

Dated: March 9, 2006.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No. 010413093-6056-04; I.D. 032301C]

RIN 0648-AP18

Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS amends regulations to modify the management measures applicable to the Federal American lobster (*Homarus americanus*) fishery. This action is in response to recommendations by the Atlantic States Marine Fisheries Commission (Commission) in Addenda II and III to Amendment 3 of the Interstate Fishery Management Plan for American Lobster (ISFMP). The lobster management measures are intended to increase protection to American lobster broodstock throughout the stock's range, and will apply to lobsters harvested in one or more of seven Lobster Conservation Management Areas (LCMA). In addition, NMFS will clarify existing Federal lobster regulations. To allow adequate time to modify lobster trap gear to meet new gear configuration requirements, the effective date of actions identified in this final rule is May 1, 2006.

DATES: Effective May 1, 2006.

ADDRESSES: Copies of the American lobster Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this regulatory action are available upon request from Harold Mears, Director, State, Federal and Constituent Programs Office, NMFS, One Blackburn Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Robert Ross, NMFS, Northeast Region, (978) 281-9234, fax (978) 281-9117.

SUPPLEMENTARY INFORMATION:

Statutory Authority

These final regulations modify Federal lobster conservation 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. These regulations must be (1) compatible with the effective implementation of an ISFMP developed by the Commission and (2) consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act.

Purpose and Need for Management

American lobster are managed within the framework of the Commission. The Commission is a deliberative body comprised of representatives both from the Atlantic coastal states and the Federal Government. The Commission serves to develop fishery conservation and management strategies for certain coastal species and coordinates the efforts of the states and Federal Government toward concerted sustainable ends. The Commission decides upon a management strategy, then forwards that strategy to the states and Federal Government along with a recommendation that the states and Federal Government take action (e.g., enact regulations) in furtherance of this strategy.

The Commission reports that American lobster (*Homarus americanus*) experience high fishing mortality rates and are growth overfished throughout their range (U.S./Canada border to Cape Hatteras, North Carolina). Overfishing is a rate of removal that is too high and, if continued, the removals would not be sustainable. Growth overfishing, under the Commission ISFMP, means that most lobsters are harvested at or just above the legal minimum size and the maximum yield is not produced because of high fishing mortality on these smaller lobsters. In March 2000, the Commission issued an American lobster stock assessment report that concluded that the resource is growth overfished. That assessment was further evaluated by an external peer review, which took

place during May 2000. The stock assessment external peer review concluded that fishing rates are unacceptably high, recruitment overfishing is occurring, and that a precautionary approach in management of the resource is warranted to sustain future viability of the lobster fishery. Recruitment overfishing, under the Commission ISFMP, means that the number of new lobsters available to the fishery each year is reduced by high fishing mortality rates. Since most egg production is from recruits and the first molt group above the minimum legal size, a decline in recruitment would lead to a decline in egg production. The Peer Review Report provided several management recommendations on the implications of the stock assessment report, including recommendations to address increasing lobster mortality and to rebuild stocks. The Commission completed an updated and peer reviewed American lobster stock assessment in late 2005. Results of the assessment and peer review recommendations are being evaluated at this time by the Commission. Based on the peer reviewed stock assessment information currently available, measures identified in this regulatory action will not be contrary to the updated assessment results.

The Commission has developed a plan to end the overfishing and has requested assistance from the Federal Government in the form of compatible Federal regulations. The Atlantic Coastal Act directs the Federal Government to support the management efforts of the Commission. Additionally, to the extent the Federal Government seeks to regulate a Commission species, those Federal regulations must be compatible with the Commission plan. The measures in this regulatory action respond to: the biological need to address increasing lobster mortality and to rebuild stocks; the practical need to have uniform state and Federal regulations; and, the legal need to support the Commission plan in complementary fashion.

Background

The Commission set forth the foundation of its American lobster fishery management plan in Amendment 3 to the ISFMP (Amendment 3) in December 1997. The Federal Government issued compatible regulations that complemented Amendment 3 in December 1999. The Amendment 3 regulations established assorted measures to directly, even if preliminarily, address overfishing (e.g., trap caps and minimum gauge sizes). Amendment 3 created seven lobster

management areas and established industry led lobster management teams that make recommendations for future measures to end overfishing. Examples of such more specific measures were set forth in Amendment 3 addenda: measures to limit future access to LCMA 3, 4, and 5 in Addendum I to Amendment 3 (Addendum I) (Commission approved August 1999—compatible Federal regulations enacted March 2003); measures to increase protection of the American lobster broodstock described in this final rule as recommended in Addendum II to Amendment 3 (Addendum II) (Commission approved February 2001); and Addendum III to Amendment 3 (Addendum III) (Commission approved February 2002); and, measures to control fishing effort being analyzed in a separate rulemaking action recommended in Addendum IV to Amendment 3 (Addendum IV) (Commission approved December 2003), Addendum V to Amendment 3 (Addendum V) (Commission approved March 2004), Addendum VI to Amendment 3 (Addendum VI) (Commission approved February 2005), and Addendum VII to Amendment 3 (Addendum VII) (Commission approved November 2005).

Protection of broodstock lobsters is one of the overarching objectives in the Commission's lobster management plan. Although Addendum II pre-dates Addendum III, both addenda involve protections designed to increase the abundance of broodstock lobsters and thereby increase egg production. The Commission's recommendations to implement the broodstock measures in Addenda II and III form the basis of the measures described in this final rule. Broodstock protective measures specified in this regulatory action, and in Addenda II and III, are the following: increase in the minimum legal gauge size in LCMA 2, 3, 4, 5, and the Outer Cape; increase in the size of escape vents on lobster traps in LCMA 2, 3, 4, 5, and the Outer Cape; implementation of a maximum legal gauge size for female lobsters in LCMA 4 and 5; require mandatory V-notching of female lobsters carrying eggs in LCMA 1 and in LCMA 3 above the 42° 30' North latitude line; and require a zero tolerance definition of V-notched female lobsters in LCMA 1.

In response to the Commission's Addendum II recommendations, NMFS published an advanced notice of proposed rulemaking (ANPR) in the **Federal Register** on May 24, 2001 (66 FR 28726). The agency responded to the Commission's Addendum III by filing in the **Federal Register** an ANPR and a

notice of intent (NOI) to prepare an environmental impact statement (EIS) on September 5, 2002 (67 FR 56801). This notice declared NMFS' intention to combine the Addendum II and Addendum III rulemakings because the Addenda involved similar subject matter—namely management measures designed to protect brood lobster stock. Addenda II and III, however, also contain numerous other effort control management measures, such as a trap transferability program for the Outer Cape Management Area and a mandatory so-called “choose and use” program for LCMA 3 fishers that would require qualified permit holders to permanently designate LCMA 3 when renewing Federal lobster permits each year. Because these control measures are so intimately a part of the subsequently developed Commission's Addenda IV, V, VI, and VII, NMFS determined that those effort control programs in Addenda II and III be analyzed contemporaneously with the Addenda IV–VII measures in a forthcoming EIS. Accordingly, NMFS published its ANPR along with an NOI to address these lobster fishing effort control measures in a **Federal Register** notice dated May 10, 2005 (70 FR 24995).

While the measures in this final rule address Commission recommendations for gauge increases and escape vent size increases as scheduled through 2005 in Addenda II and III to Amendment 3 of the ISFMP, these same addenda also call for additional broodstock management measures that have yet to be implemented by NMFS. These include four additional 1/32 inch (0.08 cm) gauge increases that would result in a 3 1/2 inch (8.89 cm) minimum gauge size requirement for LCMA 3 and the Outer Cape by July 1, 2008; escape vent size increases in LCMA 3 and the Outer Cape to 2 1/16 inches X 5 3/4 inches rectangular (5.24 cm X 14.61 cm) or two circular vents at 2 11/16 inches diameter (6.83 cm) by July 1, 2008; and an increase to the escape vent size in LCMA 1 to 2 inches X 5 3/4 inches rectangular (5.08 cm X 14.61 cm) or two circular vents at 2 5/8 inches (6.67 cm) in diameter by July 1, 2007. In response to the Commission's recommendations to implement additional broodstock management measures, on December 13, 2005, NMFS published an ANPR (70 FR 73717), announcing its intention to evaluate additional measures deemed necessary to further increase protection of the American lobster broodstock recommended by the Commission in Addenda II and III. Therefore, measures in this final rule will implement specified lobster broodstock measures

from Addenda II and III. The other two separate regulatory actions stated above will evaluate: the effort control measures specified in Addenda II–VII; and the additional broodstock measures deemed necessary to further increase protection of the American lobster broodstock specified in Addenda II and III.

