

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

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

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

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

**Response:** This final rule does not require an applicant to have saved 10 years of documentation to qualify, although in order to provide flexibility, NOAA Fisheries allows that applicant to use 10-year old data if such establishes the necessary criteria. The ability to use 10-year old data should, therefore, be considered a benefit to applicants, not a burden. See Response to HP Comment

41. NOAA Fisheries gave formal notice of the need to retain documents in publishing its control date in the **Federal Register** in September, 1999. Certainly, informal notification was available in advance of that date as the qualification criteria were created in the Commission's earlier public process in developing Addendum I. In any event, if the commenter kept 3 years of Coast Guard boarding reports and IRS records as indicated in the comment, then, as of the control date when participants were formally notified to retain records, the commenter would have already had documentation for 1996, 1997, and 1998 and would reasonably be expected to have saved those documents plus whatever documentation was ultimately created in 1999. Under this final rule, the commenter could potentially use documentation for any one of those years to qualify.

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

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

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

**Response:** NOAA Fisheries recognizes that some potential qualifiers may be denied access to the lobster fishery in Areas 3, 4 or 5 due to the rigid, but necessary, qualification scheme because they, due to no fault of their own, no longer possess the documentation necessary to support their eligibility.

Accordingly, NOAA Fisheries sought to craft an appeal process that is just and allows flexibility in the process without diminishing the effectiveness of the final rule. Consequently, NOAA Fisheries incorporated a documentary hardship appeal option into this rulemaking, whereby the appellant must provide affidavits from three Federal permit holders and one affidavit from an individual, although not necessarily a Federal permit holder, who can attest to the nature of the loss of the documents (See Section III.(2).(C) of the FSEIS and 50 CFR 697.4(a)(7)(x) of the Federal regulations as set forth by this final rule). The documentary hardship appeals process is intended to soften the qualification requirements without compromising the ability of the historical participation program to effectively allow only historical participants into the Area 3, 4 and 5 lobster trap fishery. NOAA Fisheries is sensitive to the potential use of fraud as a means to exploit the proposed qualification system. In choosing affidavits from three Federal permit holders, NOAA Fisheries sought a balance. Requiring just one or two affidavits would be insufficient while requiring five affidavits as the commenter suggests, may be too difficult to achieve for an appellant from a remote port. NOAA Fisheries also broadened the supporting affidavit requirement by allowing affidavits from Federal permit holders who are not necessarily Federal lobster permit holders, but further defined the requirements by requiring proof and corroboration of the hardship through one of the affidavits, and potential revocation of the appellant's Federal permit in the event of fraud. NOAA Fisheries believes that this is a reasonable just and appellate process.

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

**Response:** See previous response.

#### Closed Area Comments (CA)

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

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