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Regional Site Information Repository: U.S. EPA Record Center, Attn: Ms. Debbie Jourdan, Atlanta Federal Center, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. Hours of Operation (by appointment only): 8 a.m. to 4 p.m., Monday through Friday.

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**FOR FURTHER INFORMATION CONTACT:**

Michael Townsend, Remedial Project Manager, Superfund Remedial Section, Superfund Remedial Branch, Superfund Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. (404) 562-8813. Electronic mail at: [townsend.michael@epa.gov](mailto:townsend.michael@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**List of Subjects in 40 CFR Part 300**

Environmental protection, Air pollution control, Chemicals, Hazardous Waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water Supply.

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: November 7, 2011.

**Gwendolyn Keyes Fleming,**  
Regional Administrator, Region 4.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 697**

[Docket No.110722404-1405-01 ]

**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:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes new Federal American lobster regulations that would limit entry into the lobster trap fishery in Lobster Conservation Management Area 1 (Federal inshore waters-Gulf of Maine). Upon qualification, permit holders would be allowed to fish in Area 1 with up to 800 lobster traps. The proposed 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.

**DATES:** We must receive your comments no later than 5 p.m. eastern standard time on January 3, 2012.

You may submit comments on this document, identified by NOAA-NMFS-2011-0234, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter NOAA-NMFS-2011-0234 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on the right of that line.

- **Mail:** Submit written comments to: Robert Ross, Supervisory Fishery Policy Analyst, Sustainable Fisheries Division, NMFS, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: "Comments on Lobster Area 1 Proposed Rule."

- **Fax:** (978) 281-9135; Attn: Robert Ross

**Instructions:** Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only. You may obtain copies of the draft Environmental Assessment (EA), including the Regulatory Impact Review (RIR) and the Initial Regulatory Flexibility Analysis (IRFA), prepared for this action at the mailing address specified above; telephone (978) 675-2162. The documents are also 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 proposed rule to the mailing address listed above and by email to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov), or fax to (202) 395-7285.

**FOR FURTHER INFORMATION CONTACT:**

Peter Burns, Fishery Policy Analyst, phone (978) 675-2162, fax (978) 281-9135.

**SUPPLEMENTARY INFORMATION:**

**Statutory Authority**

The proposed regulations would 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 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**

The purpose of the proposed action is to manage the American lobster fishery in a manner that maximizes resource sustainability, recognizing that Federal management occurs in consort 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 ISFMP seeks to limit entry into the 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. 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, potentially flooding Area 1 with new fishers, upsetting local lobster stock stability, frustrating rebuilding efforts, 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 proposes the foregoing rule to address the potential for increased lobster trap fishing effort in Area 1 which would support 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 Lobster Conservation Management Team (LCMT), an advisory group comprised 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. 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 would 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 Web site 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 flooding 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 would be needed to restrict the migration 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.

**Proposed Changes to the Current Regulations**

NMFS proposes to limit access into the Federal Area 1 lobster trap fishery using qualification criteria similar to those recommended by the Area 1 LCMT and by the Commission's Lobster Board in Addendum XV. The most recent stock assessment warned that unbridled effort in Area 1 could jeopardize the sustainability of the stock if lobster abundance fell to more normal

levels. If such an event occurred, NMFS would be in less of a position to provide an immediate and decisive response, given the lengthy rulemaking apparatus available. Consequently, NMFS believes it most prudent to heed the scientists' advice and proactively respond to the issue before the situation becomes critical.

The timing of this proposed rule is also appropriate given the limited access programs currently being implemented in other lobster management areas. Specifically, lobster trap fishing access was recently limited in the state waters of Area 2 and the Outer Cape Cod Area, and NMFS is presently developing a rule that could limit trap fishing access in the Federal waters of those areas as well. Trap fishing access to Areas 3, 4, 5 and 6 is already restricted in both state and Federal waters. Accordingly, to the extent that a lobster permit did not qualify for trap fishing access in any of those other areas, there is potentially great incentive for that permit to be sold into Area 1—that last remaining area without access limitations—where it could be used to fish with traps, thus proliferating effort in the area. Area 1 lobster fishers were greatly concerned by such a scenario, as was the Commission. Our analysis of the data suggests that the feared effort shift into Area 1 has probably not yet occurred, but that the potential for such an effort shift certainly exists.

NMFS therefore agrees with the scientists, the industry-based Area 1 LCMT, and the Commission that effort control is needed in Area 1 to protect the stock. This proposed rule does so by seeking to limit further effort into Area 1 in the manner recommended by the industry-based Area 1 LCMT and Commission. Additionally, this proposed rule would not change the 800-trap cap in Area 1, which is consistent with Commission Addendum XV.