At present, most states have issued their complementary Addenda II and III regulations, but the Federal Government has not. As a result, there is presently a regulatory incongruence with the Commission's American lobster ISFMP, at least insofar as it pertains to the broodstock measures identified in Addenda II and III. Most Federal lobster permit holders also hold a state lobster license, and they must abide by the ISFMP measures by virtue of their state license, even if the same restrictions have not yet been placed on their Federal permit. Measures in this final rule will primarily impact Federal lobster permit holders from states that have not implemented all measures in the Commission's ISFMP. Generally, the exception to state coverage of all lobster ISFMP measures, under the Commission's ISFMP, is for states that are classified as *de minimis* states. Certain states located at the southern end of the range can qualify for *de minimis* status under the Commission's lobster ISFMP if a given state's declared annual landings, averaged over a 2-year period, amount to less than 40,000 lbs (18,144 kg) of American lobster. While *de minimis* states are required to promulgate all coastwide measures contained in Amendment 3, many of the area-specific management measures, including the broodstock measures specified in this final rule, are not required to be implemented by the *de minimis* states under the Commission's lobster ISFMP. However, Federal lobster regulations apply to all Federal lobster permit holders, including permit holders residing in and landing in *de minimis* states. Four states (North Carolina, Virginia, Delaware, and Maryland) are classified under the Commission's lobster ISFMP as *de minimis* states in 2005. Based on the analysis completed for this action, approximately ten percent of current Federal lobster permit holders are from *de minimis* states or reside in states that may not have fully implemented all Commission ISFMP management measures.

Comments and Responses

The proposed rule for this regulatory action was published in the **Federal Register** on September 2, 2005 (70 FR 52346); comments were solicited until

October 17, 2005, and a total of 41 public comments were received by NMFS during the 45-day public comment period. Of the total comments received, 20 comments were from recreational divers in the mid-Atlantic that opposed implementation of a maximum carapace size requirement in Areas 4 and 5 on recreational divers. Respondents in opposition to the maximum carapace size restriction on recreational divers also questioned the biological benefits of protecting large lobsters. Seven respondents requested a public hearing on the proposed measures or an extension to the public comment period. Seven respondents requested NMFS immediately implement additional minimum gauge increases, from 3 3/8 inches (8.57 cm) to 3 1/2 inches (8.89 cm), for Area 3 as proposed in the ISFMP. Six respondents supported the proposed rule measures identified in the preferred alternatives. All comments were carefully considered. Specific questions, concerns, and opposition to elements of the proposed rule, are more thoroughly addressed in this section.

Comment 1: Twenty comments were received in opposition to the imposition of a maximum carapace size requirement in Areas 4 and 5 on recreational divers, two respondents opposed any exemptions for recreational divers, and one respondent stated that Federal regulations should allow an exemption for the recreational dive sector to possess 1 or 2 large female lobsters in excess of the maximum size specified for Area 4 and Area 5. Many of the comments in opposition cited that a prohibition on large lobsters had a chilling effect on one of the principal lobster diving incentives—i.e., the thrill in seeking a trophy sized lobster.

Response: The agency believes this final rule provides biological protection for lobster brood stock while acknowledging the issues brought forward by the diving community in its commentary. As a preliminary matter, this final rule allows for divers to catch trophy sized lobsters, although not without limitation as had existed before this final rule. Specifically, the maximum size prohibition set forth in this final rule does not pertain to male lobsters. (See Response No. 9 for additional explanation and detail). Additionally, this final rule sets a one maximum size female bag limit for divers.

The agency maintains that a one maximum size female bag limit will not impact the biological objectives of this final rule or the Commission ISFMP because the agency believes that few trophy sized females are present for

catch by divers, and/or that few would actually be harvested by divers. The agency maintains, however, that the best available information suggests a measurable harvest of lobster by the dive sector. (See Response No. 8 for additional detail and information). And, although the vast majority of that increased harvest undoubtedly involves lobsters below the maximum size, the agency believes that this final rule's bag limit guards against further expansion of effort, particularly on lobster brood stock.

Comment 2: Seven respondents from the recreational dive sector requested NMFS hold public hearings on the proposed rule and/or requested an extension to the public comment period to address the proposed implementation of a maximum carapace size requirement in Areas 4 and 5 on the recreational dive sector.

Response: NMFS believes the 45-day public comment period provided in the proposed rule was an adequate period of time to allow for interested parties to acquire all necessary supporting documents, and provide written comments. The draft EA and proposed rule were available in hard copy format, the proposed rule was available on the **Federal Register** website <http://www.gpoaccess.gov/fr/index.html>, and both documents were available on the NMFS Northeast Region web site at www.nero.noaa.gov. In addition, written notice was provided to all Federal lobster permit holders, all state fishery agencies from Maine to North Carolina, and all interested parties that registered on the Northeast Region website to receive information on American lobster. NMFS allowed comments on this Proposed rule to be sent to the Northeast Region in writing, via email to the E-comment mailbox called Lob0305@noaa.gov, via fax to (978) 281-9117, or via the Federal E-Rulemaking Portal at www.regulations.gov. Further, the majority of the commentary received was, in fact, from the recreational dive sector, which suggests that the sector did, in fact, have notice. The agency does not believe that a further hearing or an extension of the comment period were necessary to allow public participation in this rulemaking.

Comment 3: Seven respondents requested NMFS immediately announce in the **Federal Register** its intent to begin rulemaking to implement additional minimum carapace size increases from 3 3/8 inches (8.57 cm) to 3 1/2 inches (8.89 cm), by 2008, for Area 3 as proposed in the Commission's ISFMP.

Response: Originally, additional gauge increases, up to 3 1/2 inches (8.89

cm), were included in the ISFMP for implementation only if it was determined that they were necessary for conservation. However, by the time the Commission determined that the measures were, in fact, necessary, (the Commission determined the states had to implement these "as necessary" measures by July 1, 2005), NOAA Fisheries had already begun this rulemaking. Accordingly, NOAA Fisheries undertook consideration of the "if necessary" issues in a new rulemaking announced on December 13, 2005 (70 FR 73717).

Although present Federal and state gauge regulations may differ at this time, the regulations do not conflict. Specifically, Federal regulations at 50 CFR 697.3 state that "The regulations in this part do not preempt more restrictive state laws, or state enforcement of more restrictive state laws." Accordingly, NMFS expects that states with more restrictive gauge and vent regulations should be able to enforce those regulations because the Federal Government has expressly stated that it has not preempted the field relative to more restrictive gauge and vent sizes. In this particular instance, dual state/Federal permit holders would be able to comply with both state and Federal regulations by complying with the more restrictive state regulation, and indeed a state might so enforce such compliance. The "more restrictive" regulatory concept embodied in 50 CFR 697.3 becomes especially germane in situations where the Federal Government is in the process of creating compatible regulations in response to Commission recommendations. Federal rulemaking, with the numerous statutory obligations attendant thereto, can be a far more time consuming process than rulemaking at the state level. Accordingly, states are often able to promulgate regulations in response to Commission regulations quicker than the Federal Government. Thus, the Federal regulation at 50 CFR 697.3 provides a degree of regulatory stability during the Federal rulemaking inter period.

Comment 4: Six respondents supported specific management measures recommended by the Commission and specified in the Proposed rule, including: the vent size increase to be compatible with the proposed gauge increase; the mandatory v-notch and v-notch definition in Area 3; and the Area 3 and Area 5 overlap boundary. In addition, these respondents supported additional Commission recommendations associated with fishing effort control, including an individual transferable

trap program and a proposal to require Area 3 permit holders to designate (i.e. "choose and use") Area 3 on their Federal permits when renewing Federal permits each year. The respondents proposed that, if a permit holder did not choose Area 3, then that permit holder would be prohibited from designating Area 3 on the vessel permit in future years. In that event, the permit would still retain its Area 3 qualification, and each successive owner would be given the opportunity to either permanently designate Area 3 or drop the Area 3 designation for the duration of the possession of the qualified permit.

Response: NMFS, in this final rule, will implement the lobster minimum size increases and escape vent size increases in lobster conservation management areas (Areas) 2, 3, 4, 5 and the Outer Cape Management Area; implement a maximum carapace size in Area 4 and Area 5, except for recreational divers; mandatory v-notching of egg-bearing female lobster in Area 1 and in the Gulf of Maine portion of Area 3; a zero tolerance definition of v-notching in Area 1; and a 5-mile (8-km) overlap zone along the common boundary of Area 3 and Area 5, as specified in the proposed rule. In response to the additional Commission recommendations associated with fishing effort control, including the individual transferable trap program and the choose and use proposal, NMFS published its ANPR along with an NOI to address these lobster fishing effort control measures in a **Federal Register** notice dated May 10, 2005 (70 FR 24995). Therefore, measures proposed in this action would implement specified lobster broodstock measures from Addenda II and III, and a separate rulemaking will evaluate the effort control measures specified in Addenda II–VII.

Comment 5: Five respondents supported, and one respondent opposed the proposed rule measure to exempt lobster trap gear retrieval by a substitute vessel from provisions of the exempted fishing regulations when a federally permitted vessel is inoperable or mechanically impaired. The comment in opposition did not state a rationale for that opposition.

