■ 3. Amend § 17.40 by:
■ a. Revising paragraph (c)(1); and
■ b. Removing paragraph (c)(3).
The revision reads as follows:

§ 17.40 Special rules—mammals.

(c) * * *

(1) Except as noted in paragraph (c)(2) of this section, all provisions of § 17.31 apply to the lesser slow loris *(Nycticebus pygmaeus);* Philippine tarsier *(Tarsius syrichta);* white-footed tamarin *(Saguinus leucopus*); black howler monkey *(Alouatta pigra);* stump-tailed macaque *(Macaca arctoides);* gelada baboon *(Theropithecus gelada);* Formosan rock macaque *(Macaca cyclopis);* Japanese macaque (*Macaca fuscata);* Toque macaque (*Macaca sinica);* long-tailed langur *(Presbytis potenziani);* purple-faced langur *(Presbytis senex);* and Tonkin snub-nosed langur *(Pygathrix [Rhinopithecus] avunculus).*

* * * * *

Dated: May 31, 2013.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–14007 Filed 6–11–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No. 080219213–3470–01]

RIN 0648–AT31

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 control lobster trap fishing effort by limiting access into the lobster trap fishery in Lobster Conservation Management Area 2 (Federal nearshore waters in Southern New England; Area 2), and in the Outer Cape Cod Lobster Conservation Management Area (Federal nearshore waters east of Cape Cod, MA; Outer Cape Area). Additionally, this action would implement an individual transferable trap program for Area 2, the Outer Cape Area, and Lobster Conservation Management Area 3 (Federal offshore waters; Area 3). The proposed trap transfer program would allow Federal lobster permit holders to buy and sell all or part of a permit's trap allocation, subject to the restrictions set forth in the proposed rule.

DATES: We must receive your comments no later than July 29, 2013.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2012–0244, by any of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0244,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Submit written comments to: Peter Burns, Fishery Policy Analyst, Sustainable Fisheries Division, NMFS, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: ''Comments on Lobster Transferable Trap Proposed Rule.''

• *Fax:* (978) 281–9135; Attn: Peter Burns.

Instructions: 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 by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. 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, Excel, or Adobe PDF file formats only.

You may obtain copies of the Draft Environmental Impact Statement (DEIS), 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) 281–9180. The documents are also available online at *http://www.nero.noaa.gov/sfd/lobster.*

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,* 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:

Statutory Authority

These 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 that 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 Atlantic States Marine Fisheries Commission (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 these proposed measures 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 must act in response to the Commission's recommendations in several addenda to the Commission's ISFMP for American Lobster (Plan, Lobster Plan) to control lobster trap fishing effort in a manner consistent with effort control measures already implemented by the states. The proposed measures seek to (1) promote economic efficiency within the fishery while maintaining existing social and cultural features of the industry where possible, and (2) realize conservation benefits that will contribute to the prevention of overfishing of American lobster stocks.

Background

The American lobster resource and fishery is managed by the states and Federal government within the framework of the Commission. The role of the Commission is to facilitate cooperative management of interjurisdictional fish stocks, such as

American lobster. The Commission does this by creating an ISFMP for each managed species or species complex. These plans set forth the management strategy for the fishery and are based upon the best available information from the scientists, managers, and industry. The plans are created and adopted at the Commission Management Board level—e.g., the Commission's Lobster Board created the Commission's Lobster Plan— and provide recommendations to the states and Federal government that, in theory, allow all jurisdictions to independently respond to fishery conditions in a unified, coordinated way. NMFS is not a member of the Commission, although it is a voting member of the Commission's species management boards. The Atlantic Coastal Act, however, requires the Federal government to support the Commission's management efforts. In the lobster fishery, NMFS has historically satisfied this legal mandate by following the Commission's Lobster Board recommendations to the extent possible and appropriate.

The Commission has recommended that trap fishery access be limited in all Lobster Conservation Management Areas (LCMAs or Areas). The recommendations are based in large part on Commission stock assessments that find high lobster fishing effort as a potential threat to the lobster stocks. Each time the Commission limits access to an area, it recommends that NMFS similarly restrict access to the Federal portion of the area. NMFS received its first limited access recommendation in August 1999 when the Commission limited access to Areas 3, 4, and 5 in Addendum I. NMFS received its last limited access recommendation in November 2009, when the Commission limited access to Area 1 in Addendum XV. NMFS has already completed rules that limit access to Areas 1, 3, 4, and 5. This proposed rule responds to the Commission's limited access recommendations for Area 2 and the Outer Cape Area. It also responds to the Commission's recommendation to implement a trap transferability program in Areas 2 and 3 and the Outer Cape Area. The specific Commission recommendations, and NMFS's response to those recommendations, are the subject of this proposed rule and are discussed below.

Proposed Changes to the Current Regulations

1. Outer Cape Area

a. Outer Cape Area Commission Recommendation

In 2002, the Commission recommended that the states and NMFS limit entry into the Outer Cape Area based upon certain criteria developed by the Commission. The Commission adjusted the specifics of those criteria in 2008, and those adjusted criteria remain in place today. Specifically, the Commission recommended that the states and NMFS limit Outer Cape Area access to those permit holders who could demonstrate a prior fishing history (1999–2001) within the area. Further, the Commission recommended that the states and NMFS allocate traps to the qualifiers based upon ''effective traps fished'' during the years 2000–2002. In short, ''effective traps fished'' was to be the lower value of the maximum number of traps reported fished for a given year compared to the number of traps predicted to catch the reported poundage of lobsters for those years based upon a scientifically reviewed regression formula. The specific recommendations are contained in Commission Addendum III (February 2002) and Addendum XIII (May 2008).

The Commission's Outer Cape Area recommendations were the product of significant public debate and discussion. The Commission initiated discussion of Addendum III in July 2001 and sent a draft addendum to the various Area Lobster Conservation Management Teams (LCMTs) for discussion and refinement. An LCMT is a team of industry representatives—each Lobster Management Area has one LCMT—who provide industry expertise and perspective on potential management measures. The addendum was approved in draft form in October 2001 and presented in Commission public hearings in November 2001 before the Commission ultimately approved it at a public meeting in February 2002. Addendum XIII went through a similar public process before the Commission adopted it in May 2008.

NMFS responded to the Commission's Outer Cape recommendations with a public process of its own. Ever since the transfer of lobster management to the Commission, NMFS has notified Federal permit holders that regulatory actions in the lobster fishery could potentially involve limiting access to Federal Lobster Conservation Management Areas (64 FR 47756, September 1, 1999). Moreover, NMFS published an Advanced Notice of Proposed Rulemaking seeking comment on the issue on September 5, 2002 (67 FR 56800). When the Commission added effort control as a component of the Area 2 plan, NMFS published further Advanced Notices of Proposed Rulemaking documenting the agency's decision to combine the Outer Cape Cod and Area 2 limited entry program rulemakings and to separate the effort control rulemakings from lobster brood stock protection rulemakings (70 FR 24495, May 10 2005, and 70 FR 73717, December 13, 2005). Further, NMFS analyzed the Commission's recommendations in a DEIS made available to the public on May 3, 2010 (75 FR 23245). NMFS also presented its analysis at a series of DEIS public hearings from Maine to New Jersey, at which it received numerous comments. Those comments and NMFS' responses are set forth in this proposed rule.

b. Outer Cape Area—NMFS's Response to Commission Recommendations and Proposed Outer Cape Area Rule

NMFS proposes to limit access into the Outer Cape Area in a manner consistent with the Commission's recommendations. NMFS intends to qualify individuals for access into the Outer Cape Area based upon verifiable landings of lobster caught by traps from the Outer Cape Area in any 1 year from 1999–2001. Doing so will satisfy the Outer Cape Area Plan's purpose, as stated by the Commission in February 2002 (when the Commission approved the Outer Cape Area amendment) to ''. . . control the expansion of fishing effort in the Outer Cape Area and to establish Outer Cape trap levels at a targeted level (approximately 33,000 traps).''

The choice of 2001 as a cut-off year is reasonable for many reasons. First, Commission lobster limited access plans typically use a cut-off date after which access is restricted to avoid speculators from declaring into an area after-the-fact in an effort to gain access to an area that they typically did not fish. Second, area individuals knew or should have known about the potential date because the Commission's intentions were known at the time: Addendum III was drafted, debated, and the subject of public hearings in 2001. Third, and most importantly, the involved states have already used that same date as the cut-off for state lobster licenses, and NMFS' choice of that date will allow for better alignment between the states and Federal Government. The Commission Plan added qualifying years before the cut-off date (i.e., 1999 and 2000) to provide the fishing industry flexibility without subverting the plan's desire to

cap current effort. That is, in any given year, lobster fishers may have altered their fishing effort in response to external issues (e.g., health, family, and/or other personal reasons). An additional 2 qualifying years helps mitigate the potential for an allocation to be based upon an aberrant year's fishing history.

NMFS also proposes to allocate Outer Cape Area traps according to a Commission regression analysis formula that calculates effective trap fishing effort based upon verifiable landings of lobster caught by traps from the Outer Cape Area in any one year from 2000–2002. The Commission recommended using a different 3-year period at the request of Massachusetts' Director of Marine Fisheries, who at public hearings learned that use of the 2000–2002 data would better reflect existing effort and obviate the need for a hardship appeal process. The Commission's use of the regression formula in Addendum III and XIII to establish effective traps fished is also reasonable. In the absence of reliable trap effort data, state scientists sought to develop an effective method to predict the maximum number of traps fished. Since annual audits had shown that, on average, lobstermen more accurately reported their total lobster landings on their state data collection forms (1–2 percent variance), when compared to their reported maximum number of traps fished, a regression analysis was developed based on total reported lobster landings. The use of the regression formula removes the possibility that someone will benefit from simply reporting more traps than were actually fished. The Commission's Technical Committee peer reviewed the regression analysis, and although they noted the formula tended to favor full-time fishermen, the Technical Committee confirmed its validity. NMFS analyzed the formula and its rationale in the DEIS and concluded that the formula and its rationale were scientifically sound. NMFS also notes the importance of consistency in the state and Federal limited access programs, and that the potential for regulatory disconnects would be increased were the states and Federal government to allocate traps according to different criteria and formulas.

NMFS proposes two types of appeals to its Outer Cape Area Limited Access Program. The first appeal is a Clerical Appeal. The second is a Director's Appeal.

The Clerical Appeal would allow NMFS to correct clerical and mathematical errors that sometimes inadvertently occur when applications are processed. It is not an appeal on the merits and would involve no analysis of the decision maker's judgment. Accordingly, the appeal would not involve excessive agency resources to process. NMFS used an identical appeal with identical criteria to great success in its Area 3, 4, and 5 Limited Access Program.

The Director's Appeal would allow states to petition NMFS for comparable trap allocations on behalf of Outer Cape Cod applicants denied by NMFS. The appeal would only be available to Outer Cape Cod applicants for whom a state has already granted access. The state would be required to explain how NMFS's approval of the appeal would advance the interests of the Commission's Lobster Plan. The rationale for this appeal is grounded in the desire to remedy regulatory disconnects. NMFS knows that states have already made multiple separate decisions on qualification, allocation, and at least in some instances, trap transfers for the state portion of dually permitted fishers. NMFS is, therefore, faced with the task of making these same decisions and reaching identical results based upon Federal criteria that attempts to mirror the state criteria, which themselves might contain slight differences. As noted throughout the DEIS, the potential for regulatory disconnects is significant. While NMFS expects to achieve identical results for the vast majority of dually permitted fishers, it would be unreasonable to expect perfect matching in such circumstances. The Director's Appeal will help prevent the potential damage that such a mismatch could create.

The Director's Appeal would allow more effort to qualify and enter the fishery than would otherwise occur. NMFS, however, does not expect that this potential additional effort would negatively impact the fishery. First, the number of appeals is capped by the number of individuals who have already qualified under their state permit. These individuals, therefore, are already exerting fishing pressure on the lobster stock, albeit limited to state waters. Second, the DEIS analysis suggests good correlation between state qualifiers and potential Federal qualifiers. In other words, although some disconnects will likely occur, the DEIS predicts that the number will be relatively low. Finally, even if NMFS encounters a greater than predicted number of Director's Appeals, NMFS asserts that synchronicity is so crucial as to be the overriding factor in proposing the appeal.

The proposed rule also adopts the Commission's 2-month winter trap haul-out recommendation. The exact dates of the 2-month closure are less important than making sure that the Federal Outer Cape Area closure corresponds with the state Outer Cape Area closure. That is, so long as the state and Federal closures correspond, it matters less whether those dates are January 1st through February 28th, February 1st through March 31st, or some other 2-month combination. Here, NMFS follows the Commission's Addendum XIII recommendation to require removal of all traps from Outer Cape Area waters from January 15 th to March 15th. NMFS notes that Massachusetts is proposing a law that would adjust those closure dates to February 1st through March 31st. If the Massachusetts law passes, then NMFS would consider adjusting this proposed closure to that same time in its final rule.

There are numerous benefits to the trap haul-out provision, including benefits to lobster and marine mammals if trap gear is limited, as well as enforcement benefits. These benefits are discussed in greater detail in the response to Comment 22 in the Comment and Responses Section later in this proposed rule. The choice of the dates is reasonable because fishing effort is typically minimal during that time period. Failure to implement a similar trap restriction in the Federal Outer Cape zone could have deleterious effects because the restriction already exists in state waters. Accordingly, there would be great incentive for state-Federal dually permitted fishers to transfer their traps into Federal Outer Cape Area waters during the restricted season, thus greatly increasing effort there, absent similar Federal restrictions. The closure would apply only to traps set in the Outer Cape Area; those authorized to set traps in other areas would not be affected.

