

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

Historic Participation Implementation Analysis

The stated qualification process for Areas 3, 4, and/or 5 specified by measures in this final rule was the product of considerable deliberation. NOAA Fisheries' challenge was to

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

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

NOAA Fisheries did, however, consider that some potential qualifiers may be denied access in this more rigid process because they, through no fault of their own, no longer had the documents specifically required under the proposed scheme. To ameliorate the harshness of such an eventuality, NOAA Fisheries considered an appeal on the basis of documentary hardship. The documentary hardship appeal attempts to soften for some the rigidity of the proposed action's strict documentation scheme, while still maintaining standards that would prevent trap fishing access to those who have not historically fished in Areas 3, 4, and/or 5. An appeal based upon documentary hardship for reasons beyond the applicant's control adds flexibility to the process without undermining the rule's effectiveness. The appellate parameters may have harsh impacts for some—e.g., for applicants lacking documents due to inadvertence, carelessness or excusable neglect—but inclusion of individuals who would qualify but for reasons beyond their control appears to be a just, logical, and reasonable place to draw such a line. On balance, NOAA Fisheries considers the proposed documentation and

qualification scheme to be both practical and just, and believes that it otherwise supports the Commission's lobster management regime, is compatible with Addendum I and is consistent with the applicable laws. Additional discussion on the proposed documentation and qualification scheme was provided in the FSEIS/RIR/FRFA prepared by NOAA Fisheries for this final rule (see ADDRESSES).

Area 1 Trap Limits for NH Lobster License Holders

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

Procedures for Consideration of Conservation Equivalency Measures

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