

# THE PROCESS OF “PROPERTY”: STASIS AND CHANGE IN LOBSTER MANAGEMENT IN SOUTHERN NEW ENGLAND

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## INTRODUCTION

Property rights in natural-resource management have become something of an obsession in the realm of marine-fisheries management and marine conservation.<sup>1</sup> Despite recent challenges,<sup>2</sup> the so-called rights-based fishing movement has considerable inertia. Interestingly, we have remarkably few detailed accounts of the processes by which people have attempted to put these ubiquitous ideas about “property” into effect by transforming existing fishery management regimes. There are studies of the results, of the performance under the new regime, but not of the *process* by which a new articulation between humans, nature, and commerce comes to be regarded as preferable for those people in that time and place. In this article, we present a detailed case study of such a transformation in the management of the commercial fishery for lobsters off southern New England.

How does “property” happen? In a very general sense, this is our research question in this article. That is, how is wild nature, or a claim of access to wild nature, commodified? By what process does this transformation of our relation with nature become accepted by the humans who construct these relations?

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† The authors thank the many individuals who generously gave their time to participate in the interviews that formed the fieldwork supporting this research.

1. For emphasis on property rights and natural resources generally, see MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY (Daniel W. Bromley ed., 1992); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990). For specific focus on fisheries, see RIGHTS BASED FISHING: PROCEEDINGS OF THE NATO ADVANCED RESEARCH WORKSHOP ON THE SCIENTIFIC FOUNDATIONS FOR RIGHTS BASED FISHING, REYKJAVIK, ICELAND, JUNE 27–JULY 1, 1988 (Philip A. Neher et al. eds., 1989) [hereinafter RIGHTS BASED FISHING]; 1 FishRights99 Conference, Nov. 11–19, 1999, *Use of Property Rights in Fisheries Management* 43, FAO Fisheries Technical Paper 404/1 (2000), available at <ftp://ftp.fao.org/docrep/fao/009/x7579e/x7579e.zip> [hereinafter *FishRights99 Conference*]; RÖGNVALDUR HANNESSON, THE PRIVATIZATION OF THE OCEANS (2004) (analyzing the development of economic institutions in world fisheries).

2. For critiques of the standard presentations of so-called rights-based fishing, see SETH MACINKO & DANIEL W. BROMLEY, WHO OWNS AMERICA’S FISHERIES? (2002); Seth Macinko & Daniel W. Bromley, *Property and Fisheries for the Twenty-First Century: Seeking Coherence from Legal and Economic Doctrine*, 28 VT. L. REV. 623 (2004).

Of course, this is a question for the ages. Proudhon famously answered this question with his declaration that “[p]roperty is theft.”<sup>3</sup> A counter-answer is that “[p]roperty is not theft, but a good deal of theft becomes property.”<sup>4</sup> Unfortunately, in the terrestrial realm, the processes of interest often happened so long ago that we have no accurate record of them and cannot assess these (or other) competing explanations. Lacking a history of how things happened, we are often left with Veblen’s wry quip regarding owners of natural resources that “these owners own these things because they own them.”<sup>5</sup> Without explicit knowledge of the processes of the past, we cannot inform processes in the present with the benefit of past experience.

In the marine realm, we have similarly lost the record of many processes important to the study of marine-resource use and management.<sup>6</sup> However, in the marine realm, we are only now witnessing some of the same transformations that occurred ages ago in the terrestrial realm. Most notable among these are the rearrangements in access to fisheries resources that have been informed by the notions about property rights mentioned above.

A particularly rich example of the process of creating and exerting claims to marine-fishery resources formally culminated on October 31, 2005, when the Atlantic States Marine Fisheries Commission voted to create an individual transferable trap (ITT) program in the commercial lobster fishery off Rhode Island and parts of Massachusetts.<sup>7</sup> This program, known as Addendum VII, is the basis of the case study presented in this article.

Although the broad focus of this article is an exposition of Addendum VII as a particular example of what is thought in much of the fisheries literature to be the creation of property,<sup>8</sup> our analysis of this process is

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3. PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 13 (Donald R. Kelley & Bonnie G. Smith, eds. & trans., 1994).

4. R.H. Tawney, *Property and Creative Work*, in THE ACQUISITIVE SOCIETY 70 (1920).

5. Thorstein Veblen, *The Natural Right of Investment*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 122 (C.B. Macpherson, ed., 1978).

6. See ARTHUR MCEVOY, THE FISHERMAN’S PROBLEM: ECOLOGY AND LAW IN CALIFORNIA FISHERIES, 1850–1980, at 19–40 (1986) (describing the modern loss of knowledge of the processes by which ancient indigenous societies developed sustainable practices that could inform present day fishery management).