NMFS recognizes that establishing qualification and allocation criteria and drawing lines creates the potential for somebody to be left out. However, including additional or different qualification and allocation criteria in the Commission's Outer Cape Plan would create problems. First, doing so would introduce new variables that would have the potential to skew the Plan's ability to achieve its goals. Second, it would introduce a significant mismatch between the state and Federal Outer Cape Area limited entry programs wherein the state and NMFS could reach different determinations on identical permit histories. NMFS examined this issue extensively in its DEIS and concluded that disparate treatment of like individuals had the potential to so complicate future management as to render present and

future management measures (e.g., trap transferability) unworkable.

c. Outer Cape Area Potential Qualifiers

The NMFS DEIS predicts that approximately 26 Federal permits would qualify to receive an Outer Cape Cod Area trap allocation. This figure represents only 15 percent of the 170 permit holders who designated the Outer Cape Area as a potential fishing area on their permits in 2007. Of those 170 permit holders, however, only 38 purchased trap tags, which suggests that the vast majority (132 permits) designated the Outer Cape Area, but did not actively fish. Additionally, 12 of the 38 trap tag purchasers hailed from ports so distant from the Outer Cape Area that it seems unlikely that those 12 actively fished in the Outer Cape Area. The DEIS sets forth a detailed discussion on why an individual might designate an area without ever intending to fish there. Significantly, of the 26 individuals who designated the Outer Cape Area, ordered trap tags, and lived within steaming distance of the Area, the DEIS predicts that all 26 would qualify.

d. Outer Cape Area Rejected Actions

NMFS analyzed numerous alternatives to the Outer Cape Area proposed rule, including a ''no action'' alternative and qualifying lobster vessels but not allocating traps to them. Both were rejected as creating regulatory disconnects and potentially undermining the Commission's Lobster Plan. NMFS also considered but rejected qualifying SCUBA divers for trap allocations, in part because it would add new trap fishing effort from those (SCUBA divers) who did not fish with traps during the involved time period. A more detailed discussion of potential alternatives is identified in NMFS's DEIS [see **ADDRESSES**].

2. Area 2

a. Area 2 Commission Recommendation

In November 2005, the Commission recommended that the states and NMFS limit access into Area 2 to those lobster fishers who could document past fishing history in the Area. Specifically, the Commission recommended qualifying permit holders into Area 2 if they could document Area 2 landings history from 2001 to 2003. This landings history would be fed into a scientifically-reviewed regression formula to determine the number of traps allocated to the individual. If an Area 2 fisher had been incapable of fishing during the 2001 to 2003 fishing years, then that individual could apply for a hardship consideration that would allow them to use landings from 1999 and 2000 as the basis for qualification. The specific recommendations are contained in Commission Addendum VII (November 2005).

The Commission's Area 2 recommendation was the product of significant public debate that was even more involved than the public process that went into the creation of the Outer Cape Area Plan. The Area 2 Plan originated in October 2002, when the Lobster Board's scientific Technical Committee reported the basis of what ultimately was considered to be a lobster crisis in Area 2. The Board became so concerned about the poor condition of the lobster stock that it took emergency action in February 2003 (a gauge increase) as an immediate stop-gap measure while it developed a more thorough plan to respond to the situation. For more than 7 years, the Lobster Board and its sub-committees publicly deliberated over its Area 2 plan. The Board adopted measures (Addendum IV), then re-thought its position, rescinded measures (Addendum VI), proposed new measures (Addendum VII), then later added detail to the measures (Addendum XII). Because NMFS's Area 2 rulemaking is being done at the same time as its Outer Cape Area rulemaking, the Federal public process for the Area 2 plan is the same as was previously discussed for the Outer Cape Area.

b. Area 2—NMFS's Response to Commission Recommendations and Proposed Area 2 Rule

NMFS proposes to limit access into the Area 2 in a manner consistent with the Commission's recommendations. NMFS intends to qualify individuals for access into Area 2 based upon verifiable landings of lobster caught by traps from Area 2 from 2001–2003. The choice of the 2001–2003 time period reflects an effort to cap fishing effort in Area 2 as it existed while the Commission was developing its Area 2 Limited Access Plan. The dates also reflect an attempt to capture the attrition that occurred in the fishery during the downturn years in 2001–2003. Consequently, NMFS's Area 2 rationale is similar to the rationale it is employing in setting the access dates for the Outer Cape Area, by granting access to those with past trap fishing history, while excluding speculators and/or individuals who might have a history of Area 2 permit designations, but no actual fishing history in Area 2 during the qualification period.

NMFS also proposes to allocate traps according to a Commission formula that calculates effective trap fishing effort based upon landings during 2001, 2002, and 2003. The Commission chose landings as the appropriate metric because landings better reflected actual effort than the reported maximum number of traps fished. The Commission's Technical Committee peer-reviewed the regression analysis formula and, although they noted the formula tended to favor full-time fishermen, the Technical Committee confirmed its validity. NMFS analyzed the formula and its rationale in the DEIS and concluded that the formula and its rationale were scientifically sound.

NMFS proposes to adopt the Commission's recommendation to restrict allowable landings to those from ports in states that are either in or adjacent to Area 2, i.e., Massachusetts, Rhode Island, Connecticut, and New York. The Commission, in Addendum VII, found that the location of Area 2 prevented fishers from far away ports from actively fishing in Area 2. NMFS agrees with the Commission's conclusion.

NMFS proposes to adopt the Commission's recommended Hardship Appeal. Specifically, if an Area 2 fisher had been incapable of fishing during the 2001–2003 fishing years due to documented medical issues or military service, NMFS proposes to allow that individual to appeal the qualification decision on hardship grounds, allowing the individual to use landings from 1999 and 2000 as the basis for qualification. NMFS is also proposing a second appeal, the Director's Appeal, that would allow a state's marine fisheries director to petition for a trap allocation on behalf of a dual permit holder who was granted a state allocation but denied a similar Federal allocation. The Director's Appeal would be limited to those who qualified for a trap allocation under the state program, but who were denied that allocation under the Federal program. The third Area 2 appeal would be a clerical appeal. Both the Director's Appeal and Clerical Appeal are identical in form and rationale to the Director's Appeal and Clerical Appeal being proposed for the Outer Cape Area. NMFS acknowledges the potential for appeals to create unwieldy loopholes that undermine the rule, but the DEIS analysis suggests that few permit holders would need to avail themselves of such an appeal. Further, DEIS analysis suggests reasons for even greater concern should NMFS diverge from the states and not attempt to implement appellate criteria that would assist in state-federal compatibility.

c. Area 2 Potential Qualifiers

NMFS's DEIS predicts that approximately 207 Federal permit holders will receive a Federal Area 2 allocation. This figure represents approximately 48 percent of the 431 permit holders who designated Area 2 on their permits in 2007. Of those 431 permit holders, however, only 182 purchased trap tags, which suggests that the majority (249 permits) designated Area 2 but did not actively fish there (or anywhere else). Even more significant is the DEIS finding that of the 182 Federal permit holders that both designated Area 2 and purchased trap tags in 2007, approximately 167 permit holders would qualify—a figure that suggests over 90 percent of the present Area 2 fishers fished during the qualification years and would still be allowed to fish Area 2 with traps in the future.

d. Area 2 Rejected Actions

NMFS analyzed numerous alternatives to the Area 2 proposed rule, including a no-action alternative, and qualifying participants, but not assigning them individual trap allocations. Both of these alternatives were rejected as creating regulatory disconnects, and potentially undermining the Commission's Lobster Plan. NMFS's DEIS contains a more detailed discussion of potential alternatives.

NMFS also chooses to put off the Commission's recommended Area 2 ownership cap. This cap would limit the number of Federal lobster permits that an Area 2 participant could own at any one time. At this time the Commission does not appear to have reached a definitive policy on ownership caps. For example, ownership cap options were included in Commission draft Addendum XVIII, but were pulled out of the addendum before it was approved in August 2012. NMFS intends to participate in the Commission's dialog on this issue, but NMFS asserts it imprudent to implement such a cap before the Commission completes its deliberation.

3. Individual Transferable Trap Program (ITT, Trap Transfer Program)

a. ITT Commission Recommendation

In February 2002, the Commission recommended a first of its kind Trap Transferability Program in the Outer Cape Area. The initial recommendation was overly simplistic, which hampered its implementation. In short, the Commission sought to allow qualified Outer Cape permit holders to buy and sell their trap allocations during a designated time period up to certain trap cap.

The Commission followed its Outer Cape Transferability Plan with new trap transfer plans in two other areas: One for Area 3; another for Area 2. With each recommendation, the Commission's transferability plans became more detailed. All recommendations, however, contain the following three basic elements: (1) Individuals could buy and sell traps up to a set trap cap during a designated time period; (2) only individuals with qualified area allocations could sell traps; and (3) each trap transfer would be taxed by 10 percent, payable in traps.

The specific Outer Cape recommendations are set forth in Addendum III (February 2002) and XIV (May 2009). The Area 3 recommendations are contained in Addenda IV (January 2004), V (March 2004), and XIV (May 2009). The Area 2 recommendations are contained in Addendum VII (November 2005) and Addendum IX (October 2006).

Each area trap transfer plan was crafted after considerable public debate and comment. Industry-based Lobster Conservation Management Teams in Areas 2, 3, and Outer Cape Area were the original proponents and architects of their respective area plans. The plans were further refined in public meetings and hearings by the Lobster Board. Ultimately, after Board approval, the trap transfer plans were forwarded to NMFS, at which time additional public notice and hearing occurred. Because NMFS's Trap Transfer rulemaking is being done at the same time as its Area 2 and Outer Cape Area rulemaking, the Federal public process for the Trap Transfer Plan is the same as was previously discussed for the Area 2 and Outer Cape Area limited access plans.

b. ITT Program—NMFS's Response to Commission Recommendations and Proposed ITT Rule

NMFS proposes to implement trap transfer programs in Areas 2, 3, and the Outer Cape Area in a manner consistent with the Commission's recommendations. NMFS intends to offer an optional trap transfer program in Areas 2, 3, and the Outer Cape Area. The program would allow qualified permit holders to sell portions of their trap allocation to other Federal permit holders. Buyers could purchase traps up to the area's trap cap, with 10 percent of the transferred allocation debited and retired from the fishery as a conservation tax. NMFS asserts that a trap transfer program is reasonable and will help mitigate the economic impacts to individuals who do not qualify, or who qualify, but only for a small allocation. In other words, individuals could increase their allocation by purchasing additional traps through this program. As a result, the proposed trap transfer program will allow buyers and sellers to scale their businesses to optimum efficiency.

NMFS does not, however, view the trap transfer programs without concern. As a preliminary matter, trap transferability has the theoretical potential to increase actual trap effort. Specifically, qualified lobster fishers could maximize their income by transferring ''latent'' traps—the portion of their allocation that they might not be using—to other fishers who would use the allocation more actively, thereby increasing the overall level of fishing effort. This theoretical increase, however, will not likely be seen on the water (see responses to Comments 7, 13, and 14). Nevertheless, NMFS proposes to offset this potential impact by implementing a conservation tax on trap transfers to retire 10 percent of the traps included in the transfer. The DEIS examined this issue, as well as other potential counter measures. NMFS expects that, on balance, the proposed measures will afford appropriate balance against undue activation of latent effort.

The use of area trap caps is another measure that restricts the potential to increase effort through trap transfers. In short, this proposed rule would restrict transfers so that permit holders may not receive a trap allocation that would put their overall trap allocation above the area trap cap. The trap cap in Area 2 and the Outer Cape Area is 800 traps. Area 3 has numerous trap caps, depending upon the allocation bin into which the Area 3 permit holder initially qualified. The highest Area 3 trap cap is 1,945 traps. Commission Addendum XIV and Addendum XVIII, however, make it clear that the Commission intends to have a single universal trap cap in Area 3. NMFS, therefore, proposes to set the Area 3 trap cap at 1,945 traps. NMFS notes that the Commission and Area 3 LCMT are in discussions about either increasing or decreasing that trap cap. NMFS will consider modifying the Area 3 trap cap if and/or when the Commission and Area 3 LCMT have completed their discussions and recommend amendments to NMFS.

Yet another measure to offset effort expansion is NMFS's proposal to allow three-party transfers involving dual state and Federal permit holders. This proposal differs from the Commission's proposal to limit trap transfers to a bin system that restricts a dual state and

Federal permit holder to transferring only with another dual permit holder of that same state. Under the Commission's system, permit holders from states with few qualifiers would find their participation options limited, and the economics skewed toward the few with allocations. NMFS's Trap Transfer Program, however, would allow a dual state and Federal permit holder to purchase Federal trap allocation from any other dual Federal Lobster permit holder. NMFS would still require that the transferring parties' state/Federal allocation be synchronized at the end of the transaction. Accordingly, a dual permit holder could purchase a Federal allocation from an individual in another state, as well as an equal state-only allocation from a third individual in his or her own state and the resulting allocation numbers for that dual permit holder would match. In such a scenario, there would be no added trap effort to the dual permit holder's state, but there would be a decrease of trap fishing effort in the state waters of the dual permit holder selling the original state/Federal trap allocation.

NMFS's greatest concern with a Trap Transfer Program is that it heightens the potential for regulatory disconnects. Regardless of which limited access option NMFS ultimately chooses, there will, undoubtedly, be a certain number of dually permitted lobster fishers—i.e., individuals fishing under both a state and a Federal permit—for whom the state and Federal decision-making will not align; they will either be qualified by one jurisdiction, but not another, or qualified by both, but allocated different numbers of traps. Although the DEIS confirms that the number of disconnects under the proposed rule will likely be small and of negligible impact to the overall limited access programs, creating additional layers of decision-making— i.e., trap transfers—has the potential to exacerbate disconnects with each successive transfer.

NMFS believes it can resolve the regulatory disconnect problem by requiring that potential participants agree to certain parameters before opting into the Trap Transfer Program. The Trap Transfer Program is not mandatory; rather, interested participants can choose to opt in. Any participants holding both state and Federal lobster permits (''dual permit holders'') with different trap allocations would have to agree to abide by the lower of the two trap allocations to take part in the program. In this way, permit holders would not be obliged to forfeit their higher trap allocation, but they would not be able to participate in the transferability program if they chose to retain it. This alternative would synchronize the dual permit holder's allocations at the initial opt in time, thus greatly facilitating the tracking of the transferred traps. Further, as trap allocations are transferred, a centralized trap transfer data base accessible by all jurisdictions will keep track of trap transfers, thus ensuring that all jurisdictions are operating with the same numbers at the beginning and end of every trap transfer period. The centralized trap transfer database is being created by the Atlantic Coastal Cooperative Statistics Program (ACCSP) and is a critical, foundational prerequisite to the Trap Transfer Program. As of the date of this proposed rule, the database has not been finalized and its progress bears watching. NMFS analyzed potential trap transfer programs in its DEIS and, assuming that the database is complete and functioning as designed, NMFS found the proposed Trap Transfer Program to be the most prudent of the alternatives.

