

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

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

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

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

§ 697.4(a)(7)(vi through viii) of this final rule. Discussion concerning selection of appropriate documentation and eligibility criteria was provided in the FSEIS/RIR/FRFA prepared by NOAA Fisheries for this final rule and is not repeated here (see **ADDRESSES**).

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

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

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

Areas 3, 4, and/or 5 Appeals.

If NOAA Fisheries denies an Area(s) 3, 4, and/or 5 permit after the potential

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

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

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

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