7. ATL. STATES MARINE FISHERIES COMM’N, ADDENDUM VII TO AMENDMENT 3 TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN LOBSTER, at 3 (2005), available at <http://www.asmf.org/speciesDocuments/lobster/fmps/addendumVII.pdf> [hereinafter ADDENDUM VII].

8. We note that individual-transferable-trap (ITT) programs are in the margins of the rights-based fishing literature that is dominated by a focus on individual-transferable-quota (ITQ) programs. The distinction between these two programs is fundamental. ITTs are a form of input control because they focus on limiting what is put into the process of fishing (in this case traps or pots). ITQs are a form of output control because they focus on what is taken out of a fishery (i.e., how many fish are caught).

more precise, detailing the seemingly precipitous shift from stasis to change that occurred during the development of Addendum VII. The "change" that we refer to in the title of this article encompasses the development and approval of Addendum VII. The "stasis" that we refer to is the passage of time that preceded Addendum VII, reflected in the following four quotations, representative of ten years of lobster management in Southern New England:

**1995:** The first step in the proposed management program for Area 2 is to define the historic level of fishing effort . . . so as to *establish a cap on fishing effort*, beyond which further increases should not occur.<sup>9</sup>

**2000:** Recent discussions between Area 2 LCMT [Lobster Conservation Management Team] members have identified *the need to address effort controls* in Area 2 and develop qualification criteria for the Area 2 lobster fishery.<sup>10</sup>

**2001:** *[F]ishing effort should be controlled* and reduced in all sectors of the fishery to ensure long-term sustainability of the lobster stock and ensure long-term stability of the fishery within the bounds of natural fluctuations.

Management programs to *control fishing effort* should be developed . . . .<sup>11</sup>

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Although infrequently referred to, it is clear that ITTs are regarded as a form of property-rights-based fishing. For instance, Shotton notes of input-control systems like ITTs:

These may be exactly analogous in the sense of their property-rights attributes to ITQs, except that the right relates to the amount of fishing gear that can be used. A particularly well known example is the Western Australia lobster fishery where the unit of ownership is a [sic] individual lobster trap.

Ross Shotton, *Current Property Rights Systems in Fisheries Management* 46, in *FishRights99 Conference*, *supra* note 1. It should be understood that the rights-based fishing literature slides rather freely between the terms rights and property rights. See RIGHTS BASED FISHING, *supra* note 1; *FishRights99 Conference*, *supra* note 1. See generally Daniel H. Cole & Peter Z. Grossman, *The Meaning of Property Rights: Law versus Economics?*, 78 LAND ECON. 317 (2002) (demonstrating the dominant role played by economists in authoring the rights-based literature and the discrepancies between economists' and legal scholars' understanding regarding these concepts). In this article, we will simply focus on what many people think is "property," not whether it in fact *is* property.

9. ATL. STATES MARINE FISHERIES COMM'N, MANAGEMENT PROPOSAL FOR THE AMERICAN LOBSTER FISHERY IN LOBSTER MANAGEMENT AREA 2, at 1 (1995) (emphasis added).

10. Letter from Everett Mills, Chairman, Area 2 Lobster Conservation Mgmt. Team, and Thomas Angell, R.I. Dep't of Envtl. Mgmt., to Amy Schick, Atl. States Marine Fisheries Comm'n, (Sept. 28, 2000) (emphasis added) (on file with *Vermont Law Review*).

11. Atl. States Marine Fisheries Comm'n, Draft: Status of the Area 2 American Lobster and its Fishery; A Consensus Statement of the Area 2 LCMT (2001) (emphasis added) (on file with *Vermont Law Review*).

**2005:** The purpose of this management plan is to establish a multi-state *effort control program* for Lobster Conservation Management Area 2 that governs traps fished in state and federal waters to *cap effort* (traps fished) at recent levels . . . .<sup>12</sup>

The decade leading up to Addendum VII, as one may infer from the similarity of these passages, was not distinguished by much advancement or innovation in the policy arena. In fact, the history of these ten years was mostly one of lobster managers toying with the idea of effort control and coyly deflecting the various propositions brought before them. During this time, proposed plans came and went, and drafts were tinkered with and then forgotten. The individuals involved changed too. But the words were always the same: “cap effort,” “traps fished,” and “historic levels.”

The effort-control merry-go-round came to a halt in 2005, when Addendum VII, the culmination of that tortuous decade of drafts, was added to the Atlantic States Marine Fisheries Commission’s Interstate Fisheries Management Plan for American Lobster.<sup>13</sup> The revolutionary step of actually *passing* (and committing to)<sup>14</sup> an effort control plan was made all the more remarkable because the plan’s development, from start to finish, took only nine months.<sup>15</sup> But as the quotations above attest, this plan’s swift acceptance can be partially explained by the existence of many predecessors, which, though never enacted, established effort control as the axiomatic form of lobster management. Addendum VII’s exceptionality lies not only in its success after so many other plans failed, but also in the fact that it differed so little from its precursors. If this new plan is largely indistinct from the others, why did it break the cycle of rejection to become the blueprint for the future of lobster management in Southern New England?