Finally, the timing of the Trap Transfer Program is also of great concern. Industry and Commissioners are counting on trap transferability as a foundational element of their business and management plans and cannot move forward on these plans until NMFS implements its Trap Transfer Program. Accordingly, they urge NMFS to start its Trap Transfer Program as soon as reasonably possible (see Comment 8 in comment/response section below). However, the details of how this program will operate are not yet completely known. First, the Commission's Trap Transfer Program is novel and will require intensive coordination at state and Federal levels. Such coordination would involve, at a minimum, a trap tracking system, i.e., the ACCSP's centralized trap transfer data base, that has been tested and upon which state and Federal managers have been trained. As discussed above, however, the centralized trap transfer data base remains under development and, therefore, the state-Federal coordination protocols are, as yet, unwritten. Second, before traps can be transferred, they must first be allocated, yet doing so will take time. NMFS expects that it will be able to qualify and allocate traps for the majority of Area 2 and Outer Cape Area trap fishers quickly, but future developments could easily delay the qualification and allocation process. NMFS is concerned that beginning the Trap Transfer Program without having first processed a majority of its qualification applications will complicate the trap transfer market and create derby-style pressures in the qualification/allocation process. It might also cause NMFS to have to siphon off resources from the qualification process to satisfy the transfer process, leaving neither process with sufficient resources. Ultimately, NMFS proposes to begin the first year of its Trap Transfer Program 120 days after the publication of its final rule, which NMFS expects is a sufficient amount of time for it to complete the majority of its qualification and allocation decisions. Whether the time period should be advanced (e.g., 90 days after the final rule) or delayed (e.g., 180 days after the final rule, or longer) will depend in large part on the development of the as yet incomplete infrastructure necessary to carry out the program. NMFS is greatly interested in any comments from the public, the states, and Commission on this timing issue.

c. Potential ITT Participants

At present, there are 3,152 Federal Lobster Permits. This proposed rule would allow any of these permit holder to purchase Area 2, 3, or the Outer Cape trap allocations through the Trap Transfer Program. Accordingly, any of the 3,152 individuals with a Federal Lobster Permit could opt into the proposed Trap Transfer Program and purchase qualified and allocated traps.

NMFS gave careful consideration to its proposal to allow all Federal Lobster Permit holders to purchase trap allocations. While there is some utility in limiting the number of participants fishing in an area, there exist numerous reasons to open the Trap Transfer Program to all Federal Lobster permit holders. First, a primary purpose in limiting fishery access is to limit trap fishing effort, which will have been done regardless of who is ultimately allowed to transfer traps. That is, if the total overall trap allocation for an LCMA is set, there is less biological importance to which, or how many, permit holders fish that allocation. Second, allowing all permit holders to purchase allocated traps helps to offset potential negative impacts to those individuals who did not initially qualify into the area. Third, allowing unqualified buyers to purchase allocated traps allows younger, newer lobster fishers to enter the fishery in a scaled fashion, which was a desire voiced to NMFS by the lobster industry during the DEIS public hearings. Fourth, the greater the number of potential buyers, the greater the market and potential transactions, and thus the greater the potential biological benefit through the 10 percent trap conservation tax.

Notably, the proposed rule restricts trap transfers for individuals that have also qualified into Area 1. Specifically, although Area 1 permit holders may opt into the Trap Transfer Program and transfer traps, doing so may result in a forfeit of that permit holder's ability to fish in Area 1 to the extent that person sells or transfers away part of his or her trap allocation. This prohibition originally involved Area 1 being the last open access lobster area at the time the Commission was developing its trap transfer recommendations (i.e., 2002–2010). At that time, there was concern that as other areas limited fishing access, displaced fishing effort would flood into Area 1 because Area 1 was open access; i.e., anybody with a Federal lobster permit could designate Area 1 on their Federal lobster permit and fish with 800 traps. The fear was that an individual would sell their entire Area 2, 3, or Outer Cape Area trap allocation and then move their business to Area 1 and start fishing with another 800 traps, effectively doubling effort. Since that time, however, Area 1 developed and implemented a limited access program in their area. As a result, Area 1 is no longer open access and Area 2, 3, and/or Outer Cape Area permit holders will not be able transfer traps and start fishing anew in Area 1. Accordingly, the concern is now largely moot. One problem, however, remains: Although the 800 trap limit applies to all Federal permit holders in Area 1, there is no individual permit-based Area 1 trap allocation. As such, there is no Area 1 allocation to debit should a multi-area qualifier (i.e., a person who has qualified into Area 1 as well as another area) sell allocated traps from that other area. Consequently, an Area 1 fisher who also qualified into other areas could transfer their Area 2, 3, and/or the Outer Cape Area allocation and still fish with 800 traps in Area 1. This would create an overall increase in trap fishing effort beyond what was historically fished. A simple regulatory fix—e.g., giving all Area 1 participants an individual 800 trap allocation—could resolve this issue, but the Commission has not, as yet, amended its earlier recommendation to NMFS. Accordingly, this proposed rule retains the Commission's original recommendation that Area 1 qualifiers be allowed to purchase transferable traps from Areas 2, 3, and the Outer Cape; however, by selling any of their transferable allocation, they would forfeit their eligibility for Area 1 trap fishing because the Area 1 allocation cannot be equally reduced along with the transferable allocation if transferable traps are sold.

d. ITT—Rejected Actions

NMFS analyzed numerous alternatives to the proposed Trap Transfer rule, including a no-action alternative, allowing the program only in Area 3, and implementing the Commission's Trap Transfer Program. The Commission's Trap Transfer Program is substantially identical to NMFS's proposed program, except that the Commission's program is immediately and automatically open to all participants. Accordingly, because permit holders can participate in the Commission's program without opting in, the Commission's program lacks the synchronizing mechanism that NMFS proposes. The other above-mentioned alternatives reduce the potential for regulatory disconnects, but offer none of the proposed program's mitigation benefits. A more detailed discussion of potential alternatives is identified in NMFS DEIS, section 4.4.

NMFS also rejected the Commission's proposal to tax full business transfers at 10 percent. As a preliminary matter, full business transfers have been happening for decades and are independent of trap transferability. Second, the greatest number of full business transfers occur, not surprisingly, in Area 1, which is the Lobster Management Area with the largest number of permit holders. As discussed above, however, Area 1 does not have a trap allocation from which to apply a 10 percent trap transfer retirement tax. Applying a tax, therefore, is not feasible under existing regulations. Further, NMFS notes that the Commission is continuing to deliberate upon what it considers to be a separate business entity for the purpose of determining ownership caps. NMFS will monitor these deliberations and as the issue evolves will consider additional recommendations on the matter should the Commission determine it necessary.

4. Regulatory Streamlining

NMFS proposes to remove certain old, out-dated paragraphs of regulatory text from its Federal Lobster Regulations. Specifically, this action would remove the Area 3, 4, and 5 qualification and appeals criteria from § 697.4 and remove outdated sections of the trap cap regulations in § 697.19. The Area 3, 4, and 5 limited access program qualification and allocation process was completed many years ago (the last appeal being finalized in approximately 2006). The paragraphs to be removed from § 697.19 also relate to outdated trap cap provisions (e.g., trap caps before and after August 2003). In short, the principal measures in this proposed rule (i.e., limited access programs in Area 2 and the Outer Cape Area, as well as a Trap Transfer Program) caused NMFS to review § 697.4 and § 697.19 and identify paragraphs that are old, irrelevant, and that bog down the reader. Removing these paragraphs will keep the regulations fresh and assist the public's understanding of the section going forward.

Related Lobster Rulemakings

The measures taken in the Lobster Plan are separate efforts that are designed to build off of one another so that the overall whole is greater than the sum of its parts. The Lobster Plan is also ever-changing, which as noted in the DEIS can present challenges to NMFS. Often, the Commission builds upon its Plan so quickly that its recommendations become bedrock Lobster Plan principles and the foundation of future measures that are often recommended before NMFS can complete its analysis of the initial recommendation. Such is the case here.

There are two general categories of measures that the Commission has or will likely recommend to NMFS for future rulemaking. This proposed rule would be consistent with both categories of measures. The first category relates to the Commission's response to the to the Southern New England stock recruitment failure. The Commission decided to address the recruitment failure in two phases: First, by reducing lobster exploitation by 10 percent; and, second, by reducing effort by 50 percent in Area 2 and 25 percent in Area 3, the principal southern New England Stock areas. The Commission's measures to reduce exploitation by 10 percent include changing the minimum and maximum size limits for harvestable lobster and/or implementation of closed seasons. The measures to reduce effort by 50 percent include an immediate 25 percent trap allocation reduction, for Area 2, followed by 5 years of trap allocation reductions at 5 percent reductions per year. For Area 3, traps will be reduced by 25 percent in total, with 5 percent reductions per year for 5 consecutive years. This proposed rule not only complements these other potential rulemakings, but failure to implement the proposed rule might actually undermine Commission efforts in these other matters. For example, the Commission's willingness to implement a 10 percent exploitation reduction largely depended on its willingness to implement subsequent trap cuts in Areas 2 and 3. The trap reductions

depend on affected fishers being able to mitigate the impacts of such cuts by purchasing additional trap allocation through trap transfers, and in turn a trap transfer program depends on there being a limited access program in the involved lobster management areas.

The second category of potential recommendations involves measures to more finely tune the Trap Transfer Program. These measures could include capping the number of permits (i.e., determining what ''ownership'' means and then capping permit ownership levels), changing trap caps in Area 3, as well as creating a trap banking program, which would allow fishers to purchase trap allocations above their trap cap and place them in a bank where they would not be fishable unless their overall trap allocation number fell below the area trap cap. These potential measures are still being deliberated upon by the Commission, but largely depend on NMFS implementing a Trap Transfer Program as proposed in this rule.

Comments and Responses

Comment 1: One individual expressed their displeasure on the length of time it has taken to implement this rulemaking.

Response: NMFS understands and, to an extent, even shares in this frustration. It is important to understand, however, that lobster rules are not made in isolation. Changing circumstances in the fishery have necessitated a slower, more deliberate pace. For example, since receiving the Commission's first rulemaking recommendation, the Commission has declared an emergency on an area lobster stock (the Southern New England (SNE) lobster stock in 2003). Then, in 2010 the Commission declared a lobster recruitment crisis on that same lobster stock. The Commission and commentators alike urged NMFS to delay its rulemaking process until the crisis was better understood. Further, the Commission's rulemaking recommendations have themselves changed: The Outer Cape Plan, initially approved in Addendum III in 2002, was amended by Addendum XIII in 2008. The Area 2 Plan was approved in 2003 (Addendum IV), rescinded in 2006 (Addendum VI), and a new plan approved in later that year (Addendum VII). Important details to all plans (including transferability) were not added until 2009 (Addendum XII). Ultimately, given the ever-changing context, NMFS has been forced to proceed in a more cautious, deliberate fashion, which although perhaps frustrating in the time it takes, nevertheless appears to be the most prudent approach.

Comment 2: A number of commenters noted that NMFS was ''several years behind'' in implementing the Commission's Plan and urged that NMFS proceed with this rulemaking, as its measures were already being implemented in state waters and compatible measures are needed in Federal waters.

Response: NMFS understands that implementation delays by the states and NMFS can make it more difficult for the Commission to plan new measures to respond to new crises. Lobster management is not a static process; new issues are always arising. Often, by the time the Commission completes one part of its Lobster Plan, additions, edits, and amendments to that same part are already in development. In fact, the Commission's Lobster Plan sometimes builds upon itself so quickly that new Plan measures are sometimes adopted that depend on earlier Plan measures, which have not yet been analyzed, much less adopted, by NMFS. Nevertheless, a speedy response is not always the best response. A balance needs to be struck because hastily crafted plans can have unintended and unwelcome consequences. Quite often, in attempting to more speedily address lobster issues, the Commission's Lobster Board left out important plan details to be addressed at some later date. For example, although the Commission recommended the rudiments of its Outer Cape Area limited access program and trap transferability in 2002 and the Area 2 limited access program in 2004, critically important details were not added until later (see e.g.: Addendum V–2004; Addendum VII–2005, Addendum IX–2006, Addenda XII & XIV–2009). Fortunately, the later added details were within the scope of what had been originally proposed (limited access program based upon past participation in the fishery) and thus NMFS did not need to start the rulemaking over. Now that those added details are known, and now that the SNE stock crisis is better understood, NMFS is better able to proceed with this rulemaking.

Comment 3: In public meetings of the SNE stock crisis and Addendum XVII deliberations in 2010 and 2011, the Commission's Lobster Board noted that the SNE stock crisis introduced tremendous uncertainty into lobster management, which complicated and delayed complementary Federal rulemaking until the crisis was better understood and the potential Commission response became clearer.

Response: NMFS agrees and notes that the originally recommended Lobster Board response to the SNE crisis in 2010 suggested a 5-year moratorium on lobster fishing—an option some on the Board described as a ''nuclear option'' because of its potential to put many fishers out of business and radically change the character of the SNE fishery. To proceed with this rulemaking at such a time seemed counter-productive and ill-advised (e.g., would potentially qualified permit holders even bother to apply for entry into a fishery in the midst of a 5-year moratorium?). As such, NMFS felt it imprudent to proceed with this rulemaking in the face of such widely varied and uncertain responses. The Commission, however, now has a strategy to respond to the SNE lobster stock crisis and approved the first phase of that response in February 2012 (Addendum XVII). The second phase of the response is identified in draft Addendum XVIII. Accordingly, NMFS now has a better understanding of the state of the fishery—both biologically and managerially—and the agency is able to continue on with its rulemaking.

Comment 4: One industry representative indicated that concerns over the SNE lobster stock made it difficult to comment on ''where transferability should be going or how it should end up.'' They urged that NMFS proceed cautiously with this rulemaking.

