on-hand to make a determination on each permit's Area 1 eligibility and then simply notify permit holders and inform them as to whether or not they are qualified to fish with traps in the Federal waters of Area 1. In contrast, a different state agency expressed concern that automatic qualification would qualify permits that have since left the Area 1 trap fishery and thus create incentive for effort shift back into Area 1. This issue was addressed in response to Comment 5 in the Comments and Responses.

We considered this issue and seek a balance. This rule will require all permit holders to submit an application to avoid automatically qualifying permits that may no longer be involved in the Area 1 trap fishery, but may qualify. To automatically qualify, such permits would increase latent effort in the Area 1 trap fishery and compromise the intent of this effort control program. Although we will require all permit holders to actively apply, we acknowledge that we

have the information on-hand to qualify the vast majority of eligible Area 1 trap permits. Consequently, we will minimize the burden by informing those permit holders that we have sufficient information to qualify their permit and they need only sign and remit the application form requesting that their permit be considered for eligibility for the Area 1 trap fishery. Those permits holders for whom we do not have sufficient information available to make the determination on their permit will be requested to remit documentation in support of the eligibility criteria. This approach requires a limited level of burden on otherwise qualified permit holders without undermining the effort control intent of this action.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to 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.

NMFS prepared a Final Regulatory Flexibility Analysis (FRFA) as required by section 603 of the Regulatory Flexibility Act (RFA). The FRFA describes the economic impact this final rule will have on small entities. Copies of the FRFA, RIR, and the EA prepared for this action are available from the Northeast Regional Office (see ADDRESSES). A description of the action, the reason for consideration, and its legal basis are contained under SUPPLEMENTARY INFORMATION.

This final rule will affect small entities engaged in several different aspects of the lobster fishery. The affected entities include Federal lobster trap and non-trap permit holders and this rule will limit future participation in the Area 1 lobster trap fishery to historical participants that meet the eligibility requirements as described under SUPPLEMENTARY INFORMATION section.

Summary of the Significant Issues Raised by the Public Comments

None of the public comments received in response to the proposed rule raised any significant issues, meaning that nothing new was presented that caused NMFS to change course with respect to the policy and regulations to implement a limited entry program for the Area 1 lobster trap fishery. Of the 18 comments received in response to the proposed rule, the majority, or 11 comments, fully supported the proposed rule; 3 comments neither supported nor opposed the Area 1 limited entry program; while 4 opposed the Area 1 limited entry program. A summary of the comments received as well as detailed responses to each comment are provided under Comments and Responses.

Although not significant in relation to this final rule, the content of some comment submissions raised issues that afforded us the opportunity to more fully analyze the impacts of this action on certain entities to assure that our initial impact analysis, prepared in support of the proposed rule, was accurate and comprehensive. Additionally, we made non-regulatory and esoteric changes to this program's application submission process to allow for a more timely review and decision-making period to the benefit of affected permit holders, state agencies, and NMFS.

First, comments from state agencies recommended that we attempt to make all eligibility decisions prior to the start of the 2013 state lobster fishing year, which begins January 1, 2013. The intent of this request was to assure that the states had the appropriate information to indicate whether a permit was qualified for Area 1 trap fishing to simplify the authorization for the permit holder to purchase 2013 lobster trap tags. Under agreements with certain states, NMFS allows Federal permit holders to purchase lobster trap tags annually from their home state. The regulations set forth in this rule, consistent with those in the proposed rule, allow permit holders

to apply for Area 1 eligibility until November 1, 2012. However, we are alerting the public in this final rule that we will be accepting applications as early as 30 days after the date of this final rule and that those who choose to apply early, that is by September 1, 2012, will be assured, to the extent practicable, of a final decision for the 2013 Federal fishing year, which begins on May 1, 2013. This change was only programmatic in nature and is not linked to the regulatory text of this final rule. Although we expect to have all decisions made by the end of the 2012 calendar year as requested by the states, the revised process provides an incentive to the permit holder to apply early and will give us more time to review and make decisions on each application. See Comments and Responses for additional information.