In this article, we offer three interpretations of the plan’s success, each telling the tale of Addendum VII from a different angle. In the first of these interpretations, contained in Part II.A and entitled “Understanding Addendum VII: It’s About Effort Control,” we examine the ideas and ideologies behind the history-based transferable trap program. As will be

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12. ADDENDUM VII, *supra* note 7, at 3 (emphasis added).

13. *See* Atl. States Marine Fisheries Comm’n., Proceedings of the Atlantic States Marine Fisheries Commission American Lobster Management Board 46–57 (Oct. 31, 2005), <http://www.asmf.org/speciesdocuments/lobster/minutesandmeetingsummaries/board/2005/nov05proceedings.pdf>.

14. As we will discuss in Part I.B of this Article, this was not the first history-based effort-control plan that was passed for the Area 2 lobster fishery, but it was the only one implemented.

15. We measure the start of the Addendum VII process from the passage of Addendum VI in February 2005, which instructed the industry to work on a new effort-control program. *See infra* text accompanying notes 149–53.

clear from this Part, these ideas alone hardly seem compelling enough to engender a management plan with the weight of thirteen states behind it. Therefore, in Part II.F, entitled “Understanding Addendum VII: It’s About Addendum IV,” we point to a second force propelling the passage of the new plan: an old plan. Considered a “mistake,” Addendum IV was still on the books and approaching imminent implementation in 2005, necessitating the kind of rapid solution that Addendum VII was able to provide. In the third interpretation, in Part II.G, entitled “Understanding Addendum VII: It’s About Politics,” we explore the role of pressure tactics and political maneuvering used to adopt and implement Addendum VII.

To conclude each interpretation, we offer a tentative answer to the following research question, phrasing it as one of our key informants did: “And the purpose of [Addendum VII] is . . . what?”<sup>16</sup> This question, uttered two weeks before the approval of Addendum VII by a government official whose agency was involved in the development of the plan, was a succinct expression of the haziness surrounding the quick and unchallenged march of the effort-control plan towards implementation. We borrow it in this paper to reflect the atmosphere of befuddlement that, in our eyes, characterized much of the Addendum VII process.

Finally, after considering the contribution of these various factors to Addendum VII’s acceptance, we reflect on the Addendum VII effort control plan in the larger context of lobster management. Specifically, we explore interpretations of the plan as a bellwether in a changing lobster fishery and as a harbinger of possible future changes. We close with comments on the construction of new commodities, signifying new relations within the lobster industry and between nature and industry.

#### *A Note About Methods*<sup>17</sup>

The account that follows is based on standard approaches to historical research. We have endeavored to corral the archival record of lobster management in Southern New England with emphasis on the various

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16. Remark by Informant at a Connecticut Public Hearing about Addendum VII (on file with *Vermont Law Review*).

17. Narratives detailing “research methods” (procedures) are ubiquitous in the natural and social sciences but conspicuously absent in the realm of legal and political historiography. We believe policy researchers do have methods, and these methods warrant no less acknowledgment than those in the sciences. *[This Article diverges from the research methods of many legal articles in that it draws heavily from the authors’ personal experience and notes, rather than from widely available sources in traditional printed form. The Vermont Law Review has retained copies of all of the authors’ notes that went into the writing of this Article. If you are interested in obtaining copies of any such documents cited herein, we invite you to contact the Vermont Law Review. —Eds.]*

attempts at effort control. We provide the normal citations to this record and to the other printed authorities we rely upon. We supplement this archival approach by drawing on the rich tradition in the social sciences of talking to “key informants.”<sup>18</sup> Between March and November 2005, we conducted open-ended interviews with twenty-eight individuals drawn from the lobster industry, state and fishery managers, and others associated with the development of Addendum VII.<sup>19</sup> We have preserved the anonymity of all key informants and cite our field notes when presenting quotations from key informants. Throughout this paper, we use the terms “Addendum VII,” “the effort-control plan,” and “the transferable-trap plan” interchangeably.