Response: NMFS agrees and notes that the commenter's recommendation was repeated by members of the public during past Commission Lobster Board meetings. It was not possible to proceed more quickly given the number of additions that the Commission made to its plan and given the potential plan changes that the Commission were contemplating as recently as 2012. Nevertheless, delays are always a concern insofar as they have the potential to render a rulemaking stale and cause stakeholders to disengage from the process. NMFS, however, does not consider that to have happened here. Throughout this process, stakeholders have been continually reminded of the proposed measures, be it through the numerous agency **Federal Register** Notices, or reminders in permit holder letters, or through the agency's DEIS public hearings conducted in the Northeast in 2010. Additionally, the limited access and transferability plans have been reported steadily in the news media. The recent SNE stock recruitment failure generated tremendous interest in this rulemaking, not only from the lobster industry, but from their representatives in

government, managers, non-governmental organizations, and the public in general. In addition, most of the affected Outer Cape Area and Area 2 Federal Lobster permit holders recently underwent a similar limited access program application process with their state permits. Accordingly, NMFS asserts that this rulemaking remains fresh and current with the stakeholders actively engaged. The delays, while frustrating, were unavoidable and necessary to draft a workable proposed rule.

Comment 5: Numerous commenters, both in writing and at the DEIS public hearings, supported the rule's proposed limited access measures, and further urged that NMFS enact rules that mirror the states' rules as closely as possible to avoid regulatory disconnects.

Response: NMFS's DEIS analysis supports such comments. NMFS believes that creating an Area 2 and Outer Cape Area limited entry program that is substantially identical and coordinated with the Commission's limited entry program offers the most prudent way forward for the lobster fishery in those areas. In fact, failing to do so would likely create a mismatched and disconnected management program that could undermine and even threaten fisheries management in those areas. Regardless, despite the greatest efforts of NMFS, the Commission, and the states to have identical programs, some differences and some discrepancies will undoubtedly occur. NMFS's analysis, however, suggests that the number of disconnects will be few and have negligible social and environmental impacts. Nevertheless, this proposed rule includes additional elements, such as a Director's Appeal and a voluntary Trap Transfer Program, which would allow NMFS and the states to further coordinate and reconcile irregularities should they occur on individual permits. These additional elements are discussed in greater detail in Comment 20.

Comment 6: One state agency wrote in support of NMFS's proposed Trap Transfer Program and explained that such a program was critical to the success of the overall limited access plan. The state indicated that effort control plans sometimes resulted in fishermen being allocated far fewer traps than they desired or needed. The ''relief valve'' to accommodate some individual fisherman's need to increase trap allocation was the Trap Transfer Program.

Response: NMFS analyzed this issue in detail in its DEIS and agrees that its proposed Trap Transfer Program would allow individual lobster businesses the flexibility to scale their business up or down according to individual business plans. Obviously, not all lobster businesses fish the same number of traps. Although an increase in the number of traps fished may increase the amount of lobster harvested, it will also increase fishing costs, including costs for bait, fuel, and time to tend the additional traps. Each fishing business calculates the benefits and costs of fishing at certain trap levels when deciding how many traps to fish. In this proposed rule, however, initial trap allocations will be based on levels of participation during a qualification period that occurred in the past. The qualification period does not factor into what the lobster fisher is fishing presently or what the fisher may want to fish in the future. As a result, some vessels may receive allocations that do not reflect their current business plan, with some receiving higher trap numbers and others receiving lower. Transferability will make it possible for trades to take place, thereby allowing lobster fishers a better chance to scale their businesses to their most appropriate and economically viable level.

Comment 7: Numerous lobster fishers and lobster businesses commented in favor of NMFS's proposed Trap Transfer Program. They point out that failure to implement a Federal Trap Transfer Program will have serious negative consequences for the inter-jurisdictional management of the fishery. The Trap Transfer Program increases flexibility for lobster businesses and that benefit far outweighs the biological negative of increased trap production by breaking large inefficient trap allocations and transferring them to businesses that will make them more productive.

Response: NMFS analyzed this issue in its DEIS and concluded that the proposed Trap Transfer Program makes good sense and will be an overall benefit to the fishery. Specifically, the Trap Transfer Program would likely improve the overall economic efficiency of the lobster industry by allowing businesses to scale up or down according to whatever trap number works best for their particular business. For example, some previously inactive traps, i.e., traps that were not being fished (''latent traps''), could be sold to individuals who would likely fish the traps more actively. Theoretically, doing so might increase effort in the area, although likely not on a scale that would produce negative impacts on the lobster population (see responses to Comments 13 and 14). NMFS's proposed rule, however, includes trap transfer taxes (which would retire 10 percent of the traps involved in any transfer) and trap caps on the number of traps a business could accumulate, to balance against the activation of latent effort. NMFS asserts that these protection measures mitigate the possibility for an increase in trap effort. NMFS further notes that Commission Addendum XVIII calls for further trap cuts in SNE, and provides an additional buffer against the possibility of increased effort due to the activation of previously latent traps.

Comment 8: Members of industry and the Commission asked that NMFS implement its Trap Transfer Program as soon as reasonably possible.

Response: NMFS considered many alternative start times before deciding that its preference is to start the program 120 days after the publication of the final rule. Many alternatives exist. On one extreme, NMFS could attempt to begin the Trap Transfer Program immediately in Area 3 (where trap allocations have already been decided), and then begin it in Area 2 and the Outer Cape Areas on a continuing, rolling basis as the permit holders are qualified. Such an alternative, while speedy, has significant down-sides. For example, were Area 3 to transfer traps before the other areas, it could create disconnect issues because many Area 3 traps will also likely be qualified into Area 2 and Outer Cape Area. Further, giving one group a head start over another group—especially allowing Area 2 and Outer Cape Area qualifiers to enter the program on a first come, first served basis—could create a race to transfer that might unduly advantage early qualifiers and skew market forces. At the other extreme is an alternative that delays the Trap Transfer Program until NMFS makes initial decisions on every Area 2 and Outer Cape Area application and/or appeal. Waiting would allow NMFS to start the Trap Transfer Program with all participants on equal terms, and would likely allow NMFS to proceed at a more deliberate, thoughtful, and less chaotic pace. However, NMFS's lobster limited access program experience in other areas (i.e., Areas 1, 3, 4, and 5) suggests that it often takes years to finish making decisions on all applications and all appeals. Delaying trap transfers until all limited access decisions are made would create unacceptable delays to permit holders relying on the Trap Transfer Program and to lobster managers who are waiting for the Trap Transfer Program so they can implement other lobster management measures.

Ultimately, NMFS proposes a middle ground alternative: Beginning the Trap Transfer Program in all three areas 120

days after the publication of the final rule. NMFS's lobster limited access program experience suggests that it will be able to process and complete the great majority of the applications in 120 days. This would allow the Trap Transfer Program to begin with a larger group of initial qualifiers and, thus, allow the program to proceed under more normal market conditions. Ultimately, however, the program's start time will be heavily dependent upon infrastructure being in place to properly account for and manage the transfers. At present, the ACCSP is in the process of developing a tracking system to account for all transfers. That system, however, has not yet been completed.

Comment 9: Numerous commenters were concerned about discrepancies between an individual's potential state and Federal trap allocations. These individuals supported NMFS's alternatives—such as the proposed voluntary Trap Transfer Program—that would synchronize state and Federal allocations. These commenters also uniformly agreed with the need for a centralized trap transfer data base so that all transfers could be catalogued and tracked by all relevant jurisdictions.

Response: NMFS agrees that it is critical to synchronize the state and Federal limited access and transferability programs to the greatest extent practicable. NMFS's DEIS analysis indicates that the threat presented by incongruent state and Federal regulatory programs is significant and real. This is, in fact, one of the many reasons in support of a Federal Trap Transfer Program—i.e., if the states allowed trap transfers (the states have already approved trap transferability programs of their own), but NMFS did not, then trying to follow and determine the number of traps on a state/Federal dually-permitted entity's allocation would quickly become an impossible task as that individual transferred his or her state allocation. NMFS's proposed Trap Transfer Program follows the trap transfer recommendations in the Commission addenda, including Addendum XII, and thus is substantially identical to the trap transfer programs of the states. To the extent that discrepancies occur, NMFS's Trap Transfer Program attempts to synchronize with the states by mandating that participants reconcile their state and Federal trap allocations before they are allowed to transfer traps. NMFS agrees that a centralized database is necessary to keep track of all transfers and the agency has actively advocated for such a database in Commission Lobster Board discussions.

Comment 10: Lobstermen at the DEIS public hearing in Narragansett, Rhode Island (June 2, 2010), expressed concern that management restrictions were going to cause this already aging industry to further lose its youth and vitality. As access to lobster permits and fishing areas becomes increasingly restricted (especially with that access being determined by fishing history that potentially occurred before younger fishers may have begun fishing in earnest), younger lobstermen have the potential to be squeezed out, both because they are newer and thus lack the history, and because they are younger and often lack the up-front capital to buy whole fishing operations.

Response: NMFS's proposed Trap Transfer Program should benefit young lobstermen such as those who commented at the DEIS public hearing in Narragansett, Rhode Island. The proposed Trap Transfer Program would allow participants to build up their businesses as time and capital allow (e.g., newer fishermen could start with smaller numbers of traps and build up) instead of having to incur the great expense of buying a whole, fully-established business all at once. In other words, any Federal lobster permit holder could buy into an area regardless of whether they initially qualified into that area (e.g., again, starting with a smaller, less expensive business plan that allows for expansion if necessary), which would allow younger individuals access to an area despite potentially lacking the requisite fishing history to initially qualify into that area.

Comment 11: Some people expressed concern at NMFS's DEIS public hearings that the proposed Trap Transfer Program might cause excessive consolidation of effort and allow monopolies to form. Individuals also commented that NMFS should only allow Federal permit holders who have already been qualified into an area to buy and sell traps in that area.

Response: Well over 80 percent of the United States' harvest of American lobster comes from lobster management areas lacking transferable trap programs, such as Area 1. As such, even in the unlikely event that trap effort becomes so consolidated in Areas 2, 3, and the Outer Cape that a few entities control all traps—an impossibility under the proposed plan—those entities would still not be able to so control the markets as to constitute a monopoly. Regardless, NMFS's proposed Trap Transfer Program would maintain current trap caps (800 traps in Area 2 and the Outer Cape Area and 1,945 in Area 3), to prevent excessive trap accumulation. In addition, the proposed rule would allow any Federal lobster permit holder, not just Federal lobster permit holders who qualify into the area, to buy allocated traps, thereby increasing the pool of potential buyers so that buying power would not be consolidated in a smaller number of area qualifiers.

Comment 12: One lobsterman stated at the DEIS public hearing in Chatham, Massachusetts, that he opposed allowing lobster management area non-qualifiers to gain access into a lobster management area by buying traps that were allocated to that management area. Other lobstermen, however, suggest that individuals not qualified into an area should be allowed to purchase area qualified traps.

Response: NMFS proposes to allow non-qualifiers to purchase qualified area lobster traps. Doing so will increase the pool of potential buyers and thus better facilitate the economic advantages to both buyer (e.g., access to fishing the area at a level appropriate to their business model) and seller (e.g., a larger pool of potential buyers). Allowing non-qualifiers to purchase qualified traps will also help younger entrants into the fishery participate at an economically-viable level (see response to Comment 10). Additionally, allowing non-qualifiers to purchase qualified traps will help offset impacts to individuals who might have fished the area in the past, but failed to qualify, or qualified at a lower trap allocation. The proposed rule would not go so far as to suggest that any individual—even those without federal lobster permits—could purchase qualified traps and fish in the area. Thus, the number of potential participants is greater than if limited solely to area qualifiers, but would be limited, nonetheless. Specifically, the total number of possible participants is limited to individuals with Federal lobster permits (there are presently about 3,152 Federal lobster permit holders). Additionally, geographical, economic, and regulatory considerations would prevent those participants from concentrating in one area. Requiring a purchaser to have a Federal lobster permit makes sense and provides some counter-balance: It restricts the number of purchasers to a finite pool and would allow NMFS to maintain management through its permits rather than shifting to a trap-based management paradigm. Further, limiting participation in the Trap Transfer Program to Federal lobster permit holders helps ensure the social and industry characteristics of the fishery insofar as purchasers would be existing lobster fishers rather than the general public, thereby ensuring that potential purchasers have at least some understanding of the fishery.

Comment 13: Some commenters expressed concern, both in writing and at NMFS's DEIS public hearings, that trap transferability programs sometimes allow latent effort to be activated.

Response: This proposed rule would not increase effort. Critical to understanding this point is using the current lobster fishery as a proper frame of reference. At present, any of the 3,152 existing Federal lobster permit holders can fish in Area 2, in the Outer Cape Area, or in both areas. Further, every one of those 3,152 permit holders could fish any number of traps up to the current trap cap of 800 traps. Under the proposed rule, however, the number of potential trap fishery participants is expected to drop from 3,152 to 207 in Area 2, and to 26 in the Outer Cape Area. NMFS knows that the number of permit holders actually fishing in Area 2 and the Outer Cape Area is far less than 3,152, but nevertheless, restricting access to approximately 233 permit holders (207 in Area 2 and 26 in the Outer Cape Area) based upon past fishing history represents a massive reduction in potential effort. Further, of the 233 permit holders expected to qualify, many, if not most, will be allocated less than the full 800-trap allocation, because many fishers did not fish with every possible trap during the qualifying years. Accordingly, not only will the number of Area 2 and Outer Cape Area fishers be reduced, but the number of traps that the area qualifiers can fish will also be reduced. Even those who receive the maximum 800-trap allocation will, at most, receive an allocation equal to, but not greater than, the number of traps currently allowed. In other words, whereas the present regulations allow anybody to fish up to 800 traps in these areas, the proposed regulations will allow only certain qualifiers to fish up to 800 traps, with many qualifiers allocated at trap levels below those allowed today. Again, this allocation would be tied to actual fishing history and, thus, result in a further reduction in potential effort.

Unfettered trap transferability, however, does have the theoretical potential to slightly increase actual effort as unused, latent traps in one business are sold to a different lobster business which could fish them more actively. But, that increase would only be relative to the administratively-created fishery occurring immediately after permit holders are qualified and allocated, not as compared to effort as it exists on the water today. Notably, the proposed rule's post-qualification/allocation characterization does not represent today's actual effort either: It represents actual effort as it existed in the early 2000's. Some of the qualifiers would receive an allocation greater than they now fish, others smaller than they now fish. When the parties transfer traps back and forth to get to their current-day business models, some presently latent traps might become active. But, many of these activated latent traps would be doing nothing more than replacing currently active traps that were not allocated during the allocation process—at most, a zero-sum gain. Nevertheless, the proposed rule offers a number of measures to balance against the activation of latent effort including: Permanently retiring 10 percent of all traps involved in transfers (sometimes referred to as a ''transfer tax'' or ''conservation tax''); requiring dually-permitted entities (those with both a state and Federal lobster permit) to reconcile inconsistent allocations by choosing the more restrictive number; and retaining trap caps on individual allocations. Accordingly, NMFS does not expect a great amount of latent effort to be activated through transfers, and asserts that its mitigation measures will offset any potential activation of latent effort.