This proposed rule differs from the Commission's Addendum XV recommendation only in that it would extend the qualification period cut-off date from January 2, 2009, to April 30, 2009. The April 30 date makes sense because it coincides with the Federal lobster fishing year (May 1, 2008, through April 30, 2009) and because it provides added months for those permit holders who were in the process of conducting business prior to the January 2, 2009, control date to have settled their affairs and renewed their Federal lobster permits during the normal course of the Federal fishing year. In other words, the proposed action would qualify the Federal lobster permits that

were renewed at any time during the 2008 fishing year that had an Area 1 trap gear designation and a record of purchasing one or more trap tags during any one year from 2004 through 2008. This slight extension in the qualification period remains consistent with the Commission's overall recommendation and would result in negligible additional impact because our analysis suggests that speculation did not occur during this time period as originally feared. Accordingly, despite the slight differences in the qualification period compared to the Commission's criteria, NMFS expects that this proposed rule would be supported by the stock assessment scientists, the Area 1 lobster industry and the Commission's Lobster Board because it would reflect the full complement of 2008 Federal Area 1 permit holders with recent trap tag purchases.

NMFS assessed the impacts of this action in a preliminary Environmental Assessment (EA) pursuant to the National Environmental Policy Act. The EA, based predominantly on Federal vessel permit data and state and Federal trap tag records, shows that 1,643 Federal lobster permits would likely qualify under the proposed action. Of this total, approximately 32 qualifiers would benefit from the proposed extension of the qualification cut-off date from January 2, 2009, to April 30, 2009. In other words, if NMFS adopted the January 2, 2009, control date originally recommended by the Commission, approximately 1,611 permit holders would qualify, 32 less than would qualify under the extended qualification date in this proposed action. 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.

Of the 3,152 Federal lobster permits in existence, NMFS analysis suggests that 1,509 permit holders would 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.

For the vast majority of current Area 1 permit holders, NMFS already has the necessary documentation to show that the permit meets the eligibility requirements for Area 1. In such cases, we will notify those Area 1 permit holders, on or around the time when

they receive their annual permit renewal paperwork, that they are pre-qualified into the Area 1 trap fishery. Those pre-qualified permit holders will need to simply confirm their intent to qualify their permit for the Area 1 trap fishery by signing a pre-printed application form and sending it back to NMFS by a specified date. Once we receive the application, we will confirm that the permit meets the eligibility requirements and inform the permit holder in writing that the permit has officially qualified for the Area 1 trap fishery.

Permit holders who do not pre-qualify will be notified that NMFS does not have information on hand to show that the permit meets the eligibility criteria. Permit holders in this category who wish to qualify their permit for Area 1 will need to submit the signed pre-printed application form provided to them by NMFS. In addition, the application package must include documentary proof to show that the permit meets the eligibility criteria. Specifically, to show that the vessel has a current Federal limited access lobster permit, they must provide a copy of the current Federal lobster permit or such data that would allow NMFS to identify the permit in its database (such as the applicant's name, address, vessel name and permit number). To show that the permit had a valid Area 1 designation during the 2008 fishing year, the applicant must include a copy of the 2008 permit exhibiting the Area 1 designation or such information to allow NMFS to identify the permit in its database as previously explained. Third, as proof that the permit purchased trap tags in any year from 2004–2008, the applicant must provide documentation created during the 2004–2008 trap tag purchase period from the trap tag vendor or from the state or Federal Government affirming the purchase of the tags (See the Regulatory Text for details).

We will review the applications and supporting documentation and make a ruling on each permit's eligibility. Those who apply and are denied eligibility may appeal to the Regional Administrator within 45 days of the date of the determination of ineligibility. An appeal will be approved only when there is clear and convincing evidence that NMFS erred clerically in concluding that the permit did not qualify. The Regional Administrator may authorize a vessel pending appeal to fish with traps in Area 1 while the appeal is under review.

## Comments and Responses

The ANPR published in the **Federal Register** on January 2, 2009, informed the public that NMFS was considering a rule to limit future access to the lobster trap fishery in Area 1 and to solicit public comments on the issue. The comment period closed on February 2, 2009. We received a total of nine comments in response to the ANPR. Four respondents were concerned about the loss of their current state lobster fishing license; two were concerned that Maine lobster fisher apprentices would be unable to obtain a Federal permit; one was concerned that the ability to transfer permits would be taken away; one wanted to know what documentation would be needed in order to qualify for an Area 1 permit; one was concerned about seal and cormorant predation on lobsters; one asked for exceptions for fishers who bought a vessel holding an American lobster permit, or were in the process of transferring a vessel holding an American lobster permit before the control date; and one supported the proposal to limit or restrict future access to the American lobster trap fishery in the Federal waters of Area 1. The specific comments and NMFS's responses are as follows:

*Comment 1:* Four respondents were concerned that they would lose their state lobster fishing license.