Response: NMFS, in this final rule, will exempt lobster trap gear retrieval by a substitute vessel from provisions of the exempted fishing regulations when a federally permitted vessel is inoperable or mechanically impaired. This action will merely reiterate already existing agency policy and will allow the vessel owner to retrieve trap gear in a timely manner that may otherwise be lost to adverse weather conditions or

other mobile gear operating in the same area. In addition, since current MMPA requirements prohibit leaving fixed gear in the water for longer than 30 days, this exemption will allow permit holders to retrieve their trap gear more expeditiously, while providing benefits to protected resources by avoiding the potential for up to a 60-day administrative delay imposed by exempted fishing requirements.

Comment 6: Four respondents stated that NMFS provided no data to show that protection of large lobsters would benefit the lobster population, or that large female lobsters are good egg-bearers.

Response: NMFS referred to several scientific studies in section 4.2 of the EA completed for this action that state the importance of large lobsters to the broodstock population. The studies in the EA note that predation pressures seem related to size and habitat. Mortality due to predation decreases as the lobster grows, and larger lobsters greater than 4 inches carapace length (10.2 cm) may be immune to predation. In addition, scientific studies indicate that larger lobsters produce eggs with greater energy content, and thus may produce larvae with higher survival rates, as well as noting that larger females can spawn twice between molts, making their relative fecundity greater than females within one molt of legal size.

Comment 7: Three respondents stated that the restrictions proposed in this action are not stringent enough.

Response: The cooperative state and Federal approach to American lobster management is not predicated upon a single measure, nor is it contained within a single document. Rather, the structure is based on facilitating ongoing adaptive management with necessary elements implemented over time. The Commission set forth the foundation of its American Lobster fishery management plan in Amendment 3 in December 1997. The Federal Government issued compatible regulations that complemented Amendment 3 in December 1999. The Amendment 3 regulations established assorted measures to directly, even if preliminarily, address overfishing (e.g., trap caps and minimum gauge sizes). Examples of such more specific measures were recently set forth in the following Amendment 3 addenda: measures to limit future access to Areas 3, 4, and 5 in Addendum I (Commission approved August 1999—compatible Federal regulations enacted March 2003); measures to increase protection of the American lobster broodstock described in this action as

recommended in Addendum II (Commission approved February 2001) and Addendum III (Commission approved February 2002); and measures to control fishing effort being analyzed in a separate rulemaking action recommended in Addendum III, Addendum V (Commission approved March 2004), Addendum VI (Commission approved February 2005), and Addendum VII (Commission approved November 2005). NMFS announced its intent to continue compatible rulemaking on the above referenced fishing effort control measures in a **Federal Register** Notice of intent to prepare an environmental impact statement dated May 10, 2005 (70 FR 24495).

Comment 8: Three respondents stated that NMFS exceeded Commission recommendations to the Federal Government to implement compatible regulations by including recreational divers in the maximum size prohibitions specified for Area 4 and Area 5.

Response: Although there is limited quantitative information on the volume of lobster harvested by the recreational sector, survey information collected by the State of New Jersey in 2000 indicated that recreational divers harvested over 17,000 legal lobsters during approximately 37,000 dives on wrecks and artificial reefs. Assuming each legal lobster harvested by recreational divers weighed approximately 1.25 lbs (0.57 kg)—a generally applicable weight for lobsters caught at the minimum size—these divers accounted for approximately 2.4 percent of all lobsters landed in NJ in 2000. This volume of harvest by recreational divers approximates the historic non-trap harvest of lobsters by commercial fishing vessels, a segment of the industry that has bycatch limits in place. Since, based on the most recent stock assessment, the American lobster resource is growth overfished and overfishing is continuing in Area 4 and Area 5, NMFS feels the imposition of broodstock management measures on recreational users, and commercial non-trap fishing vessels is appropriate.

Comment 9: Three respondents stated that NMFS should revise the regulatory text specified in the proposed rule associated with the maximum size prohibition specified for Area 4 and Area 5, to specify the prohibition applies only to female lobsters.

Response: NMFS notes this oversight and agrees. The Commission's recommendation and subsequent Federal analysis of impacts as provided in the draft EA and preamble to the proposed rule clearly specified the

maximum size prohibition specified for Area 4 and Area 5 is intended to apply only to female lobsters. This final rule corrects the error by revising the regulatory text in the final rule associated with the maximum size prohibition specified for Area 4 and Area 5 to specify this maximum size measure applies only to female lobsters.

Comment 10: One respondent stated that lobster management measures should be consistent in all Areas. One respondent stated that Federal regulations should protect both male and female large lobsters in Area 4 and Area 5, one respondent stated that Federal regulations should require a larger minimum carapace size in Area 1, and one respondent stated that Federal regulations should require a maximum size in Areas 2, 3, and the Outer Cape.

Response: NMFS acknowledges the complexities associated with differing management measures amongst management areas. The agency further acknowledges that uniformity and standardization amongst management areas would simplify some of these complexities. The agency, however, has to balance the utility in having a uniform management scheme against its obligation to support a Commission management program that has, as two of its objectives, the maintenance of flexible regional programs and maintenance of existing social and cultural features of the industry wherever possible. Both such objectives form the foundation of the area management scheme established in Amendment 3 to the Commission's ISFMP. This final rule seems to achieve balance. It simplifies overall lobster management, thereby facilitating enforcement, by making Federal lobster regulations more consistent with existing state regulations. Yet, the rule remains supportive of the area management construct set forth in the ISFMP by acknowledging that lobster biology and industry practices differ throughout the vast range of this fishery, and thus, a "one-size-fits-all" approach, although potentially easier to enforce (but only if all states endorsed such an approach—if some states made their regulations uniform, but others did not, then enforcement might actually become more complicated) might undermine the objectives of area management.

Comment 11: Two respondents stated that NMFS should stop drafting new regulations, and instead, NMFS should uphold and enforce current regulations.

Response: NMFS understands that enforcement is a significant component to effective management, and further that broad based industry support and

enhanced compliance with both state and Federal lobster regulations is a key benefit resulting from active industry involvement in the development of area-specific management measures under the Commission LCMT process.

Comment 12: One respondent supported, and one respondent opposed the 5-mile (8-km) overlap area between Areas 3 and 5. The comment in opposition did not state a rationale for that opposition.

Response: Lobster management in the southern end of the range is complicated by a number of factors, including distinct seasonality, limited abundance of lobsters, reliance on multiple mixed fisheries, and the similarity between finfish traps and fishing methods used to harvest American lobster. With the Federal implementation of a historical participation based limited entry program for continued access to Area 3, effective March 27, 2003 (68 FR 14902), those lobster fishers in Area 5 fishing near the boundary with Area 3 were disadvantaged. Specifically, a requirement to document annual lobster landings in excess of 25,000 lbs (11,340 kg) to qualify for continued access to Area 3 was deemed problematic for Area 5 lobster fishers, because resource availability is variable at the southern end of the range. Following discussions between the LCMTs 3 and 5 to address these issues, the Commission, in Addendum III, proposed a 5-mile (8-km) overlapping boundary zone between Areas 3 and 5 and recommended that the Federal Government implement regulations consistent therewith. In the environmental assessment completed for this action, an evaluation of the environmental consequences indicated that a 5-mile (8-km) overlapping boundary zone between Areas 3 and 5 would more effectively mitigate the impacts for those lobster fishers in Area 5 fishing near the boundary with Area 3 that were disadvantaged, yet result in no significant adverse impacts to the lobster resource, protected resources, or the habitat.

Comment 13: One respondent stated that imposition of a maximum size restriction on possession of female lobsters in Areas 4 and 5 would necessitate educating recreational users to ensure they can distinguish between a male and female lobster and identify the dividing line between Area 4 and 5.

Response: NMFS agrees that imposition of the maximum size restriction on possession of female lobsters in Areas 4 and 5 would necessitate educating recreational users to ensure they can distinguish between

a male and female lobster and identify the dividing line between Area 4 and 5. However, the impact of the maximum size requirement is likely to be mitigated to an unknown degree by providing a one maximum carapace size female bag limit per recreational diver in Areas 4 and 5. In addition, information is available—Federal regulations at 50 CFR 697.18 contain management area information, including a chart and corresponding latitude and longitude coordinates for each of the seven lobster Areas. NMFS also maintains a website containing information on Federal lobster regulations, including information on each of the seven lobster Areas at: <http://www.nero.noaa.gov/StateFedOff/>. NMFS agrees that the ability to distinguish between male and female lobsters harvested in Areas 4 and 5 is more problematic. NMFS will provide information on the American lobster website to effectively distinguish between male and female lobsters, and copies of this information can be obtained from the Director, State, Federal and Constituent Programs Office—see **ADDRESSES**.