Comment 14: Members of the public commented at the DEIS public hearings and in writing that latent traps should not be allowed to be transferred.

Response: Latent effort is potential effort. In the lobster fishery, latent effort represents the number of traps that could be fished, but that are not actually being fished at a specific point in time. For the purposes of this proposed rule, the specific point of time is the qualification/allocation time period set forth in the Commission's Lobster Plan. The Commission's Lobster Plan calculates trap allocation based upon a scientific regression formula to ensure that trap allocation correlates with fishing activity. Accordingly, every trap initially allocated can be considered active—or at least was active during the qualifying years chosen in the Commission's Lobster Plan. If, however, the commenters are suggesting that NMFS further restrict transfers of traps that have become latent since the qualification/allocation time period, then NMFS must point out the many problems with such a suggestion. First, although the commenters generally speak about latency, they have not provided a specific time period within which to determine latency. Latency is not static. It changes year-to-year, month-to-month, and even day-to-day. Traps that are active one month might become inactive the next and then reactivated the third month. Without a temporal context, latency cannot be determined with any degree of specificity. Second, even if a time period was given, there is no mandatory record-keeping to easily determine which traps were active at any given time and which traps were not. In other words, because it is seldom possible to precisely determine whether a trap is active or latent (or partially active/partially latent) it is extraordinarily difficult to craft a management program that allows only the transfer of active traps while preventing transfers of latent traps. Third, even were NMFS to somehow determine a trap's activity level in recent seasons, restricting its transfer would result in disconnects with the states because there is no restriction on the transfer of latent traps in the Commission's Lobster Plan. Ultimately, NMFS concludes that the Commission's Lobster Plan does a good job of preventing latent traps from being activated. To the extent that latency nevertheless exists, NMFS asserts that mitigation measures such as the 10 percent retirement of trap transfers will compensate for potential latent trap activation (see response to Comment 13).

Comment 15: One Outer Cape Area trap fisherman commented in a DEIS public hearing that if non-qualifiers could buy traps in the Outer Cape Area, then non-qualified gill-netters would buy small amounts of traps just to enter the area, but fish for lobster with gillnets.

Response: An individual's ability to fish for lobster is derived from his or her permit, not from the traps. The proposed rule would not change this. As a result, anybody fishing for lobster in the Outer Cape Area still must possess a Federal lobster permit. Therefore, the commenter's scenario would not occur under this proposed rule. That is, a Federal lobster permit holder would not need to buy traps as a ruse to get into the area because that permit holder could fish for lobster in the area with gillnets without a trap allocation if they already had a Federal lobster permit. If a person does not have a Federal lobster permit, only then would he or she not be allowed to participate in the proposed Trap Transfer Program to buy Outer Cape Area traps.

Comment 16: One industry group suggested that only traps that fished within the SNE area be transferrable within the SNE area.

Response: Areas 2, 3, and the Outer Cape all overlap multiple lobster stock areas. To further divide those lobster management areas by stock area would be akin to creating new sub-management areas, which is something the Commission's Lobster Plan neither does nor contemplates. Additionally,

existing documentation lacks sufficient clarity and precision to determine which stock area, within a given management area, a trap has been fished. Consequently, NMFS has determined that this suggestion cannot be implemented, and even if it were, it would likely result in inconsistencies with the Commission's Lobster Plan.

Comment 17: One organization representing Area 3 lobstermen recommended that Addendum XIII's 2,000-trap cap for Area 3 remain in place, although the commenters acknowledged that trap caps can and should be adjusted in later addenda. One lobsterman and his counsel opposed Addendum XIII's Area 3 2,000-trap cap as being too low and argued that upon allocating, and thus establishing, the total number of Area 3 traps in the qualification process, there is little reason to set individual trap caps on permits, especially a cap as low as 2,000 traps.

Response: At present, trap caps exist in every LCMA. In Area 2 and the Outer Cape Area, the cap is 800 traps. In Area 3, the highest trap cap is 1,945 traps. NMFS does not propose to change these limits in this proposed rule. First, most fishers have been fishing within the existing traps caps for over a decade. In May 2000, the Area 2 and Outer Cape Area trap caps were established at 800 traps and the Area 3 trap cap was set at 1,800 traps. After the initial Area 3 qualification and allocation process in 2003, the Area 3 trap cap jumped to 2,656 traps (very few permit holders qualified at that level), but was subject to a graduated yearly decrease so that no Area 3 fisher now deploys 2,000 traps, and most have an allocation far below that cap. Accordingly, failure to increase the cap in this rulemaking should not create any new impact on lobster businesses. Second, the mitigation provided by the Trap Transfer Program for lower allocations remains, regardless of the trap cap. Finally, and of great importance, the trap caps and their impacts on newer, more novel lobster management measures, such as controlled growth and banking, are being analyzed in great detail in draft addenda that have yet to be approved by the Commission's Lobster Board. Accordingly, it would be premature and imprudent to change trap caps in the Federal lobster regulations before having the opportunity to analyze and incorporate the proposals in the Commission's Addendum XVIII. NMFS intends to address the trap cap issue in a rulemaking that follows this present rulemaking.

Comment 18: One Area 2 lobsterman commented that he had a medical condition that drastically curtailed his lobster fishing activity during the qualifying years, and that he favored an appeal process that would allow him to qualify for access into Area 2, with a trap allocation reflecting his trap fishing history prior to his medical condition.

Response: NMFS's proposed rule contains provisions for hardship appeals in Area 2 based upon certain limited situations, such as situations in which medical incapacity or military service prevented a Federal lobster permit holder from fishing for lobster in 2001, 2002, and 2003. NMFS acknowledges the difficulties that such an appeal creates. Specifically, appeals based upon hardship can be extraordinarily subjective. What constitutes a hardship to one individual might not be so to another, and vice-versa. And short of hiring medical experts and cross-examination in a trial-type hearing—an expensive, resource intensive, and subjective process—it can be difficult to glean the applicant's state-of-mind to determine whether the matter truly prevented him or her from fishing. Accordingly, such appeals are difficult to manage by regulation and potentially introduce an exception that can threaten to engulf the rule. Lobster management, however, is a bottom to top process. In this case, the Area 2 lobster fishing industry, as well as the Commission's Lobster Board, decided after lengthy public input and debate that a limited medical hardship appeal was appropriate for Area 2. Further, Rhode Island allowed this type of appeal in its qualification process and found it manageable and just. In proposing a hardship appeal provision here, NMFS gives weight to the lobster management process, and the experience of the industry and Board in making the proposal and finds the rationale for their appeal to be reasonable.

Comment 19: An Area 2 commenter suggested that NMFS provide for a medical appeal that mirrored Rhode Island's medical appeal so that there would not be a discrepancy between his state and Federal trap allocation. He claimed that he fished state and Federal waters as a single entity and that a trap discrepancy between his state and Federal allocations would disrupt his business.

Response: Commission Addenda VII (2005) and XII (2009) both establish the premise that a single fishing operation will be considered to have developed a single indivisible fishing history even if that history was established under jointly held state and Federal fishing permits. NMFS's DEIS further acknowledged the importance of this premise and discussed the problems created by regulatory disconnects if a state and NMFS were to make inconsistent qualification and allocation decisions on that single fishing history. As a result, NMFS's proposed rule attempts to align itself with the regulatory processes already established by the states, including the appeals process set forth by Rhode Island, to the greatest extent practicable, acknowledging, of course, the difficulties in creating a Federal regulation that is consistent with state regulations that are themselves not always completely aligned.

Comment 20: Members of the public, lobstermen, the Massachusetts Lobstermen's Association, state and Federal legislators, as well as the Massachusetts Division of Marine Fisheries were concerned about unavoidable regulatory disconnects between NMFS and the states and urged NMFS to address these discrepancies in an appeals process or by grandfathering in earlier trap transfers.

Response: NMFS analyzed this issue in detail in the DEIS and shares these concerns. For this reason, NMFS introduces a Director's Appeal in this proposed rule. The Director's Appeal would allow states to petition NMFS for comparable trap allocations on behalf of Area 2 and Outer Cape Area applicants denied by NMFS. The appeal would be available only to Area 2 and Outer Cape Area participants for whom a state has already granted access. The Director's Appeal would allow more effort to qualify and enter the EEZ than would otherwise occur. NMFS, however, does not expect this potential additional effort to negatively impact the fishery. First, the number of appeals is limited to individuals who have already qualified under their state permit. These individuals, therefore, are already exerting fishing pressure on the lobster stock, albeit limited to state waters. Second, the DEIS analysis suggests strong correlation between state qualifiers and potential Federal qualifiers so, although some disconnects will likely occur, the DEIS predicts that the number will be relatively low. Finally, even if NMFS encounters a greater-than-predicted number of Director's Appeals, NMFS nevertheless concludes that synchronicity is so crucial as to be the overriding factor in proposing the appeal. To the extent that the extra qualified effort becomes a problem, which given the scale of the fishery seems unlikely, this effort can be further reduced in future Commission addenda rule recommendations.

Comment 21: Members of the public, lobstermen, the Massachusetts

Lobstermen's Association, state and Federal legislators, as well as the Massachusetts Division of Marine Fisheries, all indicate that Massachusetts allowed permit holders to transfer traps in the Outer Cape Area. As a result, even if NMFS were to allocate traps consistent with a state's initial allocation, the initial Federal allocation might not match the current state trap allocation because of the state allocation transfers that have subsequently occurred. The commenters recommend that NMFS grandfather in transactions that have already occurred, or adopt some other process to ensure that businesses with state and Federal permits have consistent allocations.

Response: NMFS agrees that the potential for disparate allocations amongst dually-licensed permit holders exists in any dually-administered allocation program. As a result, this proposed rule offers numerous safeguards without having to grandfather in earlier transactions. First, as discussed in response to Comment 20, NMFS's DEIS analysis suggests that the number of disconnects will be low. More recent Massachusetts Division of Marine Fisheries information confirms the DEIS conclusion and indicates that Massachusetts only allowed a negligible number of dually-permitted trap transfers (less than 1,000 traps) before freezing further transactions. Accordingly, NMFS expects that its proposed Director's Appeal will resolve most, if not all, of the problems. Additionally, although individuals with inconsistent allocations will not be forced to relinquish a state or Federal allocation, they will not be allowed to exacerbate the inconsistency by participating in the Federal Trap Transfer Program and transferring portions of the disparate trap allocations.

Comment 22: Massachusetts Division of Marine Fisheries, the Commission and members of the fishing industry commented in support of the Outer Cape Area January 15th to March 15th area closure.

Response: NMFS proposes to adopt the Commission's recommended closure and prohibit lobster traps in the Federal waters of the Outer Cape Area from January 15th to March 15th of each fishing year. There are numerous benefits to such a closure. Not only would it provide the lobster resource with a 2-month respite from fishing pressure, but the closure would also provide a bright-line enforcement standard: A 2-month period where no lobster trap can be legally set in the area. Thus, any traps encountered in the area during this time period would be either illegal or abandoned, and, in either case, can be easily removed by law enforcement agents. Removing illegal gear is important because it removes excess gear, which benefits lobster by decreasing effort on the resource. It also makes cheating (fishing a number of traps in excess of the allowable trap limit) harder to do, which benefits the vast majority of lobster fishers who abide by the regulations, and lends credence to the overall management process. Removing abandoned gear (also called ''ghost gear'') would benefit the lobster resource because abandoned gear still traps, and potentially kills, lobster. NMFS notes that Massachusetts currently is proposing to alter the dates of this 2-month winter closure to February 1st through March 31st. Ultimately, NMFS considers it more important that the involved state and Federal governments coordinate the dates of their 2-month Outer Cape Area closure, than for NMFS to stick to its presently proposed January 15th to March 15th timeframe. If Massachusetts implements this proposed law, then NMFS will consider altering its proposed 2-month closure to correspond with the state law.

Comment 23: The Marine Mammal Commission commented that NMFS needs to be mindful of its responsibilities to consult under section 7 of the Endangered Species Act.

Response: NMFS is aware of its responsibilities under the Endangered Species Act and is in the process of consulting with its Protected Resources Division on this matter.

Comment 24: The Marine Mammal Commission was concerned that the proposed measures could alter the level and distribution of effort, particularly in Cape Cod Bay and the Great South Channel, which could increase entanglement risks for whales.

Response: As a preliminary matter, the proposed measures are specific to Area 2, Area 3, and the Outer Cape Area. The measures are not expected to increase lobster fishing effort in Cape Cod Bay, which is in Area 1 and to which lobster fishing access was limited by a final rule dated June 1, 2012 (77 FR 32420). As for the Great South Channel, this proposed rule has the potential to decrease whale entanglement. First, the proposed rule should not expand effort, but decrease effort, because it would limit lobster fishing access in Area 2 and the Outer Cape Area to approximately 233 permit holders (207 in Area 2 and 26 in the Outer Cape Area), as opposed to all 3,152 Federal lobster permit holders who can currently fish in Area 2 and the Outer Cape Area—including portions of the Great South Channel. Thus, the proposed rule would restrict effort shift because traps would be restricted to being fished only in those areas in which they have fished in the past. Second, the proposed rule would allow for a more precise quantification of fishing effort as it would allocate a finite number of lobster traps, which would allow managers to better manage the lobster resource in each area. Third, although an unfettered trap transferability program might have the potential to increase effort to the extent latent traps become transferred and activated, the proposed rule offers measures to minimize this risk. For example, NMFS does not propose to give all qualifiers a flat 800-trap allocation (which is the number of traps permit holders can currently fish). Instead, NMFS would establish their initial allocation at the level of their demonstrated fishing history, thus decreasing the prospects that latent traps will become activated through the allocation process. In addition, the proposed Trap Transfer Program has set trap caps and a 10 percent conservation tax per trap transfer. Finally, NMFS proposes that all lobster traps be removed from the Outer Cape Area—including involved areas of the Great South Channel—for a 2-month period in late winter. NMFS discusses these issues in greater detail in the DEIS and further discusses latency issues in its responses to Comments 7, 13, and 14.