## I. BACKGROUND: HISTORY AND PROCESS

### *A. The People, the Process, and the Plan: Overview of Addendum VII and Lobster Area Management*

American lobster (*Homarus americanus*) is managed throughout its range by the Lobster Management Board of the Atlantic States Marine Fisheries Commission (ASMFC).<sup>20</sup> The ASMFC manages twenty-two coastal fisheries, each of which is assigned to a separate species board containing representatives of all states with a stake in the species.<sup>21</sup> The ASMFC Lobster Management Board includes three delegates from each of eleven states, from Maine to North Carolina.<sup>22</sup> Each state’s contingent has one vote and includes a legislative appointee, a governor’s appointee, and the director of the state’s fisheries-management agency.<sup>23</sup> Representatives of the National Marine Fisheries Service (NMFS) attend the meetings but

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18. See, e.g., H. Russell Bernard, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES 346 (2000) (defining key informants as those “who are generally competent, highly articulate, and for whatever reason of their own, ready and willing to walk you through their culture and show you the ropes”).

19. Of these, twelve were members of the lobster industry, the majority of whom were members of the principal lobster-industry association and/or members of the Lobster Conservation Management Team. Current and past leadership of the association were represented. Ten were managers in state and federal positions, including state representatives on the Atlantic States Marine Fisheries Commission Lobster Management Board from Massachusetts, Rhode Island, and Connecticut, along with the federal representative on the Lobster Management Board. Three were critical participants in the “facilitated process” that produced the initial draft of the effort-control plan.

20. For a general overview of lobster management, see the Atlantic States Marine Fisheries Commission webpage, <http://www.asmfc.org>.

21. Atl. States Marine Fisheries Comm’n, Interstate Fisheries Management, <http://www.asmfc.org/interstate.htm> (last visited Nov. 16, 2008).

22. *Id.*

23. *Id.*

do not vote.<sup>24</sup> Instead, NMFS informs the Lobster Management Board of concerns relating to federal implementation of the Fisheries Management Plan for American Lobster.<sup>25</sup> The Lobster Management Board receives advice from an assortment of multi-state panels and subcommittees, with the most significant being the Technical Committee.<sup>26</sup> The eight-person Technical Committee includes one biologist from the state fisheries-management agency of each state from New Jersey to Maine.<sup>27</sup> Its duties include undertaking stock assessments and evaluating proposed management measures for technical value.<sup>28</sup>

Formulation of management measures by the Lobster Management Board begins with the LCMT process. Lobster Conservation and Management Teams (LCMTs) are regional groups appointed by the relevant states “to advise the Board concerning all aspects of the implementation of [Amendment 3], and to recommend changes to the management program.”<sup>29</sup> Each LCMT is responsible for a Lobster Management and Conservation Area. There are seven Conservation Areas in all, numbered 1 through 6 plus the Outer Cape Cod Lobster Management and Conservation Area. Membership in the LCMTs is not prescribed in any official document, but the Lobster Management Board and its affiliated states treat them as industry advisory bodies.

Area 2 (Inshore Southern New England), which encompasses the state waters of Rhode Island, the western state waters of Massachusetts, and the adjacent waters of the federal Exclusive Economic Zone (EEZ), has a LCMT of ten people. Currently, the Area 2 LCMT includes industry representatives from Rhode Island, Massachusetts, and Connecticut. Most of these individuals also sit on the boards of their respective state industry organizations—the Rhode Island Lobstermen’s Association and the Massachusetts Lobstermen’s Association.

Lobster management operates according to an interjurisdictional arrangement codified in the Atlantic Coastal Fisheries Cooperative Management Act of 1993.<sup>30</sup> After the Lobster Management Board approves

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. ATL. STATES MARINE FISHERIES COMM’N, FISHERY MANAGEMENT REPORT NO. 29: AMENDMENT 3 TO THE INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN LOBSTER iv (1997), available at <http://www.asmf.org/speciesDocuments/lobster/fmps/lobsterAmendment3.pdf> [hereinafter AMENDMENT 3].

30. Atlantic Coastal Fisheries Cooperative Management Act of 1993, 16 U.S.C. §§ 5101–5108 (2000).

a measure, it is the responsibility of the affected states to create rules to implement that measure in state waters. With any rule applicable to federal waters, the Lobster Management Board recommends complementary measures, which NMFS then evaluates in accordance with federal guidelines and implements if it chooses. Since the federal process tends to take longer than state processes, there is often significant lag time between Lobster Management Board approval of a rule and state implementation on the one hand, and federal rulemaking on the other.<sup>31</sup>

In addition to effort control, which is discussed extensively in this article, lobster management relies on a host of biological measures that restrict the size and sex of lobsters that are landed. Females may be landed only when they bear no eggs, and only when they have not been marked with a “V-notch.”<sup>32</sup> All traps must be equipped with an escape vent, and all landed lobsters must meet a minimum carapace length (known as a “gauge size”).<sup>33</sup> Gauge sizes vary among Lobster Conservation and Management Areas and are periodically increased in response to stock declines. Although the vast majority of lobsters are caught using traps, there is a small trawl fishery for lobsters,<sup>34</sup> to which a daily catch limit applies. In the trap fishery, catch is not limited, although the Technical Committee has at times recommended restrictions on overall landings.<sup>35</sup>