Changes from the Proposed Rule

The proposed rule included a regulatory measure to prohibit the possession of a female lobster with a carapace size in excess of 5 ¼ inches (13.34 cm) in LCMA 4 and 5 ½ inches (13.97 cm) in LCMA 5. Many scientists believe that lobster can be a long-lived species, up to and over 50 years of age, and can achieve weights of 40 pounds (18 kg) or more. It is further believed by many scientists that bigger lobsters are more successful breeders and produce more eggs. For that reason, maximum size gauge restrictions on lobster can improve egg production by prohibiting harvest of the bigger, and potentially, better breeding lobsters, forcing their return to the sea and allowing further reproduction. A majority of the public comments on the proposed rule were provided by the recreational dive community, and they voiced opposition to the imposition on recreational divers of a maximum carapace size requirement in LCMA 4 and 5. Many of the comments in opposition cited that a prohibition on large lobsters would have a chilling effect on one of the principal lobster diving incentives—i.e., the thrill in seeking a trophy-sized lobster.

Based upon public comment and additional information provided by the recreational dive community in the mid-Atlantic, NMFS has determined that it would be appropriate to allow recreational divers to harvest one female

lobster in excess of the maximum size in LCMAs 4 and 5. The agency believes the final rule provides biological protection for lobster brood stock while acknowledging the issues brought forward by the diving community in its commentary. The final rule allows for divers to catch trophy-sized lobsters, although not without limitation as had existed before this final rule. Specifically, consistent with the Commission recommendations, the maximum size prohibition set forth in the final rule does not pertain to male lobsters in LCMAs 4 and 5. Additionally, the final rule allows recreational divers to harvest one female lobster in excess of the maximum size in LCMAs 4 and 5. The agency maintains that a one maximum size female bag limit will not impact the biological objectives of the rule or the Commission ISFMP because the agency believes that few trophy-sized females are present for catch by divers, and/or that few would actually be harvested by divers. The agency maintains, however, that the best available information suggests a measurable harvest of lobster by the dive sector. Additional information, provided by representatives of the recreational dive community from a survey of New Jersey's recreational wreck and artificial reef fisheries conducted in 2000 by the State of New Jersey, indicated that recreational divers harvested over 17,000 legal lobsters during approximately 37,000 dives on wrecks and artificial reefs. Assuming each legal lobster harvested by recreational divers weighed approximately 1.25 lbs (0.6 kilograms)—a generally applicable weight for lobsters caught at the minimum size—these divers accounted for approximately 2.4 percent of all lobsters landed in NJ in 2000. This volume of harvest by recreational divers approximates the historic non-trap harvest of lobsters by commercial fishing vessels, a segment of the industry that has bycatch limits in place. Although the vast majority of that increased harvest undoubtedly involves lobsters below the maximum size, the agency believes that this final rule's bag limit guards against further expansion of effort, particularly on lobster brood stock.

Revisions Implemented by This Action

This Federal lobster management action will implement the following specific management measures, as described here.

Modify Egg Production Schedule

The American lobster resource is considered overfished when the fishing

mortality rate (F) results in a reduction in estimated egg production per harvestable lobster to 10 percent (F10 percent) or less of a non-fished population. In other words, lobsters are considered overfished when harvest so reduces the amount of lobsters remaining in the water that the remaining lobsters can produce no more than 10 percent of the eggs that an unfished population would produce. If lobsters are overfished—i.e., the remaining uncaught lobsters are so few that they can only produce as a group 10 percent of the number of eggs that an unfished population would collectively produce, then the present Commission lobster plan recommends that managers act to restore egg production to 10 percent or greater by a date certain, presently December 31, 2005.

Originally, in Addendum I, the Commission targeted a rough deadline (December 31, 2005) by which they hoped to end overfishing. In so doing, the Commission used the best available stock information, but admittedly dated information, to extrapolate out an egg production schedule—a time line with interim objectives—that would meet the targeted deadline of December 31, 2005. The Commission acknowledged, however, that the Addendum I schedule and target deadline would need to be adjusted in later addenda following the peer reviewed stock assessment conducted in 2000.

The May 2000 the peer-reviewed American lobster stock assessment confirmed that overfishing of American lobster stocks is occurring throughout the species' range. Based upon the year 2000 stock assessment, the Commission revised its target deadline to end overfishing to December 31, 2008. Accordingly, the Commission, in Addendum II and its recommendations to the Federal Government, revised the schedule for increasing egg production to account for updated information on the status of the stock. Although the Commission completed an updated and peer reviewed stock assessment in November 2005, the results of the assessment and peer review recommendations are being evaluated at this time by the Commission. However, a preliminary review by NMFS indicates measures identified in this action, including the revision to the overfishing timeline, will not be contrary to the 2005 assessment results.

This Federal action will revise and extend the egg production schedule timeline by three years, from December 31, 2005, to December 31, 2008. Accordingly, this Federal action announces the revision to the timeline to restore egg production in each of the

management areas to 10 percent or greater of the egg production of an unfished population (i.e., the present overfishing definition) by December 31, 2008. This action is recommended by the Commission.

Increased Minimum Harvest Size in LCMAs 2, 3, 4, 5, and the Outer Cape

One key Addendum II broodstock management measure was to increase the minimum legal harvest size of American lobster from 3 ¼ inches to 3 ⅜ inches (8.26 cm to 8.57 cm) carapace length in certain LCMAs. The carapace is the unsegmented body shell of the American lobster. Carapace length is the straight line measurement from the rear of the eye socket parallel to the center line of the carapace to the posterior edge of the carapace. Many scientists believe that many lobsters are harvested before they have had an opportunity to reproduce. Hence, increasing the minimum legal size of lobster would force fishers to throw back lobsters at the present legal minimum size, allowing those lobsters an additional season to remain in the water, mature and reproduce. Accordingly, increasing the minimum carapace length or minimum gauge size will protect a larger number of mature female American lobsters, the broodstock, and increase egg production by allowing reproduction in a sector of the population that many believe has heretofore been harvested before reaching maturity.

Addendum II includes a series of minimum gauge size increases in state and Federal waters of LCMAs 2, 3, 4, 5, and the Outer Cape, but not LCMA 1 and LCMA 6 (Long Island Sound). By approving Addendum II, the states agreed to implement annual Area-specific gauge increases beginning December 31, 2001. NMFS received a recommendation from the Commission to implement complementary Federal measures for Federal waters of LCMAs 2, 4, 5, and the Outer Cape, as well as in LCMA 3 (comprised entirely of Federal waters). Specifically, the minimum allowable harvest size of American lobster in state waters of LCMAs 2, 4, 5, and the Outer Cape increased ⅓ inches (0.08 cm) annually until 2004 to an ultimate minimum size of 3 ⅜ inches (8.57 cm), except for the *de minimis* states and the State of Maine. The Commission recommends that the gauge increases in Federal waters of LCMA 2, 4, 5, and the Outer Cape, as well as in LCMA 3 increase to an ultimate minimum size of 3 ⅜ inches (8.57 cm).

This Federal management measure will implement a single ⅓ inch (0.32

cm) increase in the Federal minimum allowable harvest size of American lobster in LCMA 2, 3, 4, 5, and the Outer Cape. The lobster minimum size increase would result in a change of the current minimum harvest size from 3 1/4 inches to 3 3/8 inches (8.26 cm to 8.57 cm) in LCMA 2, 3, 4, 5, and the Outer Cape. LCMA 1 and LCMA 6 would retain the current minimum harvest size of 3 1/4 inches (8.26 cm). Although a 4-year phased in Federal implementation of the 3 3/8-inch (8.57-cm) minimum harvest size in LCMA 2, 3, 4, 5, and the Outer Cape is technically the Commission's recommendation, as specified in a letter dated February 13, 2001, due to the passage of time and compatible state regulations currently at 3 3/8 inches (8.57 cm) minimum harvest size, it likely no longer represents the Commission's preference.

Modify Size of Lobster Trap Escape Vents in LCMA 2, 3, 4, 5, and the Outer Cape

Lobster trap escape vents are another management measure designed to increase egg production. Conceptually, escape vents are holes intentionally placed in the trap that are large enough to allow sublegal lobsters caught in a trap to exit, yet be small enough to prevent legal sized lobsters from escaping.

Addendum II called for an increase in the rectangular escape vent minimum size from 1 15/16 inches by 5 3/4 inches (4.92 cm by 14.61 cm) to 2 inches by 5 3/4 inches (5.08 cm by 14.61 cm). These recommendations were made to the Federal Government in a letter dated February 13, 2001, and are consistent with and follow the Commission's recommended increase in the minimum harvest size of American lobster from the current minimum harvest size of 3 1/4 inches to 3 3/8 inches (8.26 cm to 8.57 cm). As with the increased minimum gauge size, the Commission recommended that the increase in the trap escape vent size apply only to lobster trap gear fished in state and Federal waters of LCMA 2, 3, 4, 5, and the Outer Cape, but not LCMA 1 and LCMA 6. An increase in the size of the escape vent opening by 1/16 inch (0.16 cm), by requiring at least one rectangular escape vent with an unobstructed opening not less than 2 inches by 5 3/4 inches (5.08 cm by 14.61 cm) per trap, or at least two circular escape vents per trap measuring 2 5/8 inches (6.67 cm) in diameter, was evaluated by the Commission's Lobster Technical Committee and determined to provide the maximum escapement of sublegal lobsters under 3 3/8 inches (8.57

cm), which is consistent with 100 percent retention of legal lobsters.