Comment 25: The Marine Mammal Commission recommended that NMFS require Federal lobster permit holders to provide data on their fishing practices to help evaluate the risk of interactions with whales and the effectiveness of related management actions.

Response: Although the nature of the request is vague, NMFS interprets the intent of the comment to suggest that additional data would help whale conservation and lobster resource management. NMFS generally agrees, but notes that the Commission's Lobster Board has struggled with this issue and has not yet reached consensus on how to best accomplish data needs in the fishery. The Board took an important step in Addendum X, which mandated lobster dealer reporting, and which NMFS implemented in 2009 (74 FR 37530). NMFS considers it important for the Lobster Board to provide direction so that all the managing states and Federal governments are operating in synergy. The Lobster Board did not recommend further lobster reporting in this action and, as a result, the request of the commenter is beyond the scope of this rulemaking. Nevertheless, better

data and understanding of the fishery is expected to result from this action. Specifically, this action would allow Federal managers to more precisely know actual fishing effort in Area 2 and the Outer Cape Area, which should aid in both the management of lobster and conservation of whales. This action also requires the creation of a centralized lobster trap tracking system that might also provide better data and understanding of the fishery. The significance of the lobster trap tracking system is discussed in greater detail earlier in this proposed rule in the section entitled: *ITT Program—NMFS's Response to Commission Recommendations and Proposed ITT Rule.*

Comment 26: The Environmental Protection Agency noted that the DEIS discussed the significance of water temperature on lobster and suggested that the Final Environmental Impact Statement contain the most current science on how temperature affects lobster.

Response: NMFS intends for the Final Environmental Impact Statement to contain the best available scientific information.

Comment 27: One commentator suggested that leasing of traps be allowed in addition to being sold during the trap transferability process, because doing so would provide industry with greater flexibility.

Response: NMFS does not propose to add leasing traps to its Trap Transfer Program. The Commission did not recommend leasing when it proposed its trap transferability program and to do so without the Commission and states also doing so would increase the potential for disconnects amongst the states, Federal government, and industry.

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 multiple addenda, which were approved by the states, recommended by the states through the Commission for Federal adoption, and are 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, has been submitted to OMB for approval. The PRA analysis evaluates the burden on Federal lobster permit holders resulting from the application and appeals process, as well as the Trap Transfer Program.

Burden on the Public

Prior to the start of the eligibility and allocation application process, NMFS will contact all Federal lobster permit holders and inform them of whether or not the agency has information on hand to demonstrate that a permit meets the eligibility requirements based upon the review of data provided by the states.

There are five types of respondents characterized in the PRA analysis. Group 1 applicants are those for whom NMFS has data on hand to show that their permits meet the eligibility criteria for one or both of the Outer Cape Area and Area 2. These permit holders would still need to apply by submitting an application form to NMFS agreeing with the NMFS assessment of their eligibility based on the state data. Group 2 applicants are the subset of Group 1 pre-qualifiers who do not agree with the NMFS pre-determination of the areas they are eligible for and/or the corresponding trap allocations. These applicants would be required to submit the application form, but would also need to provide additional documentation to support their disagreement with NMFS's assessment of their permits' eligibility. Group 3 applicants are those Federal lobster permit holders for whom there are no state data available to show that their permits meet the eligibility criteria for either Area 2 or the Outer Cape Area and who, consequently, have no trap allocation for either areas based on NMFS's review of the state-supplied data. Permit holders in this group may still apply for eligibility, but must submit, along with their application forms, documentation to support their claim of eligibility and trap allocation for the relevant areas. Group 4 are those who apply for access to either Area 2 and/or the Outer Cape Area, are deemed ineligible (a subset of Groups 2 and 3), and appeal the decision based on a military, medical, or technical issue. Group 5 consists of those who fall under the Director's Appeal. The Director's Appeal process was established to address those Federal lobster permit holders who were qualified into either Area 2 and or the Outer Cape Area by their state, but their eligibility is not based on the qualification criteria set forth by the Commission's Lobster Plan. The Director's Appeal allows a state's fisheries director to appeal on behalf of such permit holders and advocate for their qualification to avoid disconnects that could occur if they were qualified by their state, but not by the Federal Government.

The PRA requires NMFS to estimate the individual and overall time and economic cost burdens to the affected public and the Federal Government. To apply, Group 1 applicants would need only to check off the area(s) they are seeking access to on an application form, sign the form, and submit it to NMFS for review. The burden for each applicant is estimated at 2 minutes. We expect about 202 applicants from this category, totaling 6.7 hours of burden for all Group 1 applicants combined. Each Group 1 application is expected to cost the applicant $0.95 for postage, paper, and envelopes, totaling about $192 for all 202 Group 1 applicants.

Because they are not pre-qualified, the application process for Group 2 and 3 applicants is expected to take 22 minutes: 2 minutes to complete and sign the application form; and 20 minutes to locate documentation to support the eligibility criteria. We expect about 31 Group 2 applicants and 79 Group 3 applicants. Consequently, the overall burden for all Group 2 and Group 3 applicants is estimated at 11.4 hours, and 29 hours, respectively. Group 2 and 3 applications are expected to cost each applicant about $1.75 for paper, postage, and envelopes, totaling about $193 for all 110 Group 2 and 3 applicants.

Group 4 applicants, those whose appeal a NMFS decision to deny their application, would require about 30 minutes to prepare and submit an appeal. Twenty-one appellants are expected from this group, totaling 11 hours of time for all 21 appellants to complete the appeal. The cost to each appellant to prepare and submit an appeal is $4.42, with a total of about $93 for all 21 Group 4 appeals.

Group 5 appellants, those who appeal under a Director's Appeal, would require 20 minutes of time to complete and file the appeal. With 40 expected appellants, the total burden for this group is estimated at 13 hours. Each Director's Appeal is estimated to cost each appellant about $1.90, totaling $76 for all 40 permit holders expected through the Director's Appeal.

Once the area eligibility decisions have been made and a specified

majority of the Area 2 and Outer Cape Area permits have been qualified and allocated traps, a trap transferability program will begin, allowing all Federal lobster permit holders, regardless of whether their permit qualified for the Area 2, Area 3, or Outer Cape Area trap fisheries, to purchase lobster trap allocations and gain access to these exclusive areas. Permit holders whose permits qualified for these areas may sell all or some of their trap allocation to other Federal lobster permit holders, and also may buy additional traps for these areas, up to an area-specific trap limit. Trap transfers for all interested permit holders would be restricted to a specified period. For each transaction, a buyer and a seller must complete a trap transfer form indicating the number of traps to be transferred, the permit information for each affected vessel, the amount of traps to account for the conservation tax, and other information needed to fully process and account for the transaction.

Prior to the implementation of the trap transfer program, a joint state/Federal database is expected to be on line to allow state agencies and NMFS to track the transfers by their respective permit holders—this is especially critical for tracking transfers between dual permit holders (those holding both a state and Federal lobster permit), because all agencies must have current and consistent records of a permit holder's trap allocation for tracking and enforcement. NMFS anticipates that such a system would likely allow permit holders to transfer traps using a Web site, which would feed into the joint state/Federal database as well as the relevant in-house state and Federal permit databases to facilitate submission and tracking. Regardless of the on-line option, we may accept hard copy trap transfer forms, depending upon the operational status of the inter-agency centralized trap transfer data base at the time the transfer program commences.

We estimate that the time needed for a permit holder to submit a transfer transaction online is the same amount of time as filling out and submitting a hard copy, but the costs of an electronic submission could be $0.00, because those choosing that option may already have access to a computer and the Internet. Nevertheless, because this is a new program and we have no exact method for determining the percentage of permit holders who would conduct their trap transfer transactions on-line we will assume, for the purposes of public burden estimation, that all participants will conduct their transactions with hard-copy submissions. We estimate that it would take 10 minutes to complete a trap transfer request. We expect that each year, about 432 Federal lobster permit holders will apply to buy or sell traps. Each transfer transaction requires two permit holders: A buyer and a seller. Therefore, the number of expected participants is twice the number of expected transactions. Accordingly, about 216 trap transfer applications are expected, with a total permit holder burden of 36 hours. Costs for each transfer transaction are the combined costs of paper, envelopes, and postage, calculated at $5.62 per transfer application, totaling $1,214 for all 216 transfer requests.

Total cost to the affected permit holders for all applications, appeals, and the first year of the trap transfer program are the combined costs of all these categories, totaling about $1,768.

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* 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.

Economic Impact of the Proposed Rule on Small Entities

1. Regulatory Flexibility Act: Background

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. Such an analysis requires an initial finding that (1) small entities are involved; and (2) that economic impacts would result. Both factors occur here.

NMFS prepared this IRFA in tandem with the DEIS, which was made available in 2010. The DEIS and IRFA are based on 2007 data, which was the most recent and best available when these analyses were initiated. All lobster permit holders are being considered small business entities for the purposes of the analysis. The Small Business Administration's size standard for commercial fishing (NAICS 1141) is $4 million in gross sales. The proposed action would potentially affect any fishing vessel using trap gear that holds a Federal lobster permit. During 2007, a total of 3,287 Federal lobster permits were issued. Of these permits, 699 were issued only a non-trap gear permit, 2,168 were issued only a trap-gear permit, and 420 held both a trap and a non-trap gear permit. According to dealer records, no single lobster vessel exceeded $4 million in gross sales. Some individuals own multiple operating units, so it is possible that affiliated vessels would be classified as a large entity under the SBA size standard. However, the required ownership documentation submitted with the permit application is not adequate to reliably identify affiliated ownership. Therefore, all operating units in the commercial lobster fishery are considered small entities for purposes of analysis.

The second required finding—that economic impacts would result—also occurs here. In fact, a primary reason in proposing this rule is to have an economic impact, i.e., to establish regulations that ''…promote economic efficiency within the fishery…'' (see Supplementary Information— Purpose and Need for Management). The DEIS analysis of preferred and non-preferred alternatives and this proposed rule's discussion of proposed and rejected actions are largely an analysis of the economic impacts of the proposed measures and their alternatives on small business entities. This section is only a summary of the full impact analysis NMFS completed for this action. Although this section attempts to provide a broad sense of the IRFA, NMFS advises the public to review its DEIS as well as earlier sections of this proposed rule for a more detailed understanding of the economic impacts.

2. Regulatory Flexibility Act—Overview of Economic Impacts Analysis

The economic impacts of the proposed limited entry program for the Outer Cape Area and Area 2 cannot be quantified with any meaningful precision. The economic viability of a lobster business is not simply dependent on the amount of lobster harvested, but is also dependent on the cost of resources expended to harvest

lobster (such as fuel, bait, boat mortgages, etc.). Information about the costs is not collected and, therefore, is not available for this analysis. Even if the information were available, human factors, such as skill of the captain, decisions on when and where to fish, and when to bring the harvest to market so impact lobster economics that quantification would still not be possible. Nevertheless, a qualitative analysis of potential economic impacts is both possible and helpful to better understand the impacts of the proposed rule and its alternatives.

In the Outer Cape Area and Area 2, the proposed action would implement a limited access program with individual trap allocations. This action would mean that any Federal permit holder who did not qualify for limited access would not be able to set traps in either area now or in the future. Based on preliminary estimates, a total of 207 Federal lobster trap vessels would qualify for Area 2 and 26 Federal lobster trap vessels would qualify for limited access in the Outer Cape Area. Conceptually, then, more than 2,000 Federal lobster permit holders would not qualify. However, the majority of these non-qualifiers either do not currently participate in any lobster trap fishery, or they set traps in other LCMAs.

Past Federal lobster regulations allowed individuals to select any lobster management area on their annual permit renewal. For a variety of reasons, some vessel owners elect multiple areas, yet have no history or intent of actually setting traps in all of them. Election of an LCMA may be thought of as representing an option to set traps in an area, whereas the purchase of trap tags may reflect an indication of the intent to actually fish there. For example, during 2007, a total of 431 permit holders elected Area 2 on their permit application and 170 elected the Outer Cape Area. Only 38 of the 170 vessels electing the Outer Cape Area in 2007 purchased Outer Cape Area trap tags, while in Area 2, only 182 of 431 vessels purchased Area 2 trap tags. For purposes of further discussion, vessels that have elected to fish in either Area 2 or the Outer Cape Area will be considered participating vessels.

As noted above, in 2007, there were 182 participating businesses engaged in the Area 2 trap fishery, whereas the proposed action would qualify a total of 207 permitted vessels. Whether all of the participating vessels would be included in the 207 vessels that would qualify for limited access in Area 2 is uncertain. Nevertheless, the number of qualifying vessels under the proposed action would likely exceed the number of currently participating vessels. By contrast, the number of qualifying vessels in the Outer Cape Area would be less than the number of currently participating vessels. Specifically, participating vessels from both Rhode Island (nine) and New Jersey (three) might no longer be allowed to participate in the Outer Cape Area lobster trap fishery. Note that the actual level of participation by these non-qualified vessels is uncertain because, in the absence of mandatory reporting, we cannot verify whether or not any traps were actually fished in the area, which also means that the economic impacts on any non-qualified participating vessels cannot be reliably estimated.

In the absence of action (i.e., the no-action alternative identified in the DEIS) a shift in effort could likely occur into Area 2 and the Outer Cape Area because the two areas would be the only remaining open-access lobster management areas. In other words, under the no-action alternative, any Federal lobster permit holder could fish in those two areas, including permit holders who have no trap fishing history during the qualification period, and those excluded from fishing in nearby areas. In such a scenario, the most likely economic impact would be a dilution in profitability for current and future participants in the lobster fishery. Increasing the number of participating vessels and traps fished in either area may result in higher landings overall, but unless landings linearly increase with traps fished, landings, and average gross stock per vessel would be likely to go down. In effect, limited access would insulate the majority of current participating vessels from the external diseconomies that typify open access fisheries.

NMFS's proposed qualification process should aid small lobster businesses by streamlining what might otherwise be a cumbersome application process. NMFS proposes to allow applicants to provide their state qualification and allocation decision as proof of what their Federal allocation should be. In contrast, in its earlier limited access programs for Areas 3, 4, and 5, NMFS required that all applicants provide documentation, including an affidavit, which was a time-consuming and relatively burdensome, albeit necessary, process. Here, NMFS reviewed the applicable regulations for the involved states and determined that the state criteria was substantially identical to the proposed Federal criteria, which is not surprising because the Commission proposed that the states and NMFS implement compatible regulations based upon Commission recommended addenda. Thus, NMFS will accept state allocation information as the best evidence of its decision unless NMFS had reason to think the underlying state decision was incorrect.