Additionally, we received a comment outside of the comment period that questioned the impact to Federal permits which were in Confirmation of Permit History (CPH) status during the 2008 Federal fishing year—the critical period during which a permit must have had an Area 1 trap gear designation in order to qualify. Since this is one of the eligibility criteria, a permit that was in CPH status during the entire 2008 Federal fishing year would not qualify because it was inactive during that critical year. This comment prompted us to explore this issue in more depth. Our subsequent analysis revealed that this situation would not result in a significant group of otherwise active Area 1 permit holders who would not qualify while their permit was in CPH due to a temporary absence from the fishery.

This issue is explained in detail under Federal Lobster Permits in Confirmation of Permit History in Description and Estimate of the Number of Small Entities to Which the Final Rule Applies under SUPPLEMENTARY INFORMATION.

Description and Estimate of the Number of Small Entities to Which the Final Rule Applies

This final rule will limit entry to the Area 1 lobster trap fishery for any small entity

engaged in the harvesting of lobsters that hold a Federal limited access lobster permit. During fishing year 2008 there were a total of 3,152 such permitted vessels. Note that fishing year 2008 permit data were used in the assessment of economic impacts in the EA. A review of fishing year 2009 and fishing year 2010 permit application data found that there was no change in either gear (trap/non-trap) or LCMA designations for more than 98 percent of all valid permits issued during fishing year 2008, fishing year 2009, and fishing year 2010. For this reason, fishing year 2008 permit data are considered reasonably representative of fishing year 2009 and fishing year 2010 permit status and are used herein for purposes of analysis.

Under current regulations any fishing business may fish for lobsters with trap gear in Area 1 provided it has been issued a valid limited access lobster permit, it designates Area 1 as part of the annual permit renewal process, and it purchases Area 1 trap tags. However, of the 3,152 limited access permit holders, 1,867 permits elected to fish using trap gear in Area 1 on their permit while the remainder either elected to fish for lobster with non-trap gear or did not designate Area 1 on their 2008 permit application. Thus, while the option to fish in Area 1 with trap gear sometime in the future will be curtailed for about 40 percent of limited access lobster permit holders, this final rule will have a more immediate impact on permitted vessels that may already be participating in the Area 1 trap fishery. Note that this action will only limit entry to the Area 1 lobster trap fishery. Any Federal limited access lobster vessel that may not qualify will still be able to fish for lobster in Area 1 using non-trap gear.

The small business size standard for businesses engaged in a commercial fishing activity is \$4 million in gross sales. The number of regulated entities most likely to be affected by this action is expected to be 1,867 limited access permit holders who designated Area 1 on their 2008 permit application. The number of these entities that may be above or below the Small Business

Administration (SBA) size standard is indeterminate. Unlike most other federally managed fisheries, the lobster fishery is not subject to mandatory reporting. This means that gross sales for entities that possess only a Federal limited access lobster permit, which is the case for a majority of permitted vessels, particularly in Area 1, cannot be reliably determined. For purposes of further analysis, all 1,867 regulated entities are considered small entities.

NMFS evaluated three management alternatives prior to moving forward with the preferred alternative set forth in this final rule. One alternative, the status quo alternative, would make no changes to the Federal lobster regulations and would continue to allow any Federal lobster permit to gain access into the Area 1 lobster trap fishery. This alternative provides the greatest potential for trap fishing effort to proliferate in Area 1. The status quo alternative was not selected because it was counter to the recommendations of the Commission and the Area 1 lobster industry, as well as the scientists of the Commission's Lobster Technical Committee who cautioned that unchecked lobster trap fishing effort could jeopardize the sustainability of the Gulf of Maine lobster stock and the Area 1 lobster fishery.

A second management alternative we analyzed was the Commission's alternative. This alternative would have implemented changes to the Federal lobster regulations to limit access into the Area 1 lobster trap fishery by employing the eligibility criteria adopted by the Commission in Addendum XV. The only difference between the Commission's alternative and the preferred alternative established in this final rule is that the Commission's alternative adopted a January 2, 2009, control date which is the date that NMFS published the ANPR in the Federal Register (74 FR 67) to notify the public that an Area 1 trap fishery limited entry program was under consideration. Consequently, Area 1 trap fishery eligibility under the Commission's alternative would require that a permit had an Area 1 trap tag purchase during any year from

2004-2008 and that the permit was active for the 2008 fishing year with an Area 1 designation prior to January 2, 2009. January 2, 2009, falls in the middle of the 2008 fishing year and would not effectively capture all Area 1 Federal lobster permits that were active during that fishing year.