This Federal management measure will implement a single 1/16-inch (0.16-cm) increase in the Federal minimum lobster trap rectangular escape vent opening of lobster traps in LCMA 2, 3, 4, 5, and the Outer Cape. The increase will require at least one rectangular escape vent with an unobstructed opening not less than 2 inches by 5 3/4 inches (5.08 cm by 14.61 cm) per trap or at least two circular escape vents per trap measuring 2 5/8 inches (6.67 cm) in diameter. At the current time, Federal regulations require that all lobster trap gear must have a rectangular escape vent with an unobstructed opening not less than 1 15/16 inches by 5 3/4 inches (4.92 cm by 14.61 cm) or two circular escape vents with unobstructed openings not less than 2 7/16 inches (6.19 cm) in diameter. LCMA 1 and LCMA 6 will retain the current Federal rectangular and circular lobster trap escape vent requirements.

Require Mandatory V-Notching in LCMA 1 and in LCMA 3 above the 42°30' North Latitude Line

Mandatory v-notching is another management measure designed to increase egg production. V-notching is a process wherein a lobster fisher cuts a v-shaped notch into the flipper in the tail of an egg-bearing female lobster. Any subsequent lobster fisher catching that v-notched lobster must return it to the sea. As such, v-notching is a management measure designed to specifically protect the female lobster broodstock. At present, there is no Federal requirement to cut a v-shaped notch into the flipper in the tail of an egg-bearing female lobster, although Federal regulations currently prohibit possession of female lobsters possessing a v-notch. The Commission has recommended that the Federal Government require mandatory v-notching for all Federal vessels fishing in LCMA 1 and in LCMA 3 above the 42°30' North latitude line.

This Federal management measure will require all Federal lobster fishers with LCMA 1 permits to v-notch all egg bearing lobsters and will mandate all Federal permit holders fishing in LCMA 3 above the 42°30' North latitude line to v-notch all egg-bearing female lobsters. There will be no requirement to v-notch all egg-bearing female lobsters in LCMA 2, 4, 5, 6, the Outer Cape or LCMA 3 below the 42°30' North latitude line.

Implement Zero Tolerance V-Notching in LCMA 1

Zero tolerance v-notching of female lobsters relates both to the interpretation of what constitutes a v-notch and the limited latitude that the government will grant a violator possessing a v-notched lobster. Commission guidelines, as well as state and Federal regulations, prohibit the harvesting of v-notched lobsters. Prior to Addendum III, however, the ISFMP, and current Federal regulations for all LCMA, provided only one definition of what constituted a v-notched lobster, i.e., the Commission and current Federal regulations defined "v notch" as being a straight-sided cut, without setal hairs, at least 1/4 inch (0.64 cm) in depth and tapering to a point. In contrast, lobster fishers from Maine had long considered a v-shaped notch to be a cut 'of any size' in the flipper next to and to the right of the center flipper, and Maine State regulations prohibited possession based on that more restrictive definition. Possessors of v-notched lobsters outside of Maine State waters in LCMA 1, often argued that a clearly v-notched lobster was legal to possess because the v-notch was less than 1/4 inch (0.64 cm) or that the cut was not obviously straight sided. Maine argued that its definition ensured protection of female lobsters beyond the first molt, since after the first molt, possession was prohibited if there was a notch of any size discernable. The Commission, in Addendum III, supported and approved recommendations that sought to define "v-notch" in LCMA 1 as being a v-shaped notch of any size in the flipper next to and to the right of the center flipper as viewed from the rear of the female lobster. The Commission recommended that the Federal regulations be amended consistent therewith.

This Federal management measure will amend the Federal v-notch definition to include a second, so called zero tolerance definition of a v-notched lobster to mean a v-shaped notch of any size in the flipper next to and to the right of the center flipper as viewed from the rear of the female lobster in all of LCMA 1. Federal regulations will retain the current definition of a v-notched lobster in all other LCMA (LCMA 2, 3, 4, 5, 6, and the Outer Cape), as being a straight-sided cut, without setal hairs, at least 1/4 inch (0.64 cm) in depth and tapering to a point.

Implement a Maximum Harvest Size in LCMA 4 and LCMA 5

Another management measure designed to protect lobster broodstock is

the implementation of a maximum harvest size for lobster. A maximum size gauge restriction on lobster can improve egg production by prohibiting harvest of bigger, and potentially, better breeding lobsters, forcing their return to the sea and allowing further reproduction. In Amendment 3, the Commission set a 5-inch (12.7-cm) maximum gauge size (carapace length) on all male and female lobsters caught in LCMA 1. The Amendment 3 recommendations have already been incorporated into Federal law. The Commission, in Addendum III, called for a 5 ¼-inch (13.34-cm) maximum gauge size on all female lobsters harvested in LCMA 4, and a 5 ½-inch (13.97-cm) maximum gauge size on all female lobsters harvested in LCMA 5. The Commission requested that the Federal Government implement compatible maximum gauge size regulations in LCMAs 4 and 5.

This Federal management measure will amend Federal lobster regulations to set a maximum size restriction for possession of female lobsters in LCMA 4 and LCMA 5. This measure will prohibit the possession of a female lobster with a carapace size in excess of 5 ¼ inches (13.34 cm) for Federal permit holders fishing in, or electing to fish in LCMA 4 and will prohibit the possession of a female lobster with a

carapace size in excess of 5 ½ inches (13.97cm) for Federal permit holders fishing in, or electing to fish in LCMA 5. However, based on public comment and additional information provided by the recreational dive community, NMFS has determined that it would be appropriate to allow recreational divers to harvest one female lobster in excess of the maximum size in LCMAs 4 and 5 (for additional information on this determination, see Changes from the proposed rule).

Establish a Overlap Zone Between LCMA 3 and LCMA 5

Lobster management in the southern end of the range is complicated by a number of factors, including distinct seasonality, limited abundance of lobsters, reliance on multiple mixed fisheries, and the similarity between finfish traps and fishing methods used to harvest American lobster. With the approval of Addendum I and the establishment of a historical participation based limited entry program for continued access to LCMA 3, those lobster fishers in LCMA 5 fishing near the boundary with LCMA 3 were impacted. Specifically, a requirement to document annual lobster landings in excess of 25,000 lbs to qualify for continued access to LCMA 3

was deemed problematic for LCMA 5 lobster fishers, because resource availability is variable at the southern end of the range. The Commission, in Addendum III, proposed a 5-mile (8-km) overlapping boundary zone between LCMAs 3 and 5, extending in to LCMA 3 along the length of the eastern most border of LCMA 5 for 5 miles (8 km), and recommended that the Federal Government implement regulations consistent therewith.

This Federal management action will establish a 5-mile (8-km) overlapping boundary zone between LCMAs 3 and 5, extending along the length of the eastern most border of LCMA 5 for 5 miles (8 km) in to LCMA 3. Federal lobster vessels in possession of an LCMA 5 lobster permit, but not an LCMA 3 permit, will not be bound by LCMA 3 regulations within the overlap zone. Federal lobster vessels in possession of an LCMA 3 permit, but not an LCMA 5 permit, will not be bound by LCMA 5 regulations within the overlap zone. Federal lobster vessels in possession of an LCMA 3 and LCMA 5 permit will be required to comply with the most restrictive regulations applicable within the overlap zone.

The New LCMA 3/LCMA 5 coordinates are as follows:

Current Coordinates		New Overlap Coordinates	
Point:	Latitude (°N)/Longitude (°W)	Point:	Latitude (°N)/Longitude (°W)
V	39°50' 73°01'	V1	39°50' 72°55'
X	38°39.5' 73°40'	X1	38°38.2' 73°33.8'
Y	38°12' 73°55'	Y1	38°10.4' 73°49'
Z	37°12' 74°44'	Z1	37°10.6' 74°38'
ZA	35°34' 74°	ZA1	35°31.9' 74°45.5'
ZB	35°14.5' 75°31'	ZB1	35°14.5' 75°19.3'

From point V, current coordinates extending out to new overlap coordinates, back to point ZB.

Clarify Existing Regulations

These measures attempt to clarify existing Federal lobster regulations and will: allow a change in the LCMA designations upon sale or transfer of a fishing vessel with a Federal lobster permit, or within 45 days of the permit's effective date; clearly reference other laws and regulations applicable to Federal lobster permit holders; clearly prohibit hauling or possession of lobster trap gear belonging to another vessel; and, exempt lobster trap gear retrieval from provisions of the exempted fishing regulations by a substitute vessel if a federally permitted vessel is inoperable or mechanically impaired.