NMFS proposes a limited number of appeals to its Area 2 and Outer Cape Area limited access programs. These appeals have economic benefit to small lobster businesses because they afford an opportunity for lobster businesses to qualify and receive a trap allocation they otherwise would be denied. NMFS considered the alternative of having no appeals. Having no appeals would likely result in a smaller number of qualifiers, which could result in some economic advantage to existing qualifiers in that they would receive a proportionately greater share of access to the resource. The DEIS, however, predicts that the number of appeals will be low, and as such, excluding appeals would likely result in little measurable economic advantage to the other qualifiers. In contrast, failure to include appeals could result in negative economic impacts. Certainly, denying access to a permit holder who might otherwise qualify through an appeal would have a direct negative impact to that permit holder. Further still, the states and Commission recommended that appeals be implemented in their addenda. NMFS's failure to similarly include appeals would result in regulatory disconnects. The DEIS discusses in further detail the negative impacts that a disjointed regulatory program would have on small businesses, government managers, and the lobster resource.

As noted previously, the proposed action would create individual trap allocations and would implement a transferable trap program. Conceptually, initial allocations would preserve the relative competitive position among qualifying lobster trap fishing businesses, but transferability would provide regulated lobster trap vessels with the flexibility to adjust trap allocations as economic conditions and business planning warrant. This program would be an overall economic benefit to lobster businesses. Failure to implement such a transferable trap program (e.g., by selecting the no-action alternative identified in the DEIS) would likely result in negative economic impacts. First, non-qualifiers would be excluded from future trap access into the areas, while qualifiers with low allocations might lack sufficient traps to operate profitably according to their selected business model. Second, qualifiers with

sufficient allocation would lose the opportunity to derive profit from the incremental sale of traps as they scale down and retire their business. Third, failure to implement a transferable trap program would create regulatory disconnects between NMFS, the states, and Commission, given that some states have already implemented a trap transfer program, and because the Commission is relying on trap transferability as a foundational element to its effort reduction measures identified in Addendum XVIII.

The proposed Trap Transfer Program differs from that of the Commission's recommended alternative in that once initial qualifications for trap allocations have been made in each LCMA, the ability to purchase traps to fish in the area under the proposed Trap Transfer Program would not be limited to only individuals that qualified for limited entry. This program feature affords small lobster trap fishing businesses the flexibility to scale their businesses up or down, and acquire and set traps in any LCMA in which trap allocations have been established and trap transferability has been approved (presently, Areas 2, 3, and the Outer Cape Area). This feature has several economic advantages. Without this feature, under the no-action alternative, the only way a non-qualified Federal lobster permit holder could fish in Areas 2, 3, and/or the Outer Cape Area, would be by purchasing someone else's qualifying vessel and traps. The proposed action would, in effect, implement a single Trap Transfer Program for Areas 2, 3, and the Outer Cape Area. This feature would not only reduce the administrative costs of running the Trap Transfer Program, but would also simplify the Program for potential lobster trap fishery participants. However, while the purchase of less than a full complement of transferable traps would be allowed, the ability to fish traps would be impacted by enforcement of the Most Restrictive Rule set forth in § 697.3 and § 697.4. In cases where a trap allocation in a specific LCMA would be low, lobster fishing businesses electing to fish/utilize those traps in that area would be bound or capped to that low allocation of traps for all LCMAs they intend to fish in for the entire fishing year.

List of Subjects in 50 CFR Part 697

Fisheries, fishing.

Dated: June 4, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the 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, remove paragraphs (a)(7)(ix) through (a)(7)(xi), and revise paragraphs (a)(7)(ii), (a)(7)(vii) and (a)(7)(viii) 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, 2, 3, 4, 5, and/or the Outer Cape Management Area, however, will be first contingent upon a one-time initial qualification, as set forth in paragraphs (a)(7)(vi) through (a)(7)(viii) of this section.

* * * * *

(vii) Participation requirements for EEZ Nearshore Outer Cape Area (Outer Cape Area). To fish for lobster with traps in the EEZ portion of the Outer Cape Area, a Federal lobster permit holder must apply for access in an application to the Regional Administrator. The application process is set forth as follows:

(A) *Qualification criteria.* To initially qualify into the EEZ portion of the Outer Cape Area, the applicant must establish with documentary proof the following:

(*1*) That the applicant possesses a current Federal lobster permit;

(*2*) That the applicant landed lobster caught in traps from the Outer Cape Area in either 1999, 2000, or 2001. Whichever year used shall be considered the qualifying year for the purposes of establishing the applicant's Outer Cape Area trap allocation;

(B) *Trap allocation criteria.* To receive a trap allocation for the EEZ portion of the Outer Cape Area, the qualified applicant must also establish with documentary proof the following:

(*1*) The number of lobster traps fished by the qualifying vessel in 2000, 2001, and 2002; and

(*2*) The total pounds of lobster landed in 2000, 2001, and 2002.

(C) *Trap allocation formula.* The Regional Administrator shall allocate traps for use in the Outer Cape Area based upon the applicant's highest level of Effective Traps Fished during the qualifying year. Effective Traps Fished shall be the lower value of the maximum number of traps reported fished for that qualifying year compared to the predicted number of traps that is required to catch the reported poundage of lobsters for that year as set forth in the Commission's allocation formula identified in Addendum XIII to Amendment 3 of the Commission's Interstate Fishery Management Plan for American Lobster.

(D) *Documentary proof.* To satisfy the Outer Cape Area Qualification and Trap Allocation Criteria set forth in paragraphs (a)(7)(vii)(A) and (B) 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 traps fished the Outer Cape Area and lobsters landed from the Outer Cape Area in either 2000, 2001, or 2002, the applicant must provide the documentation reported to the state of the traps fished and lobsters landed during any of those years as follows:

(*i*) *State records.* An applicant must provide documentation of his or her state reported traps fished and lobster landings in 2000, 2001, or 2002. The Regional Administrator shall presume that the permit holder was truthful and accurate when reporting to his or her state the traps fished and lobster landed in 2000, 2001, and 2002 and that the state records of such are the best evidence of traps fished and lobster landed during those years.

(*ii*) *State decision.* An applicant may provide their state's qualification and allocation decision to satisfy the documentary requirements of this section. The Regional Administrator shall accept a state's qualification and allocation decision as prima facie evidence of the Federal qualification and allocation decision. The Regional Administrator shall presume that the state decision is appropriate, but that

presumption is rebuttable and the Regional Administrator may choose to disallow the use of the state decision if the state decision was incorrect or based on factors other than those set forth in this section. This state decision may include not only the initial state qualification and allocation decision, but may also incorporate state trap transfer decisions that the state allowed since the time of the initial allocation decision.

(*iii*) *States lacking reporting.* An applicant may provide Federal vessel trip reports, dealer records or captain's logbook as documentation in lieu of state records if the applicant can establish by clear and convincing evidence that the involved state did not require the permit holder to report traps or landings during 2000, 2001, or 2002.

(E) *Application period.* Applicants will have 180 days to submit an application. The time period for submitting an application for access to the EEZ portion of the Outer Cape Area begins on the date 30 days after publication of this final rule (application period start date) and ends 210 days after the publication of the final rule. Failure to apply for Outer Cape Management Area access by that date shall be considered a waiver of any future claim for trap fishery access into the Outer Cape Area.

(F) *Appeal of denial of permit.* Any applicant having first applied for initial qualification into the Outer Cape Area trap fishery pursuant to this section, but having been denied access or allocation 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. Appeals may be submitted in the following two situations:

(*1*) *Clerical error.* The grounds for administrative appeal shall be that the Regional Administrator erred clerically in concluding that the vessel did not meet the criteria in paragraph (a)(7)(vii) 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*) *Director's appeal.* A state's marine fisheries agency may appeal on behalf of one of its state permit holders. The only grounds for a Director's Appeal shall be that the Regional Administrator's decision on a dual permit holder's Federal permit has created a detrimental incongruence with the state's earlier decision on that permit holder's state permit. In order to pursue a Director's Appeal, the state must establish the following by a preponderance of the evidence:

(*i*) *Proof of an incongruence.* The state must establish that the individual has a state lobster permit, which the state has qualified for access with traps into the Outer Cape Area, as well as a Federal lobster permit, which the Regional Administrator has denied access or restricted the permit's trap allocation into the Outer Cape Area. The state must establish that the incongruent permits were linked during the year or years used in the initial application such that the fishing history used in Federal and state permit decisions was the same.

(*ii*) *Proof of detriment.* The state must provide a letter supporting the granting of trap access for the Federal permit holder. In the support letter, the state must explain how the incongruence in this instance is detrimental to the Outer Cape Area lobster fishery and why granting the appeal is, on balance, in the best interests of the fishery overall. A showing of detriment to the individual permit holder is not grounds for this appeal and will not be considered relevant to the decision.

(G) *Appellate timing and review.* All appeals must be submitted to the Regional Administrator in writing and reviewed as follows:

(*1*) *Clerical appeals timing.* Applicants must submit Clerical Appeals no later than 45 days after the date on the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. 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 in writing 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.

(*2*) *Director's appeals timing.* State Directors must submit Director's Appeals on behalf of their constituents no later than 180 days after the date of the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 180 days of the date of the Notice of Denial will preclude any further appeal. The Director may notify the Regional Administrator in writing of his or her intent to appeal within the 180 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 180-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadline will not be accepted.

(*3*) *Agency response.* 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.

(H) *Status of vessels pending appeal.* The Regional Administrator may authorize a vessel to fish with traps in the Outer Cape Area during an appeal. The Regional Administrator may do so by issuing a letter authorizing the appellant to fish up to 800 traps in the Outer Cape Area 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. 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.

(viii) *Participation requirements for EEZ nearshore lobster management area 2 (Area 2).* To fish for lobster with traps in the EEZ portion of Area 2, a Federal lobster permit holder must apply for access in an application to the Regional Administrator. The application process is set forth as follows:

(A) *Qualification criteria.* To initially qualify into the EEZ portion of Area 2, the applicant must establish with documentary proof the following:

(*1*) That the applicant possesses a current Federal lobster permit;

(*2*) That the applicant landed lobster caught in traps from the Area 2 in either

2001, 2002, or 2003. Whichever year used shall be considered the qualifying year for the purposes of establishing the applicant's Area 2 trap allocation;

(B) *Trap allocation criteria.* To receive a trap allocation for the EEZ portion of Area 2, the qualified applicant must also establish with documentary proof the following:

(*1*) The number of lobster traps fished by the qualifying vessel in the qualifying year; and

(*2*) The total pounds of lobster landed during that qualifying year.

(C) *Trap allocation formula.* The Regional Administrator shall allocate traps for use in Area 2 based upon the applicant's highest level of Effective Traps Fished during the qualifying year. Effective Traps Fished shall be the lower value of the maximum number of traps reported fished for that qualifying year compared to the predicted number of traps that is required to catch the reported poundage of lobsters for that year as set forth in the Commission's allocation formula identified in Addendum VII to Amendment 3 of the Commission's Interstate Fishery Management Plan for American Lobster.

(D) *Documentary proof.* To satisfy the Area 2 Qualification and Trap Allocation Criteria set forth in paragraphs (a)(7)(viii)(A) and (B) 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 traps fished in Area 2 and lobsters landed from Area 2 in either 2001, 2002, or 2003, the applicant must provide the documentation reported to the state of the traps fished and lobsters landed during any of those years as follows:

(*i*) *State records.* An applicant must provide documentation of his or her state reported traps fished and lobster landings in 2001, 2002, or 2003. The landings must have occurred in a state adjacent to Area 2, which the Regional Administrator shall presume to be limited to Massachusetts, Rhode Island, Connecticut, and/or New York. The Regional Administrator shall presume that the permit holder was truthful and accurate when reporting to his or her state the traps fished and lobster landed in 2001, 2002, and 2003 and that the state records of such are the best evidence of traps fished and lobster landed during those years.

(*ii*) *State decision.* An applicant may provide their state's qualification and allocation decision to satisfy the documentary requirements of this section. The Regional Administrator shall accept a state's qualification and allocation decision as prima facie evidence of the Federal qualification and allocation decision. The Regional Administrator shall presume that the state decision is appropriate, but that presumption is rebuttable and the Regional Administrator may choose to disallow the use of the state decision if the state decision was incorrect or based on factors other than those set forth in this section. This state decision may include, not only the initial state qualification and allocation decision, but may also incorporate state trap transfer decisions that the state allowed since the time of the initial allocation decision.

(*iii*) *States lacking reporting.* An applicant may provide Federal Vessel Trip Reports, dealer records, or captain's logbook as documentation in lieu of state records if the applicant can establish by clear and convincing evidence that the involved state did not require the permit holder to report traps or landings during 2001, 2002, or 2003.

(E) *Application period.* Applicants will have 180 days to submit an application. The time period for submitting an application for access to the EEZ portion of Area 2 begins on the date 30 days after publication of this final rule (application period start date) and ends 210 days after the publication of the final rule. Failure to apply for Area 2 by that date shall be considered a waiver of any future claim for trap fishery access into Area 2.

(F) *Appeal of denial of permit.* Any applicant having first applied for initial qualification into the Area 2 trap fishery pursuant to 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. Appeals may be submitted in the following three situations:

(*1*) *Clerical error.* The grounds for administrative appeal shall be that the Regional Administrator erred clerically in concluding that the vessel did not meet the criteria in paragraph (a)(7)(viii) 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*) *Medical or military hardship appeal.* The grounds for a hardship appeal shall be limited to those situations in which medical incapacity or military service prevented a Federal lobster permit holder from fishing for lobster in 2001, 2002, and 2003. If the Federal lobster permit holder is able to prove such a hardship, then the individual shall be granted the additional years of 1999 and 2000 from which to provide documentary proof in order to qualify and fish for traps in Area 2. In order to pursue a Hardship Appeal, the applicant must establish the following by a preponderance of the evidence:

(*i*) *Proof of medical incapacity or military service.* To prove incapacity, the applicant must provide medical documentation from a medical provider, or military service documentation from the military, that establishes that the applicant was incapable of lobster fishing in 2001, 2002, and 2003. An applicant may provide their state's qualification and allocation appeals decision to satisfy the documentary requirements of this section. The Regional Administrator shall accept a state's appeals decision as prima facie evidence of the appeals Federal decision. The Regional Administrator shall presume that the state decision is appropriate, but that presumption is rebuttable and the Regional Administrator may choose to disallow the use of the state decision if the state decision was incorrect or based on factors other than those set forth in this section.