The central measure in Addendum VII is the creation of transferable-trap certificates based on historical participation. Eligibility is restricted to those individuals who held a federal permit or state license to catch lobster in Area 2 in any one of the years 2001 through 2003. Each participant’s allocation is determined by his “‘effective traps fished’ which is ‘the lower value of (1) the maximum number of traps calculated or reported fished for a year; [or] (2) the predicted number of traps that is required to catch the reported poundage of lobsters for a year.’”<sup>36</sup> Reductions in the total trap number will be accomplished passively, with a

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31. ERIC M. THUNBERG, NAT’L MARINE FISHERIES SERV., DEMOGRAPHIC AND ECONOMIC TRENDS IN THE NORTHEASTERN UNITED STATES LOBSTER (*HOMARUS AMERICANUS*) FISHERY, 1970–2005, at 6 (2007), available at <http://nefsc.noaa.gov/nefsc/publications/crd/crd0717/crd0717.pdf>.

32. See AMENDMENT 3, *supra* note 29, at 20 (stating that “it shall be unlawful to possess a V-notched female lobster,” and defining a V-notch as “a straight-sided triangular cut without setal hairs, at least 1/4 inch in depth and tapering to a sharp point”).

33. *Id.*

34. *Id.* at 2.

35. See, e.g., Lobster Modeling Subcomm., Atl. States Marine Fisheries Comm’n, Total Allowable Landings for Area 2 (Jan. 30, 2003) (on file with *Vermont Law Review*) (recommending an average value of 920,000 pounds for Area 2).

36. Addendum VII, *supra* note 7, at 6.



trap tax on every transfer,<sup>37</sup> and actively, on a percentage basis imposed across the fleet, if necessary.

### *B. History of Effort Control in Area 2*

In this section, we present a history of effort control in Southern New England lobster management, ending with the Addendum VII process of 2005.

#### 1. 1972–1999: Effort Control Comes of Age

Before 1976, lobster management was the province of state fisheries-management agencies and consisted mostly of biological measures.<sup>38</sup> The idea of managing effort in the fishery first arose in the context of the State/Federal Fishery Management Program. This program, an early attempt at cooperative management, was established in 1972 to provide a forum for states to coordinate management measures under federal supervision.<sup>39</sup> In the program’s founding principles, its creators expressed intent to develop an effort-control program.<sup>40</sup> However, the prevailing lobster-management structure shifted before this goal could be put into practice. This shift came with the 1976 Magnuson–Stevens Fishery Conservation and Management Act,<sup>41</sup> which extended U.S. jurisdiction over fisheries management to waters between 3 and 200 miles from shore and established the regional fisheries-management-council system to manage fisheries in these waters, including lobster.

The next twenty-three years were characterized by parallel state and federal lobster management. In state waters, states continued to coordinate lobster management, this time under the guidance of the ASMFC. The ASMFC had been “formed by the 15 Atlantic coast states in 1942 in recognition that fish do not adhere to political boundaries.”<sup>42</sup> Its founding mission was “to promote the better utilization of the fisheries, marine, shell

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37. During the discussions leading up to Addendum VII, this tax was presumed to be 10%. However, in the final version, a fixed number was taken out, although the existence of such a tax remained in the Addendum. Then, in Addendum IX, the trap tax on transfers in Area 2 was formally established to be 10%. ATL. STATES MARINE FISHERIES COMM’N, ADDENDUM IX TO AMENDMENT 3 OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN LOBSTER, at 1 (2006), *available at* <http://www.asmfc.org/speciesDocuments/lobster/fmps/lobsterAddendumIX.pdf>.

38. NE. MARINE FISHERIES BD., AMERICAN LOBSTER FISHERY MANAGEMENT PLAN, at 71 (1978).

39. *Id.* at 72.

40. *Id.* at tbl.18.

41. Magnuson–Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801–1884 (2000).

42. Atl. States Marine Fisheries Comm’n, About Us, <http://www.asmfc.org/aboutUs.htm> (last visited Nov. 16, 2008).

and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries.”<sup>43</sup> Lobster management under the ASMFC began with passage of the Interstate Fisheries Management Plan for American Lobster in 1978.<sup>44</sup> State cooperation was voluntary, however, until 1993, when the Atlantic Coastal Fisheries Cooperative Management Act granted NMFS the authority to enforce state compliance with ASMFC management measures.<sup>45</sup> Aside from limited-entry licensing programs in individual states, state lobster management under the Interstate Fisheries Management Plan did not incorporate effort control into its suite of management measures until 1997.<sup>46</sup>

In federal waters, lobster management under the New England Fishery Management Council (newly created by the Magnuson–Stevens Act) began in 1978 when the Northeast Marine Fisheries Board prepared a planning document.<sup>47</sup> This document proposed uniform measures throughout jurisdictions.<sup>48</sup> It also mentioned overcapitalization as an outstanding problem, and suggested reducing excess effort through limitations on licenses or traps.<sup>49</sup> This document formed the basis for the American Lobster Fisheries Management Plan (ALFMP), which was approved by the Council in 1983.<sup>50</sup> However, the influence of the Northeast Marine Fisheries Board document on the ALFMP was limited to biological measures; its effort-control suggestions were not incorporated in the Plan.