Allow a Change in the LCMA Designations

Current Federal regulations at 50 CFR 697.4(a)(7)(iv) prohibit a Federal lobster permit owner from changing the permit's lobster management area designations during the fishing year. In other words, lobster fishers have yearly flexibility to designate new or different LCMAs when they renew their annual permit, but upon making that designation, fishers are bound by that choice for the remainder of the fishing year. This measure was designed in large part to close a potential regulatory loophole. That is, Federal regulations at § 697.4(a)(7)(v) mandate that permits with multiple LCMA designations must abide by "...the most restrictive management measures in effect for any one of the specified areas, regardless of the area being fished, for the entire

fishing year." Individuals, however, could circumvent this most restrictive provision if they were allowed to drop or add LCMA permit designations based on the seasonal availability of the resource, or if management measures within a certain management area became more or less restrictive during the year.

Although the restriction on changing LCMA designations was designed to prevent speculative add/drop fishing practices, it was not intended to apply to vessel sales and transfers or unintended errors in the permit category selection noted upon issuance or renewal of a vessel permit. For example, the current regulation specifically allows a change in permit LCMA designation for a replacement vessel. The term "replacement vessel," however, could be interpreted narrowly

as pertaining to a vessel that replaces a former vessel for reasons other than the sale of that former vessel (e.g., the former vessel being permanently or temporarily decommissioned due to damage or engine trouble, etc.).

Accordingly, the present regulatory text has confused some lobster fishers as to their ability to re-designate LCMAs upon the sale and receipt of a new vessel and permit. Furthermore, the existing regulatory text could be interpreted narrowly to prevent a correction to either a new vessel application or permit renewal, if an error occurs in the permitting process. This new rule change will allow a re-designation of the vessel permit LCMA category upon sale or transfer of a vessel with a lobster permit. This new rule change will allow permit holders, upon initial receipt of a new or renewed permit, one opportunity to request a change in the permit LCMA category if requested within 45 days of the effective date of the vessel's permit. If such a request is not received within 45 days of the effective date of the vessel's permit, the vessel owner may not request a change in the permit category for the duration of the fishing year. NMFS believes the 45 day time period to be sufficiently limited to prevent speculative add/drop fishing practices. Furthermore, the provision for one opportunity to change categories, if requested within 45 days, will bring lobster permitting procedures in line with existing procedures currently in place for other Northeast vessel permit practices.

This Federal action will clarify the existing regulations to specifically allow a lobster fisher to re-designate LCMAs on a newly purchased permit, a transferred permit, or within 45 days of the effective date of the vessel permit.

Clearly Reference Other Pertinent Federal Laws

Presently, lobster regulations are issued under the Atlantic Coastal Act in Title 50 of the Code of Federal Regulations, Part 697—Atlantic Coastal Fisheries Cooperative Management. Federal lobster permits, however, are also held subject to conditions contained in acts other than the Atlantic Coastal Act and regulatory parts other than part 697. Although there are clear links in part 697 to these other conditions, the pathway could be stated more plainly. For example, lobster permit conditions are stated in and through the regulation at 50 CFR 697.4(b)—Vessel Permits and Trap Tags: Conditions. According to § 697.4(b), a Federal lobster permit is held conditionally, subject to the permit

holder abiding by all state and local laws, as well as "... the requirements of this part," which itself is regulatory parlance for "subject to the requirements of Title 50 of the Code of Federal Regulations, Part 697—Atlantic Coastal Fisheries Cooperative Management. Included in "this part" (i.e., part 697) is § 697.3—Relation to Other Federal and State Laws. Within Section § 697.3 is reference to and incorporation of §§ 307 through 311 of the Magnuson-Stevens Act, which generally relate to enforcement. Also within § 697.3 is a statement incorporating by reference 50 CFR 600.705—Relation to Other Laws, which sets forth other pertinent Federal laws that Federal lobster permit holders must abide by, including those regulations in Part 229—Authorization For Commercial Fisheries Under the Marine Mammal Protection Act of 1972. Still further, within part 229 are lobster restrictions pertaining to gear, time and area that are designed to benefit marine mammals. Thus, gear, time and area restrictions specified within part 229 are conditions of a Federal lobster permit held under § 697.4(b), although it requires multiple steps to make the connection and could be written in more direct fashion.

This Federal action will clarify the existing regulations to more directly reference lobster permit conditions that exist outside of part 697. The agency will amend § 697.4(b)—Conditions to include a direct statement that lobster permit holders are subject to the laws and regulations administered by NOAA, including the Endangered Species Act, the Marine Mammal Protection Act and the gear, time and area restrictions thereunder, as well as the enforcement provisions of the Magnuson Stevens Act. The agency will also amend § 697.7—Prohibitions to track the newly added text in § 697.4(b)—Conditions.

Prohibit the Hauling or Possession of Another's Gear

Current Federal regulations at 50 CFR 697.7(c)(1)(viii) generally prohibit permit holders from possessing or hauling improperly identified lobster trap gear. According to Federal regulations at 50 CFR 697.21, lobster trap gear is improperly identified if the trap is not properly tagged to identify the vessel possessing or hauling it. In other words, a vessel may only possess or haul its own gear and not gear tagged to another. Other lobster regulations also address this gear possession/hauling prohibition but again do so in similarly circuitous, even if clear, fashion. For example, 50 CFR 697.7(1)(c)(vii) prohibits hauling and

possession of traps above a permit holder's trap limit, and 50 CFR 697.7(c)(xii) prohibits possession of a lobster trap tag issued to another vessel. Accordingly, hauling and possession of another vessel's lobster gear is presently prohibited but stating that prohibition more directly might reduce the perception of confusion on the issue. This Federal action will clarify the existing regulations to more directly state the present prohibition against the hauling and possession of another's lobster trap gear.

Exempt Gear Retrieval from Exempted Fishing Regulations

Federal lobster regulations, specified at 50 CFR 697.22—Exempted fishing, allow the Regional Administrator to exempt any person or vessel from Federal lobster regulations for the conduct of exempted fishing beneficial to the management of the American lobster, weakfish, Atlantic striped bass, Atlantic sturgeon, or horseshoe crab resources or fisheries, pursuant to the provisions of § 600.745. However, since administrative compliance the exempted fishing procedures may require up to 60 days to complete, a narrow interpretation of the exempted fishing regulations could significantly delay the ability of a Federal permit holder to retrieve lobster trap gear if a Federal vessel is inoperable or mechanically-impaired.

With this Federal action, NMFS will modify 50 CFR 697.22 to allow the Regional Administrator for the Northeast Region, or the Director of the Office of Sustainable Fisheries, as appropriate, to authorize a substitute vessel to haul ashore the lobster trap gear of an inoperable or mechanically-impaired federally permitted lobster vessel without having to engage in the exempted fishing process outlined at 50 CFR 600.745—Exempted fishing. This revision will allow NMFS to more expeditiously address pressing needs than is currently provided in the regulations.

Corrections

In addition to the measures described here, the following change will correct an inaccurate reference in the regulations at § 697.21—Gear identification and marking, escape vent, maximum trap size, and ghost panel requirements. Specifically, § 697.21(f) references enforcement action and seizure and disposition authority by reference to "part 219 of this title". Part 219 of this title has been superceded, and the authority for enforcement action now resides at 15 CFR part 904. NMFS will revise § 697.21(f) to reference the

correct authority to enforce seizure and disposition as follows: Enforcement action. Unidentified, unmarked, unvented, improperly vented American lobster traps, or, beginning May 1, 2000, any untagged American lobster traps, or any lobster traps subject to the requirements and specifications of § 697.21, which fail to meet such requirements and specifications may be seized and disposed of in accordance with the provisions of 15 CFR part 904.

Classification

The Regional Administrator has determined that this Federal regulatory action is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws.

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

This final rule does not contain policies with Federalism implications as that term is defined in E.O. 13132.

NMFS prepared a final regulatory flexibility analysis (FRFA) for this action as required by section 603 of the Regulatory Flexibility Act (RFA). The FRFA describes the economic impact that this final rule will have on small entities. The FRFA incorporates the initial regulatory flexibility analysis (IRFA), a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS responses to those comments, and a summary of the analyses completed to support the action. The IRFA was summarized in the proposed rule (70 FR 52346, September 2, 2005) and is thus not repeated here. A copy of the IRFA, RIR, and the EA prepared for this action are available from the Northeast Regional Office (see **ADDRESSES**). A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUMMARY** section of the preamble and in the preamble to this final rule.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides". The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as a small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Northeast Regional Office (see **ADDRESSES**), and the guide

will be sent to all holders of permits for the American lobster fishery as part of a permit holder letter. The guide and this final rule will be available upon request.