(*ii*) *Proof of Area 2 trap fishing in 1999 and 2000.* To prove a history of Area 2 lobster trap fishing in 1999 and/or 2000, the applicant must provide documentary proof as outlined in paragraph (a)(7)(viii)(D) of this section.

(*3*) *Director's appeal.* A state's marine fisheries agency may appeal on behalf of one of its state permit holders. The only grounds for a Director's Appeal shall be that the Regional Administrator's decision on a dual permit holder's Federal permit has created a detrimental incongruence with the state's earlier decision on that permit holder's state permit. In order to pursue a Director's Appeal, the state must establish the following by a preponderance of the evidence:

(*i*) *Proof of an incongruence.* The state must establish that the individual has a state lobster permit, which the state has

qualified for access with traps into Area 2, as well as a Federal lobster permit, which the Regional Administrator has denied access or restricted the permit's trap allocation into Area 2. The state must establish that the incongruent permits were linked during the year or years used in the initial application such that the fishing history used in Federal and state permit decisions was the same.

(*ii*) *Proof of detriment.* The state must provide a letter supporting the granting of trap access for the Federal permit holder. In the support letter, the state must explain how the incongruence in this instance is detrimental to the Area 2 lobster fishery and why granting the appeal is, on balance, in the best interests of the fishery overall. A showing of detriment to the individual permit holder is not grounds for this appeal and will not be considered relevant to the decision.

(G) *Appellate timing and review.* All appeals must be submitted to the Regional Administrator in writing and reviewed as follows:

(*1*) *Clerical appeals timing.* Applicants must submit Clerical Appeals no later than 45 days after the date on the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. 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 in writing 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.

(*2*) *Medical or military appeals timing.* Applicants must submit Medical or Military Appeals no later than 45 days after the date on the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. 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 in writing 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.

(*3*) *Director's appeals timing.* State Directors must submit Director's Appeals on behalf of their constituents no later than 180 days after the date of the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 180 days of the date of the Notice of Denial will preclude any further appeal. The Director may notify the Regional Administrator in writing of his or her intent to appeal within the 180 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 180-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadline will not be accepted.

(*4*) *Agency response.* 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.

(H) *Status of vessels pending appeal.* The Regional Administrator may authorize a vessel to fish with traps in Area 2 during an appeal. The Regional Administrator may do so by issuing a letter authorizing the appellant to fish up to 800 traps in Area 2 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. 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.

* * * * *

■ 3. In § 697.7, add paragraph (c)(1)(xxx) to read as follows:

§ 697.7 Prohibitions.

* * * * *

(c) * * *

(1) * * *

(xxx) The Federal waters of the Outer Cape Area shall be closed to lobster fishing with traps by Federal lobster permit holders from January 15th through March 15th.

(A) Lobster fishing with traps is prohibited in the Outer Cape Area during this seasonal closure. Federal trap fishers are prohibited from possessing or landing lobster taken from the Outer Cape Area during the seasonal closure.

(B) All lobster traps must be removed from Outer Cape Area waters before the start of the seasonal closure and may not be re-deployed into Area waters until after the seasonal closure ends. Federal trap fishers are prohibited from setting, hauling, storing, abandoning or in any way leaving their traps in Outer Cape Area waters during this seasonal closure. Federal lobster permit holders are prohibited from possessing or carrying lobster traps aboard a vessel in Outer Cape Area waters during this seasonal closure unless the vessel is transiting through the Outer Cape Area pursuant to paragraph (c)(1)(xxx)(D) of this section.

(C) The Outer Cape Area seasonal closure relates only to the Outer Cape Area. The restrictive provisions of § 697.3 and § 697.4(a)(7)(v) do not apply to this closure. Federal lobster permit holders with an Outer Cape Area designation and another Lobster Management Area designation on their Federal lobster permit would not have to similarly remove their lobster gear from the other designated management areas.

(D) Transiting Outer Cape Area. Federal lobster permit holders may possess lobster traps on their vessel in the Outer Cape Area during the seasonal closure only if:

(*1*) The trap gear is stowed; and

(*2*) The vessel is transiting the Outer Cape Area. For the purposes of this section transiting shall mean passing through the Outer Cape Area without stopping to reach a destination outside the Outer Cape Area.

(E) The Regional Administrator may authorize a permit holder or vessel owner to haul ashore lobster traps from the Outer Cape Area during the seasonal closure without having to engage in the exempted fishing process in § 697.22, if the permit holder or vessel owner can establish the following:

(*1*) That the lobster traps were not able to be hauled ashore before the seasonal closure due to incapacity, vessel/mechanical inoperability, and/or poor weather; and

(*2*) That all lobsters caught in the subject traps will be immediately returned to the sea.

(*3*) The Regional Administrator may condition this authorization as appropriate in order to maintain the overall integrity of the closure.

* * * * *

■ 4. Revise § 697.19 to read as follows:

§ 697.19 Trap limits and trap tag requirements for vessels fishing with lobster traps.

(a) *Area 1 trap limits.* The Area 1 trap limit is capped at 800 traps. Federally permitted lobster fishing vessels shall not fish with, deploy in, possess in, or haul back more than 800 lobster traps in Area 1.

(b) *Area 2 trap limits.* The Area 2 trap limit is capped at 800 traps. Federally permitted lobster fishing vessels shall not fish with, deploy in, possess in, or haul back more than 800 lobster traps in Area 2.

(c) *Area 3 trap limits.* The Area 3 trap limit is capped at 1,945 traps. Federally permitted lobster fishing vessels shall not fish with, deploy in, possess in, or haul back more than 1,945 lobster traps in Area 3.

(d) *Area 4 trap limits.* The Area 4 trap limit is capped at 1,440 traps. Federally permitted lobster fishing vessels shall not fish with, deploy in, possess in, or haul back more than 1,440 lobster traps in Area 4.

(e) *Area 5 trap limits.* The Area 5 trap limit is capped at 1,440 traps, unless the vessel is operating under an Area 5 Trap Waiver permit issued under § 697.26. Federally permitted lobster fishing vessels shall not fish with, deploy in, possess in, or haul back more than 1,440 lobster traps in Area 5, unless the vessel is operating under an Area 5 Trap Waiver permit issued under § 697.26.

(f) *Outer Cape Area.* The Outer Cape Area trap limit is capped at 800 traps. Federally permitted lobster fishing vessels shall not fish with, deploy in, possess in, or haul back more than 800 lobster traps in the Outer Cape Area.

(g) *Lobster trap limits for vessels fishing or authorized to fish in more than one EEZ management area.* A vessel owner who elects to fish in more than one EEZ Management Area is restricted to the lowest cap limit of the areas and may not fish with, deploy in, possess in, or haul back from any of those elected management areas more lobster traps than the lowest number of lobster traps allocated to that vessel for any one elected management area.

(h) *Conservation equivalent trap limits in New Hampshire state waters.* Notwithstanding any other provision, any vessel with a Federal lobster permit and a New Hampshire Full Commercial Lobster license may fish up to a maximum of 1,200 lobster traps in New Hampshire state waters, to the extent authorized by New Hampshire lobster fishery regulations. However, such vessel may not fish, possess, deploy, or haul back more than 800 lobster traps in the Federal waters of EEZ Nearshore Management Area 1, and may not fish more than a combined total of 1,200 lobster traps in the Federal and New Hampshire state waters portions of EEZ Nearshore Management Area 1.

(i) *Trap tag requirements for vessels fishing with lobster traps.* Any lobster trap fished in Federal waters must have a valid Federal lobster trap tag permanently attached to the trap bridge or central cross-member. Any vessel with a Federal lobster permit may not possess, deploy, or haul back lobster traps in any portion of any management area that do not have a valid, federally recognized lobster trap tag permanently attached to the trap bridge or central cross-member.

(j) *Maximum lobster trap tags authorized for direct purchase.* In any fishing year, the maximum number of tags authorized for direct purchase by each permit holder is the applicable trap limit specified in paragraphs (a) through (f) of this section plus an additional 10 percent to cover trap loss.

(k) *EEZ Management Area 5 trap waiver exemption.* Any vessel issued an Area 5 Trap Waiver permit under § 697.4(p) is exempt from the provisions of this section.

■ 5. Add § 697.27 to read as follows:

§ 697.27 Trap transferability.

(a) Federal lobster permit holders may elect to participate in a program that allows them to transfer trap allocation to other participating Federal lobster permit holders, subject to the following conditions:

(1) *Participation requirements.* In order to be eligible to participate in the Federal Trap Transfer Program:

(i) An individual must possess a valid Federal lobster permit; and

(ii) If the individual is dually permitted with both Federal and state lobster licenses, the individual must agree to synchronize their state and Federal allocations in each area for which there is an allocation. This synchronization shall be set at the lower of the state or federal allocation in each area. This provision does not apply to Areas 1 and 6 as neither area have a Federal trap allocation.

(iii) Individuals participating in the Lobster Management Area 1 trap fishery may participate in the Trap Transfer Program, but doing so may result in forfeiture of future participation in the Area 1 trap fishery as follows:

(A) Area 1 fishers may accept, receive, or purchase trap allocations up to their Area 1 trap limit identified in § 697.19 and fish with that allocation both in Area 1 and the other area or areas subject to the restrictive provisions of § 697.3 and § 697.4(a)(7)(v).

(B) Area 1 fishers with trap allocations in Areas 2, 3 and/or the Outer Cape Area may transfer away or sell any portion of that allocation, but in so doing, the Area 1 fisher shall forfeit any right to fish in Area 1 with traps in the future.

(2) *Trap allocation transfers.* Trap allocation transfers will be allowed subject to the following conditions:

(i) *State/federal alignment.* Participants with dual state and Federal permits may participate in the Trap Transfer Program each year, but their state and Federal trap allocations must be aligned as required in paragraph (a)(1)(ii) of this section at the start and close of each trap transfer period.

(ii) *Eligible traps.* Buyers and sellers may only transfer trap allocations from Lobster Management Areas 2, 3, and the Outer Cape Area.

(iii) *Debiting remaining allocation.* The permit holder transferring trap allocations shall have his or her remaining Federal trap allocation in all Lobster Conservation Management Areas debited by the total amount of allocation transferred. This provision does not apply to Areas 1 and 6, as neither area have a Federal trap allocation. A seller may not transfer a trap allocation if, after the transfer is debited, the allocation in any remaining Lobster Conservation Management Area would be below zero.

(iv) *Crediting allocations for partial trap transfers.* In a partial trap transfer, where the transfer is occurring independent of a Federal lobster permit transfer, the permit holder receiving the transferred allocation shall have his or her allocation credited as follows:

(A) *Trap retirement.* All permit holders receiving trap allocation transfers shall retire 10 percent of that transferred allocation from the fishery for conservation. This provision does not pertain to full business transfers where the transfer includes the transfer of a Federal lobster permit and all traps associated with that permit.

(B) *Multi-Area trap allocation history.* To the extent that transferred trap allocations have been granted access into multiple management areas, the recipient must choose a single management area in which that transferred allocation will be fished. Upon choosing the single management

area, whatever multi-area fishing history previously associated with that transferred allocation shall be considered lost and shall not serve as a basis for future multi-area access. The trap allocation retirement percentages shall be calculated according to the area chosen.

(C) *Single management area trap allocation history.* A trap may only be fished in an area for which it was allocated.

(D) All trap allocation transfers are subject to whatever trap allocation cap exists in the involved lobster management area. No participant may receive a transfer that, when combined with existing allocation, would put that permit holder's trap allocation above the involved trap caps identified in § 697.19.

(v) Trap allocations may only be transferred in ten trap increments.

(vi) Trap allocation transfers must be approved by the Regional Administrator before becoming effective. The Regional Administrator shall approve a transfer upon a showing by the involved permit holders of the following:

(A) The proposed transfer is documented in a legible written agreement signed and dated by the involved permit holders. The agreement must identify the amount of allocation being transferred as well as the Federal lobster permit number from which the allocation is being taken and the Federal lobster permit number that is receiving the allocation. If the transfer involves parties who also possess a state lobster license, the parties must identify the state lobster license number and state of issuance.

(B) That the transferring permit holder has sufficient allocation to transfer and that the permit holder's post-transfer allocation is clear and agreed to.

(C) That the permit holder receiving the transfer has sufficient room under any applicable trap cap identified in § 697.19 to receive the transferred allocation and that the recipient's post-transfer allocation is clear and agreed to.

(3) *Trap transfer period.* The timing of the Trap Transfer Program is as follows:

(i) Federal lobster permit holders must declare their election into the program in writing to the NMFS Permit Office. Electing into the Trap Transfer Program is a one-time declaration, and the permit holder may participate in the program in later years without needing to re-elect into the program year after year. Federal permit holders may elect into the program at any time in any year, but their ability to actively transfer traps will be limited by the timing restrictions identified in paragraphs (a)(3)(ii) and (iii) of this section.

(ii) All trap transfer requests must be made in writing before September 30 each year, and if approved, will become effective at the start of the next fishing year. The Regional Administrator shall attempt to review, reconcile and notify the transferring parties of the disposition of the requested transfer before December 31 each year. Transfers are not valid until approved by the Regional Administrator.

(iii) *Year 1.* The timing of the first year of the Transfer Program is impacted by the timing of the final rule implementing the program. As a result, in Year 1 of the program only, and notwithstanding paragraph (a)(3)(ii) of this section, NMFS will allow participation in the Program as follows:

(A) Federal permit holders may elect into the Trap Transfer Program beginning 120 days after the publication of the final rule establishing the program;

(B) Federal permit holders may request trap transfers beginning 120 days after the publication of the final rule and ending 150 days after the publication of the final rule, and if approved will be effective at the start of the new fishing year. Transfer requests postmarked later than 150 days after the final rule will not be accepted. The Regional Administrator shall attempt to review, reconcile and notify the transferring parties of the disposition of the requested transfer within two months (within 210 days of the publication of the final rule). Transfers are not valid until approved by the Regional Administrator.

(b) [Reserved]

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