In contrast, the final rule will qualify any Federal permit holder that designated Area 1 on their 2008 permit application at any time during the 2008 fishing year (May 1, 2008 to April 30, 2009), and had a record of purchasing Area 1 trap tags in any year during 2004-2008. The qualification criterion regarding the date when the 2008 permit application had to be received is less restrictive than the January 2, 2009, control date recommended by the Commission. . An additional 32 permit holders would likely qualify under this adopted alternative as opposed to the Commission's alternative. These 32 permits, however, do not represent new or additional effort, and is such a small number that it would likely have no measurable impact on the species. The Commission, states and industry groups support this alternative as following the spirit and intent of their recommendation. As such, the final rule will be less burdensome for regulated small entities than the Commission's alternative, because it provides an opportunity for more affected entities to qualify for limited access to the Area 1 trap fishery, while remaining consistent with the Commission's intent to cap the number of Federal lobster trap permits in Area 1 at 2008 levels.

Based on the qualification criteria, 1,643 (88 percent) of the 1,867 potentially affected small entities will qualify for the Area 1 trap fishery. Note that the Commission's alternative would have qualified 32 fewer regulated small entities. The 224 potential non-qualifiers—calculated by taking the 1,867 permit holders that designated Area 1 in 2008 and subtracting the 1,643 expected qualifiers—are permit holders for which NMFS has no record of having

purchased Area 1 trap tags in any year from 2004 to 2008. Further analysis of these non-qualifiers suggest that the majority had selected non-trap as a gear type during 2008, or had selected other LCMA's in addition to Area 1, or based their fishing operation in states that do not border the Gulf of Maine. NMFS asserts that these potential non-qualifiers likely elected Area 1 on their permit out of speculation, not because they were fishing there. Specifically, 49 of the 224 non-qualifiers listed a homeport state of Rhode Island, New York, New Jersey, Virginia, North Carolina, or other state. Of the 175 non-qualifiers from Maine, Massachusetts, or New Hampshire, 106 selected non-trap gear on their permit and 55 had elected to use trap gear in an LCMA other than Area 1. Thus, available data suggest that 92 percent of the non-qualifiers may not be economically affected by this rule because they are not engaged in the Area 1 trap fishery. The potential economic impact on the remaining 14 non-qualifiers is uncertain. These non-qualifiers did not select non-trap gear, nor did they select a trap area alternative to Area 1. Given the absence of any indication of trap fishing in Area 1, these 14 vessels may not be actively fishing for lobster at all.

This final rule will not implement any regulatory measures that will affect the manner in which qualifiers prosecute the Area 1 trap fishery and will not, therefore, have any direct economic impact on qualifying entities. As noted above, the majority of non-qualifiers that listed Area 1 are most likely using non-trap gear to fish for lobster, or are engaged in a lobster trap fishery in other LCMAs. The direct economic impact on these non-qualifying vessels is likely to be negligible in terms of their gross sales or profitability. However, these non-qualifiers, as well as the 1,285 permit holders that did not elect Area 1 on their 2008 permit (most of which did not select Area 1 in other years since), may suffer some economic loss in terms of the value of their fishing vessel. That is, the value of a fishing vessel depends on the

condition of the physical asset itself, its fishing history, and the suite of limited access permits (i.e., an open access permit conveys no added value since there is no scarcity) that are attached to the vessel.

To the extent that limited access fishing permits may themselves be considered assets, any change in the rights or conditions affecting the current or future use of the permit affects its asset value. Limiting access to the Area 1 trap fishery will restrict the future use of a limited access lobster permit for non-qualifiers, hence some diminution of the contribution of the lobster permit to the value of the fishing business may occur. Notably, the permit value of Area 1 qualifiers may increase, since these permits will retain the access rights that will no longer be available to non-qualifiers. The magnitude of any such changes in permit value to either non-qualifiers or qualifiers is highly uncertain. There certainly is no indication or available data to suggest that the final rule will have anything other than a small, if any, impact on permit values.

Federal Lobster Permits in Confirmation of Permit History

If a Federal lobster permit was in CPH status during the entire 2008 fishing year, then it was inactive and the permit holder was not fishing under the permit. Consequently, the permit will not have an Area 1 designation for that year, will fail to satisfy that criterion, and would be considered ineligible for future participation in the Federal Area 1 lobster trap fishery.