Effort control did not lose its allure, however, and in 1991 it got another moment in the spotlight. This time, it was in the context of Amendment 4 to the federal ALFMP, which evened out inconsistencies in the gauge size among state and federal waters.<sup>51</sup> Amendment 4 offered to

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43. Interstate Fisheries Compact, Pub. L. No. 77-539, 56 Stat. 267, 267 (1943).

44. *See* *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 112 (1st Cir. 2002).

Federal management of the American lobster began in 1978 when NMFS and the states of Maine, New Hampshire, Rhode Island, Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina developed a FMP pursuant to the Magnuson–Stevens Act. This effort resulted in the adoption and implementation of an Interstate Fishery Management Plan (“ISFMP”) for state and federal waters.

*Id.*

45. Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101–5108 (2000).

46. *See* AMENDMENT 3, *supra* note 29, at ii, 22.

47. Letter from Allen E. Peterson, Jr., Chairman, Ne. Marine Fisheries Bd., to Chairman, New England Fishery Mgmt. Council (Nov. 9, 1978), *in* NE MARINE FISHERIES BD., *supra* note 38.

48. *See id.* at 72 (describing a proposed “unified approach to management of the lobster fishery”).

49. *Id.* at 83–84.

50. THUNBERG, *supra* note 31, at 4.

51. *Id.* at 5. Although the ALFMP had instituted uniform gauge sizes, Amendment 2 to the ALFMP had initiated a schedule of gauge increases, and some states had elected not to implement these increases presumably due to market problems. *Id.* at 4–5.

reduce the gauge size in the EEZ to match that of most states and to eliminate further scheduled increases.<sup>52</sup> It stipulated a condition that states cooperate with the Council to develop and enact an effort-control program within two years.<sup>53</sup>

Biologists and industry members formed a Lobster Industry Working Group to take the lead on meeting this condition, and ended up advocating a regional approach to effort control that recognized different social and economic contexts in different areas.<sup>54</sup> Based on this advice, the Council approved Amendment 5 to the American Lobster Fisheries Management Plan (implemented in 1995), establishing limited-access lobster licenses and appointing four regional Effort Management Teams made up of state, Council, NMFS, and regional industry representatives.<sup>55</sup>

Amendment 5 gave the Effort Management Teams six months to develop regionally appropriate stock-rebuilding plans.<sup>56</sup> Although the teams met this deadline,<sup>57</sup> the Council failed to develop a plan based on their recommendations within the allotted time. One reason for the delay was that several states expressed concern over their inability to implement Effort Management Team proposals.<sup>58</sup> Faced with this scenario, NMFS published an advanced notice of proposed rulemaking in September 1995 that presented two options: a secretarial amendment implementing Effort Management Team recommendations, or transfer lobster-management authority to the ASMFC under the Atlantic Coastal Fisheries Cooperative Management Act.<sup>59</sup> In 1996, NMFS announced its intent to withdraw the American Lobster Fisheries Management Plan.<sup>60</sup> The rule cited doubts about the plan's ability to stem overfishing in the absence of improved coordination with the states.<sup>61</sup> The NMFS also expressed concerns over duplication of management efforts by the Council and the states, which had become unnecessary since the passage of the Atlantic Coastal Fisheries Cooperative Management Act.<sup>62</sup>

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52. *Id.* at 5.

53. THUNBERG, *supra* note 31, at 5. As our subsequent narrative will illustrate, this arrangement remarkably foreshadows the bargain that was embedded in Addendum VII.

54. *Id.*

55. Management Options for the American Lobster Fishery, 60 Fed. Reg. 48,086, 48,087 (Sept. 18, 1995) (to be codified at 50 C.F.R. pt. 649).

56. American Lobster Fishery, 59 Fed. Reg. 31,938 (June 21, 1994) (to be codified at 50 C.F.R. pt. 649).

57. Management Options for the American Lobster Fishery, 60 Fed. Reg. at 48,087.

58. *Id.*

59. *Id.* at 48,086.