Summary of the Significant Issues Raised by the Public Comments

A total of 41 comments were received during the public comment period of the proposed rule. Significant issues raised by the public comments, a summary of the assessment of the Agency of such issues, and a statement of changes made, are addressed in the preamble of this final rule (see Comments and Responses, and Changes from the Proposed Rule).

Description of and Estimate of the Number of Small Entities to Which the Final Rule Will Apply

This action would potentially affect any vessel in the Northeast region that holds a Federal limited access lobster permit. During fishing year 2003, a total of 3,217 limited access lobster permits were issued to Northeast region permitted vessels. Based on the Small Business Administration's (SBA) size standard of \$3.5 million in gross sales, all of these vessels would be considered small entities as the maximum earnings for any given vessel was less than half of this standard.

While the number of permitted vessels represents the universe of vessels that may be affected, an assessment of impacts needs to distinguish between this universe and the number of vessels that are actually participating in the lobster fishery. Unfortunately the precise number of participating vessels is not known with certainty since lobster permit holders are not subject to mandatory reporting. Specifically, less than half of all vessels using trap gear (the primary gear used on the fishery) were subject to mandatory reporting. Based on 2003 dealer records, while 62 percent of these vessels subject to mandatory reporting reported landings, only 18 percent (361 vessels) reported landing lobster. Applying this proportion to the total number of permit holders would result in an estimate of 582 participating vessels. Alternatively, where it was possible to identify Federal permit holders, comparing the number of vessels eligible to purchase trap tags to the number of vessels that actually did purchase trap tags in 2003 indicates that about 46 percent of Federal permit holders using trap gear participate in the EEZ fishery. Applying this number to the total number of permit holders results in an estimate of almost 1,500 participating vessels; an estimate that

seems more likely than that based on activity reports but is still subject to uncertainty.

Active participation by the lobster industry through the state and Commission management process does help mitigate the impacts of Federal lobster management regulations on small entities. Lobster regulatory impacts to Federal small entities are mitigated under the Commission Lobster ISFMP most effectively through the LCMTs and Area-specific management programs. Through the Commission LCMT process, active industry involvement in the local management programs ensure measures have more support from the small entities in each LCMA, and management measures are more likely to be appropriate for each LCMA than a coastwide measure without local support. The flexibility of the Commission adaptive management program through the use of conservation equivalent measures by the Commission can be used to effectively implement resource conservation measures that most effectively mitigate the cumulative impacts on small entities. As explained in the preamble, the broodstock measures in this final rule are in response to recommendations by the Commission to implement measures in Addenda II and III to the ISFMP. Implementation of these Federal regulations will: compliment state regulations; mitigate regulatory discrepancies between state and Federal lobster broodstock measures; facilitate industry understanding of and compliance with uniform area-specific measures; and, enhance enforcement of lobster regulations.

To clarify current Federal lobster regulations NMFS will: allow a change in the LMCA designations of a fishing vessel with a Federal lobster permit upon sale, transfer, or within 45 days of the permit's effective date; clearly reference other laws and regulations applicable to Federal lobster permit holders; clearly prohibit hauling or possession of lobster trap gear belonging to another vessel; and, exempt lobster trap gear retrieval from provisions of the exempted fishing regulations by a substitute vessel if a Federally permitted vessel is inoperable or mechanically impaired. Clarification of these measures are intended to mitigate the social and economic impacts to Federal lobster permit holders and ensure impacted small entities can more clearly interpret Federal lobster permit transfer procedures; clearly and succinctly identify other laws and regulations applicable to Federal lobster permit holders; clearly understand hauling and

possession of another vessel's lobster gear is presently prohibited; and, mitigate impacts that may result from administrative delays, if exempted fishing regulations are required, when retrieving trap gear by a substitute vessel if a Federally permitted vessel is inoperable or mechanically impaired.

There is no reporting and recordkeeping requirements resulting from this action.

List of Subjects in 50 CFR Part 697

Fisheries, Fishing.

Dated: March 8, 2006.

James W. Balsiger,

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

■ For the reasons set out in the preamble, 50 CFR chapter VI, part 697, is 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 § 697.2, the definition of “V-shaped notch” is removed; the definition of “Standard v-shaped notch” and “Zero tolerance v-shaped notch” are added in alphabetical order to read as follows:

§ 697.2 Definitions.

* * * * *

Standard V-shaped notch means a straight-sided triangular cut, without setal hairs, at least ¼ inch (0.64 cm) in depth and tapering to a point.

* * * * *

Zero tolerance V-shaped notch means a v-shaped notch of any size, with or without straight sides, with or without setal hairs.

■ 3. In § 697.3, paragraph (b) is revised to read as follows:

§ 697.3 Relation to other Federal and state laws.

* * * * *

(b) The relation of this part to other laws is further set forth in § 600.705 of this chapter and would include all regulations and statutes administered by the National Oceanic and Atmospheric Administration (NOAA), including, but not limited to the regulations in this part issued pursuant to the ACFCMA, the regulations at 50 CFR part 229 issued pursuant to the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), and the regulations at 50 CFR part 648 issued pursuant to the Magnuson-Stevens Act.

* * * * *

■ 4. In § 697.4, paragraphs (a)(7)(iv) and (b) are revised to read as follows:

§ 697.4 Vessel permits and trap tags.

* * * * *

(a) * * *

(7) * * *

(iv) Once a vessel has been issued a lobster management area designation certificate or limited access American lobster permit specifying the lobster EEZ management areas in which the vessel may fish, no changes to the EEZ management areas specified may be made for such vessel for the remainder of the fishing year. There are two exceptions to this re-designation restriction:

(A) Vessels that have been bought, transferred, or become a replacement vessel for another qualified vessel may request re-designation of the EEZ management areas within 45 days of the effective date of the vessel's permit; and

(B) All vessels will have one opportunity to request a correction in permit category, if such request is made in writing to the Regional Administrator within 45 days of the effective date of the vessel's permit.

* * * * *

(b) *Condition.* Vessel owners who apply for a Federal limited access American lobster permit under this section must agree, as a condition of the permit, that the vessel and vessel's fishing, catch, and pertinent gear (without regard to whether such fishing occurs in the EEZ or landward of the EEZ, and without regard to where such fish or gear are possessed, taken, or landed), are subject to all requirements of this part, as well as gear, time, and area restrictions issued or set forth in other parts, including, but not limited to, 50 CFR parts 229 and 648. The vessel and all such fishing, catch, and gear shall remain subject to all applicable state or local requirements. If a requirement of this part and a management measure required by state or local law differ, any vessel owner permitted to fish in the EEZ must comply with the more restrictive requirement.

■ 5. In § 697.7, paragraphs (c)(1)(i) and (c)(1)(v) are revised and paragraphs (c)(1)(xxvii) through (c)(1)(xxix) are added to read as follows:

§ 697.7 Prohibitions.

* * * * *

(c) * * *

(1) * * *

(i) Retain on board, land, or possess at or after landing, whole American lobsters that fail to meet the minimum carapace length standard specified in

§ 697.20(a). All American lobsters will be subject to inspection and enforcement action, up to and including the time when a dealer receives or possesses American lobsters for a commercial purpose.

* * * * *

(v) *V-notch.* (A) Retain on board, land, or possess any zero tolerance v-notched female American lobster when fishing in or electing to fish in EEZ Nearshore Lobster Management Area 1.

(B) Retain on board, land, or possess any standard v-notched female American lobster when fishing in or electing to fish in the EEZ Nearshore Management Area 2, 4, 5, 6, and the Outer Cape Lobster Management Area or the EEZ Offshore Management Area 3.

* * * * *

(xxvii) Possess, deploy, fish with, haul, harvest lobster from, or carry aboard a vessel trap gear issued to another vessel.

(xxviii) Fail to comply with any gear, time, or area restriction in this part or, as is explained in § 697.3 and § 697.4(b), fail to comply with any gear, time, or area regulation set forth in any other regulatory part, including part 229 and part 648.

(xxix) Retain on board, land, or possess at or after landing, whole American lobsters that exceed the maximum carapace length standard specified in § 697.20(b). All American lobsters will be subject to inspection and enforcement action, up to and including the time when a dealer receives or possesses American lobsters for a commercial purpose.

* * * * *

■ 6. In § 697.18, paragraph (f) is revised to read as follows:

§ 697.18 Lobster management areas.

* * * * *

(f) EEZ Nearshore Management Area 5. EEZ Nearshore Management Area 5 is defined by the area, including state and Federal waters that are near-shore in the southern Mid-Atlantic, bounded by straight lines connecting the following points, in the order stated:

Point	Latitude	Longitude
W	39°50'N.	74°09'W.
V1	39°50'N.	72°55'W.
X1	38°38.2'N.	73°33.8'W.
Y1	38°10.4'N.	73°49'W.
Z1	37°10.6'N.	74°38'W.
ZA1	35°31.9'N.	74°45.5'W.
ZB1	35°14.5'N.	75°19.3'W.
ZB	35°14.5'N.	75°31'W.