To better understand the consequences of this rule and its potential impact on individuals who may have been active permit holders immediately before and/or after 2008, we conducted a review of all permits in CPH status during the 2008 fishing year. Specifically, we identified 34 Federal lobster permits that were inactive (in CPH status) during much of 2008, but that might have been active immediately before or after. Our investigation revealed that the vast majority of these permits never fished in Area 1 because they were associated with vessels from southern

New England and points south and show a history of fishing in more southerly lobster management areas, or they had a history of fishing with mobile gear and not traps.

We focused our attention on 12 of the 34 permits that had a previous Area 1 trap gear designation and were taken out of CPH after the 2008 fishing year. We were interested in this group of permits because they represent a category of permit holders that may be most impacted the eligibility criterion that requires a 2008 Area 1 designation. Of these 12 permits, only one purchased trap tags during the required 2004-2008 period (in 2005 only). Since this permit did not have an Area 1 designation in 2008, it would not qualify. Nevertheless, it is not the type of permit that this rule (and the Commission and LCMT) strives to qualify, since the permit has not been an active Area 1 trap permit since 2005.

Overall, we found that our criterion requiring that a permit have an Area 1 trap gear designation during the 2008 fishing year did not create a significant group of non-qualifying permit holders, particularly those whose permits were in CPH status during that year. A more detailed analysis of this issue is provided in the EA.

Impacts to Federal Lobster Permit Holders with Federal Multispecies Permits

To address industry concerns that catch limitations under the multispecies sector management program may prompt traditional multispecies fishermen to re-direct their efforts into the lobster trap fishery, we analyzed the potential impact of the proposed action on multispecies vessels that also hold Federal lobster permits. The sector management program implemented by Amendment 16 to the Northeast Multispecies Fishery Management Plan allows federally permitted multispecies (groundfish) vessels to form cooperative groups called sectors. Within each sector, the participating vessels combine their respective historical groundfish quotas, allowing them the flexibility to share and manage the cumulative quota of their sector.

Those Federal multispecies vessels that do not participate in a sector may harvest groundfish on an individual basis, but must adhere to trip-based catch limits and days-at-sea. This component of the fleet is known as the common pool.

As part of this analysis, we analyzed the potential impacts of the proposed action on the dual lobster and multispecies vessels that participate in the common pool and will not qualify for the Area 1 trap fishery. We considered that these vessels may be most susceptible to restrictions in the multispecies fishery and may be most inclined to pursue the directed lobster trap fishery. Common pool vessels make up about half of the groundfish fleet, but share less than 10 percent of the overall groundfish quota for all species combined.

Of the 967 vessels that have both a Federal lobster and multispecies permit, 758 will probably not qualify for the Area 1 trap fishery under the proposed action. Of these, 51 permits are in the common pool category and hail from Area 1 ports. This final rule will prohibit these permit holders from transitioning into the Area 1 lobster trap fishery if restrictions on groundfishing, particularly those impacts on the more vulnerable common pool vessels, necessitate a change in fishing operations from groundfishing to the lobster trap fishery. On balance, we contend that this will result only in indirect negative impacts on these common pool fishers, since they do not have a previous history of fishing with traps, they had not previously taken advantage of the long-standing opportunity to transition into the Area 1 trap fishery, and refitting their vessels for trap fishing may be cost-prohibitive. Furthermore, restricting these non-historical participants from the Area 1 trap fishery is consistent with the Commission's recommendations in Addendum XV to cap effort at recent (2004-2008) levels.

In contrast to the number of dual multispecies and lobster permits that will not qualify for the Area 1 trap fishery under the proposed action, 209 vessels with both a Federal lobster and

multispecies permit will qualify. Compared to the Commission's Alternative, five more Federal lobster permits with a multispecies permit will qualify under the final rule's criteria – two from Massachusetts and three from Maine. All five are in the common pool and hail from Gulf of Maine ports, thus the final rule decreases the number of affected common pool participants hailing from the Gulf of Maine ports, since the extension of the eligibility period will allow these vessels to qualify for the Area 1 trap fishery.