60. Removal of Regulations, 61 Fed. Reg. 13,478, 13,478–79 (Mar. 27, 1996) (to be codified at 50 C.F.R. pt. 649).

61. *Id.*

62. *Id.*

Around the same time, the ASMFC began developing its own proposal for a new lobster-management framework that would jointly manage fisheries in state and federal waters.<sup>63</sup> This framework, which was adopted in 1997 as Amendment 3 to the Interstate Fisheries Management Plan for American Lobster,<sup>64</sup> was modeled on the regional effort-management system promoted in the Lobster Industry Working Group recommendations and pioneered in the Effort Management Team system.<sup>65</sup> It created seven Lobster Conservation and Management Areas, established trap-reduction plans for two of these areas (Area 1 and the Outer Cape Cod Lobster Conservation and Management Area), and gave the LCMTs of the remaining Lobster Conservation and Management Areas the option of developing their own effort-reduction plans.<sup>66</sup> In Areas 2 and 3, inaction by the LCMT would have obligated these areas to accept a default trap limit of 2000 traps per vessel in Area 3 and a gradual reduction to 800 traps per vessel in Area 2 by the year 2000.<sup>67</sup>

Meanwhile, at the federal level, the discussion of whether to transfer authority to ASMFC continued. In its 1998 Draft Environmental Impact Statement and Regulatory Review, NMFS evaluated the option of withdrawing the American Lobster Fisheries Management Plan.<sup>68</sup> NMFS expressed reservation over the short duration of the trap-reduction schedule, saying that a “three-year trap reduction strategy, by itself, is insufficient to end overfishing and rebuild stocks. A more stringent longer-term trap management strategy is essential . . . .”<sup>69</sup> However, “[b]oth federal and ASMFC managers agree that lobsters would most effectively be managed through an interstate plan under Atlantic Coastal Fisheries Conservation Management Act.”<sup>70</sup> In 1999, NMFS issued a final rule<sup>71</sup> that removed lobster-management regulations under the Magnuson–Stevens Act and replaced them with regulations under the Atlantic Coastal Fisheries Cooperative Management Act, including the area-based effort-control plan in the ASMFC’s Amendment 3.<sup>72</sup>

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63. NAT’L MARINE FISHERIES SERV., NE. REGION, DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS) AND REGULATORY IMPACT REVIEW: FEDERAL LOBSTER MANAGEMENT IN THE EXCLUSIVE ECONOMIC ZONE, at 8 (1998) [hereinafter NMFS DEIS].

64. AMENDMENT 3, *supra* note 29.

65. THUNBERG, *supra* note 31, at 6.

66. AMENDMENT 3, *supra* note 29, at iii–iv.

67. *Id.* at iv.

68. NMFS DEIS, *supra* note 61, at 23.

69. *Id.*

70. *Id.* at 1.

71. American Lobster Fishery, 64 Fed. Reg. 68,228 (Dec. 6, 1999) (to be codified at 15 C.F.R. pt. 902).

72. During our interviews, federal managers told us that the national standards of the

The same year, the ASMFC Lobster Management Board approved Addendum I to Amendment 3, wherein the Board formalized LCMT recommendations for trap-based effort-control programs that had been left open to LCMT deliberation in Amendment 3.<sup>73</sup> LCMTs in Areas 3, 4, 5, and 6 had each elected to establish trap-allocation programs based on the number of traps reported fished in a year of each participant’s election.<sup>74</sup> The Area 2 LCMT, on the other hand, had considered this kind of trap-allocation program,<sup>75</sup> but failed to reach consensus by the deadline.<sup>76</sup> Consequently, the ASMFC default plan went into effect for Area 2 in August 1999, and by 2001, all Area 2 operations were restricted to 800 traps per vessel.<sup>77</sup> Thus, for the first time in history, trap numbers in the American lobster fishery were restricted by law. However, in two Lobster Conservation and Management Areas—the Outer Cape Cod Area and Area 2—the story was not over yet.

## 2. The Rhode Island Lobstermen’s Association Push for Transferable Traps

Although the passage of Addendum I fulfilled the mandate to develop an effort-control plan for Area 2, not everyone in this Area was satisfied with this outcome.<sup>78</sup> Some industry members were concerned that the 800-trap cap on individuals did not accomplish an actual reduction of effort, since the total trap number permitted under the 800-trap cap was still higher than the total number of traps fished at that time.<sup>79</sup>

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Magnuson–Stevens Act no longer apply to the lobster fishery, even that portion of the fishery located in federal waters. We know of no focused history of this fascinating handoff of authority to the ASMFC, removing the lobster fishery from the Council/NMFS/Magnuson–Stevens Act assemblage.