From Point “ZB”, along the coasts of North Carolina, Virginia, Maryland, Delaware, New Jersey back to Point “W”.

* * * * *

■ 7. Section 697.20 is revised to read as follows:

§ 697.20 Size, harvesting and landing requirements.

(a) *Minimum carapace length.* (1) The minimum carapace length for all American lobsters harvested in or from the EEZ Nearshore Management Area 1 or the EEZ Nearshore Management Area 6 is 3 ¼ inches (8.26 cm).

(2) The minimum carapace length for all American lobsters landed, harvested, or possessed by vessels issued a Federal limited access American lobster permit fishing in or electing to fish in the Nearshore Management Area 1 or the EEZ Nearshore Management Area 6 is 3 ¼ inches (8.26 cm).

(3) The minimum carapace length for all American lobsters harvested in or from the Nearshore Management Area 2, 4, 5, and the Outer Cape Lobster Management Area or the Offshore Management Area 3 is 3 ⅜ inches (8.57 cm).

(4) The minimum carapace length for all American lobsters landed, harvested, or possessed by vessels issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Nearshore Management Area 2, 4, 5, and the Outer Cape Lobster Management Area or the EEZ Offshore Management Area 3 is 3 ⅜ inches (8.57 cm).

(5) No person may ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any whole live American lobster that is smaller than the minimum size specified in paragraph (a) in this section.

(b) *Maximum carapace length.* (1) The maximum carapace length for all American lobster harvested in or from the EEZ Nearshore Management Area 1 is 5 inches (12.7 cm).

(2) The maximum carapace length for all American lobster landed, harvested, or possessed by vessels issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Nearshore Management Area 1 is 5 inches (12.7 cm).

(3) The maximum carapace length for all female American lobster harvested in or from the EEZ Nearshore Management Area 4 is 5 ¼ inches (13.34 cm), except as provided in paragraph (b)(7) of this section.

(4) The maximum carapace length for all female American lobster landed, harvested, or possessed by vessels issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Nearshore Management Area 4 is 5 ¼ inches (13.34 cm), except as provided in paragraph (b)(7) of this section.

(5) The maximum carapace length for all female American lobster harvested in or from the EEZ Nearshore Management Area 5 is 5 ½ inches (13.97 cm), except as provided in paragraph (b)(7) of this section.

(6) The maximum carapace length for all female American lobster landed, harvested, or possessed by vessels issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Nearshore Management Area 5 is 5 ½ inches (13.97 cm), except as provided in paragraph (b)(7) of this section.

(7) In the EEZ Nearshore Management Area 4 and EEZ Nearshore Management Area 5, recreational fishing vessels and divers engaged in recreational fishing, regardless of the platform from which they dive, are allowed to possess one female American lobster per fishing trip in excess of the maximum carapace length specified in paragraphs (b)(3) through (b)(6) of this section.

(c) *Mutilation.* (1) Subject to the rebuttable presumption in § 697.7(c)(3), no person may remove meat or any body appendage from any American lobster harvested in or from the EEZ before, or at the time of landing, or have in possession any American lobster part other than whole lobsters, up to the time when a dealer first receives or possesses American lobster.

(2) Subject to the rebuttable presumption in § 697.7(c)(3), no owner, operator or person aboard a vessel issued a Federal American lobster permit may remove meat or any body appendage from any American lobster before or at the time of landing, or have in possession any American lobster part other than whole lobsters, up to the time when a dealer first receives or possesses American lobster.

(d) *Berried females.* (1) Any berried female harvested in or from the EEZ must be returned to the sea immediately. If any berried female is harvested in or from the EEZ Nearshore Management Area 1, or in or from the EEZ Offshore Management Area 3 above 42°30', it must be v-notched before being returned to the sea immediately.

(2) Any berried female harvested or possessed by a vessel issued a Federal limited access American lobster permit must be returned to the sea immediately. If any berried female is harvested in or from the EEZ Nearshore Management Area 1, or in or from the EEZ Offshore Management Area 3 above 42°30', it must be v-notched before being returned to the sea immediately.

(3) No vessel, or owner, operator or person aboard a vessel issued a Federal limited access American lobster permit may possess any berried female.

(4) No person may possess, ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any berried female as specified in paragraph (d) of this section.

(e) *Removal of eggs.* (1) No person may remove, including, but not limited to, the forcible removal and removal by chemicals or other substances or liquids, extruded eggs attached to the abdominal appendages from any female American lobster.

(2) No owner, operator or person aboard a vessel issued a Federal limited access American lobster permit may remove, including but not limited to, the forcible removal, and removal by chemicals or other substances or liquids, extruded eggs attached to the abdominal appendages from any female American lobster.

(3) No person may possess, ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any whole live American lobster that bears evidence of the removal of extruded eggs from its abdominal appendages as specified in paragraph (e) of this section.

(f) *Spearing.* (1) No person may spear any American lobster in the EEZ.

(2) No person on a vessel issued a Federal lobster license may spear a lobster.

(3) No person may harvest or possess any American lobster which has been speared in the EEZ.

(4) No person on a vessel issued a Federal lobster license may harvest or possess any American lobster which has been speared.

(5) No person may possess, ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any American lobster which has been speared.

(g) *V-notched females.* (1) No person may possess any female lobster possessing a zero tolerance v-shaped notch harvested in or from the EEZ Nearshore Management Area 1.

(2) No vessel, owner, or operator issued a Federal limited access American lobster permit fishing in or electing to fish in EEZ Nearshore Management Area 1 may land, harvest, or possess any female lobster possessing a zero tolerance v-shaped notch.

(3) No person may possess any female lobster possessing a standard v-shaped notch harvested in or from the EEZ Nearshore Management Area 2, 4, 5, 6, and the Outer Cape Lobster Management Area or the EEZ Offshore Management Area 3 may possess.

(4) No vessel, owner, or operator issued a Federal limited access American lobster permit fishing in or

electing to fish in EEZ Nearshore Management Area 2, 4, 5, 6, and the Outer Cape Lobster Management Area or the EEZ Offshore Management Area 3 may land, harvest, or possess any female lobster possessing a standard v-shaped notch.

■ 8. In § 697.21, paragraphs (c) and (f) are revised to read as follows:

§ 697.21 Gear identification and marking, escape vent, maximum trap size, and ghost panel requirements.

* * * * *

(c) *Escape vents.* (1) All American lobster traps deployed or possessed in the EEZ Nearshore Management Area 1 or the EEZ Nearshore Management Area 6 or, deployed or possessed by a person on or from a vessel issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Nearshore Management Area 1 or the EEZ Nearshore Management Area 6, must include either of the following escape vents in the parlor section of the trap, located in such a manner that it will not be blocked or obstructed by any portion of the trap, associated gear, or the sea floor in normal use:

(i) A rectangular portal with an unobstructed opening not less than 1 15/16 inches (4.92 cm) by 5 3/4 inches (14.61 cm);

(ii) Two circular portals with unobstructed openings not less than 2 7/16 inches (6.19 cm) in diameter.

(2) All American lobster traps deployed or possessed in the EEZ Nearshore Management Area 2, 4, 5, and the Outer Cape Lobster Management Area or the EEZ Offshore Management Area 3, or, deployed or possessed by a person on or from a vessel issued a Federal limited access American lobster permit fishing in or electing to fish in the EEZ Nearshore Management Area 2, 4, 5, and the Outer Cape Lobster Management Area or the EEZ Offshore Management Area 3, must include either of the following escape vents in the parlor section of the trap, located in such a manner that it will not be blocked or obstructed by any portion of the trap, associated gear, or the sea floor in normal use:

(i) A rectangular portal with an unobstructed opening not less than 2 inches (5.08 cm) x 5 3/4 inches (14.61 cm);

(ii) Two circular portals with unobstructed openings not less than 2 5/8 inches (6.67 cm) in diameter.

(3) The Regional Administrator may, at the request of, or after consultation with, the Commission, approve and specify, through a technical amendment

of this final rule, any other type of acceptable escape vent that the Regional Administrator finds to be consistent with paragraph (c) of this section.

* * * * *

(f) *Enforcement action.* Unidentified, unmarked, unvented, improperly vented American lobster traps, or, beginning May 1, 2000, any untagged American lobster traps, or any lobster traps subject to the requirements and specifications of § 697.21, which fail to meet such requirements and specifications may be seized and disposed of in accordance with the provisions of 15 CFR part 904.

* * * * *

■ 9. In § 697.22, paragraph (c) is added as follows:

§ 697.22 Exempted fishing.

* * * * *

(c) The Regional Administrator, or the Director, as appropriate, may authorize a substitute vessel to haul ashore the lobster trap gear of an inoperable or mechanically-impaired federally permitted lobster vessel without having to engage in the exempted fishing process as specified in this section.

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