*Response:* This proposed rule is limited to the qualification of vessels carrying Federal lobster permits to fish in the Federal waters of Area 1. It does not involve any qualification decision or ruling on an individual's state lobster license; therefore, it does not follow that individuals would "lose" their state lobster permit as a result of the proposed Federal qualification process (or at least it is not sufficiently clear from the comment to determine how this would occur).

*Comment 2:* Two respondents were concerned that apprentice lobster fishers would not be able to purchase a Federal lobster permit if this proposed rule were approved.

*Response:* Under the proposed action, NMFS would determine whether a Federal lobster permit will remain eligible to fish for lobster with traps in Area 1 based on the permit's fishing history as it pertains to the eligibility criteria. It would not alter the current allowances for the purchase of a vessel and permit or the transfer of a permit to another vessel or entity.

*Comment 3:* One respondent feared that the control date would effectively eliminate the transfer of permits.

*Response:* This proposed rule places no restriction on the transfer of Federal lobster permits from one vessel to another. If a Federal lobster permit that qualifies for Area 1 under the proposed rule is transferred to another vessel, the Area 1 trap eligibility would remain part of the permit and would be attributed to the replacement vessel.

*Comment 4:* One respondent was concerned that the January 2, 2009, control date and forthcoming rule would result in his Federal lobster permit being taken away.

*Response:* This proposed rule would not take away any Federal lobster permits. This proposed rule responds to recommendations made by the Commission's Lobster Board and industry-based Area 1 LCMT to prevent the expansion of trap fishing effort into the Federal waters of Area 1. Those Federal lobster vessels that were actively fishing with traps in Area 1 during the 2008 fishing year—meaning that they had a valid Area 1 lobster trap permit during the 2008 Federal fishing year and purchased a lobster trap tag during any year from 2004 through 2008—would be allowed to continue to fish there with trap gear in the future. Those that do not meet the eligibility criteria would not be allowed to fish with traps in the Federal waters of Area 1. But, regardless of whether a vessel carrying a Federal permit qualifies to fish with traps in Area 1, that Federal vessel would be allowed to retain its Federal lobster permit and fish for and possess lobsters wherever allowed under Federal regulation, including fishing for lobster in Area 1. However, it would not be allowed to fish with trap gear in Area 1.

*Comment 5:* One respondent asked what documentation would be needed in order to qualify for a Federal permit into Area 1.

*Response:* The qualifying documentation can be found in the **BACKGROUND** section of this proposed rule. Most of the information is available to NMFS through state or Federal records/databases. NMFS has access to trap tag data and can determine which vessels qualify. Those permit holders would only need to submit an application form and no additional supporting documentation would be needed since sufficient evidence is already available to NMFS. If NMFS does not have sufficient evidence on-hand to pre-qualify a permit, those permit holders would be notified and may submit an application including documentation to support the eligibility criteria. If a permit is ruled to be ineligible for Area 1 access and a case arises where an error occurred, the

lobster fisher may request an appeal, as described in the Background section of this proposed rule.

*Comment 6:* One respondent expressed concerns about predation of lobsters by seals and cormorants.

*Response:* Although there is a recent scientific report by the American Lobster Technical Committee dated April 17, 2010, that discusses increased natural mortality in shallow waters by some mid-Atlantic predators whose abundance has increased substantially in the last decade, this issue is beyond the scope of the proposed rule.

*Comment 7:* Two respondents were against the control date and one stated that lobster fishers could not have known of this proposed control date or the criteria used to determine who would be eligible for a permit.

*Response:* Although NMFS cannot speak to the specific circumstances of the respondents, the agency can state with certainty that the Commission's Area 1 Limited Access Program, including the control date, was the subject of much public debate both before and after January 2, 2009. As a preliminary matter, it was 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 Lobstermen's Association and Massachusetts Lobstermen's Association), that 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 Commission's Lobster Board took the Area 1 LCMT's concept and, after public discussion, formally recommended the use of a control date at the Lobster Board's October 2008 public meeting. 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. NMFS, in fact, is proposing to liberalize 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 (See Background).

*Comment 8:* One respondent asked for exceptions for fishers who bought a vessel holding an American lobster permit, or were in the process of transferring a vessel before the control date.