Description of Steps the Agency Has Taken to Minimize the Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

We took several steps to minimize the economic impact of this action on small entities. First, we extended the permit qualification period four months beyond the control date to consider all Federal lobster permits that elected Area 1 for trap gear on their 2008 Federal lobster permit, as discussed under the Final Rule section of this document. Ultimately, this will allow about 32 additional active Area 1 trap permits to qualify without compromising the effort control intentions of the Commission's plan. Second, we have set forth an application process that reduces the burden on the vast majority of Federal Area 1 lobster permit holders for whom NMFS already has sufficient information on hand to qualify the permit for the Area 1 trap fishery. This issue is described in more detail in the Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements section. Third, we will allow all Federal lobster permit holders to fish with traps in Area 1 for the remainder of the 2012 Federal fishing year while the application review process is underway to avoid short-term disruptions in current fishing practices. Finally, those permit holders who choose to apply early, that is by September 1, 2012, will be assured, to the extent practicable, of a final decision for the 2013 Federal fishing year, which begins on May 1, 2013. This issue is discussed in more detail under the Summary

of Significant Issues Raised by the Public Comments section.

List of Subjects in 50 CFR Part 697

Fisheries, fishing.

Dated: May 29, 2012

Alan D. Risenhoover,

Acting Deputy Assistant Administrator

For Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR 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 § 697.4, redesignate paragraphs (a)(7)(vi) through (a)(7)(x) to paragraphs (a)(7)(vii) through (a)(7)(xi), revise paragraph (a)(7)(ii), and add a new paragraph (a)(7)(vi) 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 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 1, 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)(ix) of this section.

* * * * *

(vi) Participation requirements for EEZ Nearshore Management Area 1. To fish for lobster with traps in the Federal waters of Area 1 after April 30, 2013, a Federal lobster permit holder must initially qualify into the area, or have an open pending application to fish in 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 1, the applicant must establish with documenting proof the following:

(1) That the applicant has a valid and current Federal lobster permit as of the date of the application; and

(2) That the involved Federal lobster permit had an Area 1 trap designation at some time during the 2008 fishing year, which was May 1, 2008, through April 30, 2009; and

(3) That at least one Area 1 trap tag was purchased to fish with traps under the involved Federal lobster permit in any one fishing year from 2004 to 2008.

(B) Documentary proof. To satisfy the Area 1 Initial Qualification and Trap Allocation Criteria set forth in paragraph (a)(7)(vi)(A) 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 will allow NMFS to identify the Federal lobster permit in its database, which will at a minimum include: The applicant's name and address; vessel name; and permit number.

(2) As proof of the lobster permit's 2008 Area 1 trap designation, the applicant must provide a copy of the vessel's Federal lobster permit for the 2008 fishing year. The potential qualifier may, in lieu of providing a copy, provide NMFS with such data that will allow NMFS to identify the Federal lobster permit in its database, which will at a minimum include: The applicant's name and address; vessel name; and permit number.

(3) As proof of Area 1 trap tag purchases in any one fishing year from 2004 to 2008, the applicant must provide documentation from those years, either from the trap tag vendor supplying the tags or from the state or Federal government agency, affirming the purchase of the tags from the vendor.

(4) 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 will satisfy that qualification criteria for the applicant.

(C) Application period. Federal lobster permit holders seeking entry into the Area 1 trap fishery must apply for qualification by November 1, 2012. Failure to apply for Area 1 access by that date shall be considered a waiver of any future claim for trap fishery access into Area 1.

(D) Appeal of denial of permit. Any applicant having first applied for initial qualification into the Area 1 trap fishery pursuant to paragraph (a)(7)(vi) of this section, but having been denied access, 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.

(1) Grounds for appeal: The sole grounds for administrative appeal shall be that NMFS erred clerically in concluding that the vessel did not meet the criteria in paragraph (a)(7)(vi) of this section. Errors arising from oversight or omission such as ministerial, mathematical, or typographical mistakes will 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. If the appealing applicant does not clearly and convincingly prove that an error occurred, the appeal must be denied.

(2) 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's 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 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.

(3) Status of vessels pending appeal. The Regional Administrator may authorize a vessel

to fish with traps in Area 1 during an appeal. The Regional Administrator may do so by issuing a letter authorizing the appellant to fish up to 800 traps in Area 1 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 to fish. 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.

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