*Response:* The proposed April 30, 2009, limited entry cut-off date attempts to strike a balance between two competing interests: (1) The desire to have a cut-off date that is flexible enough to accommodate Area 1 fishers who were in the process of transferring permits and caught off-guard by the January 2009 control date notice; and, (2) the need to have a quick and specific cut-off date so speculators would not be able to take advantage of the January 2009 control date notice and declare into the Area 1 fishery, not to fish, but simply to satisfy potential permit qualification criteria. More specifically, in 2008, members of the industry-based Area 1 LCMT expressed concern that effort in other LCMAs was shifting and/or would shift into Area 1, especially as other LCMAs began their own limited entry programs. The Area 1 LCMT was adamant that Area 1 trap fishery access needed to be restricted to ensure stock and fishery stability in Area 1 and that a clear and definitive control date needed to be established immediately—some suggested retroactively—to prevent the influx of speculation that they feared would occur as more and more individuals became aware of the limited access proposal. In other words, the LCMT worried that non-Area 1 permit holders might try to designate Area 1 on their permits and purchase Area 1 trap tags without any intention of ever fishing there, simply so they could stake a claim for future Area 1 access. The Commission's Lobster Board agreed with the Area 1 LCMT and urged, by letter dated October 22, 2008, that NMFS set a control date immediately, which NMFS did by **Federal Register** publication January 2, 2009.

In proposing the April 30, 2009, cut-off date, instead of the January 2, 2009, cut-off date, NMFS specifically rejected the suggestions of some who thought the cut-off date should be set at a time before the January 2, 2009, control date notice. In fact, our proposed cut-off date is more than 4 months after the January 2009 control date, which could potentially include those fishers who were renewing their permits at the time of the control date. We believe that the proposed choice provides flexibility for

those few fishers who were potentially transferring permits in January 2009, and those who renewed after January 2009, while still addressing the overall goals of capping effort and discouraging speculation as articulated by the Area 1 LCMT and Lobster Board. Our choice of this date was analyzed in the draft EA for this action.

*Comment 9:* One respondent supported the proposal to limit or restrict future access to the American lobster trap fishery in the EEZ of Area 1.

*Response:* We agree with the respondent and with the Commission's reasoning behind its adoption of Addendum XV. This proposed rule addresses the Area 1 industry's concerns that lobster fishers, restricted from other limited conservation management areas, may shift their lobster trap fishing effort into Area 1. The potential for shifting effort into Area 1 may threaten Gulf of Maine lobster stock stability and stock rebuilding efforts, and this proposed rule would cap lobster trap fishing effort and promote the stability of the stock and stock rebuilding efforts.

#### Classification

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

This proposed rule does not contain policies with federalism implications as defined in E.O. 13132. The proposed measures are based upon the lobster ISFMP that was created by and is overseen by the states. The proposed 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, these proposed measures would not pre-empt state law and would do nothing to directly regulate the states.

This proposed 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 submitted to OMB for approval. 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 whose permits pre-qualify and need only to sign and remit an application form, and those who do not pre-qualify and would need to remit an application form along with documentation to support the qualification criteria. For pre-qualifiers, NMFS would notify the approximately 1,643 permit holders for whom there is sufficient evidence to show that the permit would 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 permit holders, those whose permits would not pre-qualify, would be sent a letter indicating that insufficient information is on-hand to qualify the permit. NMFS estimates that 288 permit holders would apply in this fashion. The burden is estimated at 22 minutes to allow for the search for 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 on all appellants is 14 hr and \$118. Overall, the total program burden on permit holder 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 \$19,406. Material costs to the Federal Government include those for paper, envelopes, postage and other supplies associated with processing the applications and appeals. When the estimated material costs of \$2,811 are considered, the overall costs to the Federal Government are estimated at \$22,217.

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the

burden of the collection of information, including though the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the Sustainable Fisheries Division at the ADDRESSES above, and by email to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov) or fax to (202) 395-7285.

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 an Initial Regulatory Flexibility Analysis (IRFA) as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, the reason for consideration, and its legal basis are contained in the SUMMARY section of the preamble in this proposed rule.

The proposed management measures would 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 would limit future participation in the Area 1 lobster trap fishery to those historical participants that meet the proposed eligibility requirements as described in the SUPPLEMENTARY INFORMATION section.

#### Economic Impacts of the Proposed Rule on Small Entities

The proposed action would 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 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 would be curtailed for about 40 percent of limited access lobster permit holders, the proposed action would have a more immediate impact on permitted vessels that may already be participating in the Area 1 trap fishery. Note that the proposed action would only limit entry to the Area 1 lobster trap fishery. Any Federal limited access lobster vessel that may not qualify would 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 the proposed action is expected to be 1,867 limited access permit holders that designated Area 1 on their 2008 permit application. The number of these entities that may be above or below the 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.

The proposed action would 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 proposed action qualification criterion regarding the date of when the 2008 permit application had to be received is less restrictive than that recommended by the Commission. Specifically, the Commission alternative would have required that fishing year 2008 permits be renewed by January 2, 2009. Consequently, the proposed action would 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.

Based on the proposed action qualification criteria, 1,643 (88 percent)

of the 1,867 affected small entities would 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 believes that they 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 the proposed action 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.

The proposed action would not implement any regulatory measures that would affect the manner in which qualifiers prosecute the Area 1 trap fishery and would 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 would retain the access rights that would 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 proposed action would 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 Confirmation of Permit History (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 would not have an Area 1 designation for that year and thus would likely fail to satisfy that criterion in the proposed rule. There were five permits that went into CPH status prior to the start of the 2008 fishing year that remained in CPH throughout the entire fishing year. Preliminary analysis indicates that only one of these permits was from a vessel hailing from an Area 1 port. These permits would likely not qualify under either the Commission's Alternative or the Preferred Alternative, nor would any permits that were in CPH during the 2004–2008 trap tag purchase period that did not purchase trap tags or elect Area 1 on their 2008 Federal permit. In contrast, under the status quo alternative, these permits could transition into the Area 1 fishery if taken out of CPH and transferred to a vessel in the future. On balance, this appears to be a negligible number of permits that were inactive and not representative of the Area 1 lobster trap fleet.

#### *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 would 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 would 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. Adoption of the proposed action would 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 believe that this would 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 would not qualify for the Area 1 trap

fishery under the proposed action, 209 vessels with both a Federal lobster and multispecies permit would qualify. Compared to the Commission's Alternative, five more Federal lobster permits with a multispecies permit would qualify under the proposed action—two from Massachusetts and three from Maine. All five are in the common pool and hail from Gulf of Maine ports, thus the proposed action decreases the number of affected common pool participants hailing from the Gulf of Maine ports, since the extension of the eligibility period would allow these vessels to qualify for the Area 1 trap fishery.

#### **Economic Impacts of Non-Selected Alternatives**

We analyzed two other management alternatives in addition to the proposed action: The Commission's Alternative that requires renewal of the Area 1 permit prior to the January 2, 2009, control date; and a Status Quo Alternative that would continue to allow all Federal lobster permit holders the ability to gain access into the Area 1 trap fishery.

Under the Commission's Alternative, 1,541 Federal lobster permits would not qualify for the Area 1 lobster trap fishery. Of these, 1,285 have no history of fishing in Area 1 with traps. These same permits would not qualify under the proposed action. The remaining 256 non-qualifying permits elected Area 1 on the 2008 Federal permit but did not purchase a trap tag during the established 2004–2008 trap tag purchase period. Forty-three of the 256 renewed their permits in 2008, but did so after the control date. Thirty-two of these purchased a trap tag during the required period and would qualify under the proposed action. Overall, the Commission's Alternative would qualify 32 fewer permits compared to the proposed action. These 32 non-qualifiers would likely suffer losses in value to their Federal fishing permits through loss of access to Area 1. The remaining non-qualifiers would also lose permit value, but were not actively fishing in Area 1. Therefore, any negative impacts due to ineligibility would be indirect and would not interfere with current or historical fishing practices.

Under the status quo alternative, all Federal lobster permits would maintain the option to prosecute the Area 1 lobster trap fishery, regardless of any historical participation. Traditional Area 1 trap fishery participants may be negatively impacted if fishing effort increases due to lack of effort controls. Unchecked effort may impact stock



stability and could result in losses in income due to deteriorating stock conditions and increased competition. Gear conflicts may increase with potential increases in traps. Non-traditional participants may benefit by gaining access to the Area 1 lobster trap fishery, the most prolific lobster producing area. Such benefits may be short-lived if unchecked effort results in de-stabilization of the stock and fishery.

#### List of Subjects in 50 CFR Part 697

Fisheries, fishing.

Dated: November 14, 2011.

**Samuel D. Rauch III,**

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

For the reasons set out in the preamble, 50 CFR part 697 is proposed to be 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, revise paragraph (a)(7)(ii), redesignate paragraphs (a)(7)(vi) through (a)(7)(x) to (a)(7)(vii) through (a)(7)(xi), 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 Area 1, 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 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 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 would allow NMFS to identify the Federal Lobster Permit 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 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 would allow NMFS to identify the Federal Lobster Permit in its data base, which would at a minimum include: The applicant's name and address, vessel name, and permit number.

(3) As proof of 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 would 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 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. 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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