73. ATL. STATES MARINE FISHERIES COMM’N, ADDENDUM I TO AMENDMENT 3 OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN LOBSTER, at 1 (1999) [hereinafter ADDENDUM I], available at <http://www.asmfc.org/speciesDocuments/lobster/fmps/lobsterAddendumIAm3.pdf>.

74. *Id.* at 5–7.

75. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of April 13, 1998 (on file with *Vermont Law Review*).

76. One issue appears to be the data on historic trap numbers in Area 2 is unavailable. At the February 1999 Lobster Management Board meeting, the chairman of the Area 2 LCMT said of the history-based allocation scheme proposed for Areas 3, 4, 5, and 6: “We have wanted this type of system forever. But it’s a historical participation, and we’re constantly told that we didn’t have enough data to do such a system. And so we abandoned it . . .” Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of Feb. 22, 1999 (statement of Bob Smith), available at <http://www.asmfc.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/1999/feb99bdminutes.pdf>.

77. ADDENDUM I, *supra* note 73, at 5.

78. See Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of June 27, 2000 (on file with *Vermont Law Review*).

79. See, e.g., Letter from Everett Mills, Chairman, Area 2 Lobster Conservation Mgmt. Team, and Thomas Angell, R.I. Dep’t of Envtl. Mgmt., to Amy Schick, Atl. States Marine Fisheries Comm’n, (Sept. 28, 2000) (on file with *Vermont Law Review*) (expressing dissatisfaction with Area 2 effort control).

Starting in 2000, the potential for effort to increase became a constant theme at LCMT meetings.<sup>80</sup>

In 2001, the Rhode Island Lobstermen's Association resurrected the idea of history-based trap allocations.<sup>81</sup> Based on a series of Rhode Island Lobstermen's Association workshops—featuring speakers familiar with Florida's Individual Transferable Trap program and funded by Rhode Island Sea Grant—the Association developed a proposed Transferable Trap Certificate and Trap Reduction Program.<sup>82</sup> This plan created two categories of license holders: those who actively fished during 1999–2000 were eligible to receive a trap allocation based on a traps-landings formula, 50% of which would be transferable, whereas latent license holders would receive only non-transferable traps.<sup>83</sup> When this plan was submitted to the LCMT, the transferability aspect faced resistance from LCMT members who were not in the Rhode Island Lobstermen's Association.<sup>84</sup> These members developed an alternate proposal, which, like the Rhode Island Lobstermen's Association plan, created two categories of license holders, but did not include transferability. Under the alternate proposal, license holders with more than 75 days of fishing or 51% of income derived from fishing would receive 800 non-transferable traps, and all others would receive 400 non-transferable traps.<sup>85</sup> Over time the two plans morphed into one plan to create four “bins,” or allocation levels, based on historical catch from 1991 to 2001, and a 10% trap tax on trap transfers to accomplish passive effort reductions.<sup>86</sup>

Also during 2001, Rhode Island held a series of public meetings dedicated to controlling effort in the lobster fishery as part of its commercial-fishing-license restructuring process.<sup>87</sup> The Effort Control and

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80. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of June 27, 2000 (on file with *Vermont Law Review*); Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Mar. 27, 2001 (on file with *Vermont Law Review*).

81. See R.I. Lobstermen's Ass'n, Notice for Meeting of Mar. 15, 2001 Concerning the ASMFC Lobster Management Plan (on file with *Vermont Law Review*).

82. R.I. Lobstermen's Ass'n, Outline of a Transferable Trap Certificate and Trap Reduction Program (Mar. 2001) (on file with *Vermont Law Review*).

83. *Id.*

84. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of June 5, 2001, at 2, available at <http://www.asmfc.org/speciesDocuments/lobster/minutesandmeetingsummaries/lcmts/area2/lcmt2min060501.pdf>. One member even resigned from the LCMT based on his objections to transferability. *Id.*

85. Area 2 LCMT, Atl. States Marine Fisheries Comm'n., Draft Lobster Management Plan for Rhode Island (Area 2) (Mar. 26, 2001) (on file with *Vermont Law Review*).

86. Lobster Mgmt. Subcomm., R.I. Dep't of Env'tl Mgmt., Fisheries Mgmt. Project—Phase 2, *Meeting Summary*, Meeting of Nov. 6, 2001 (on file with *Vermont Law Review*).

87. Lobster Mgmt. Subcomm., R.I. Dep't of Env'tl Mgmt, Fisheries Mgmt. Project—Phase 2, *Meeting Summary*, Meeting of Nov. 20, 2001 (on file with *Vermont Law Review*); Lobster Mgmt.

Consolidation plan, one of several proposals submitted by industry during this process, gained sufficient support to rival the LCMT plan, for which the Rhode Island Department of Environmental Management advocated.<sup>88</sup> The Effort Control and Consolidation plan used landings records to divide license holders into full-time and part-time lobstermen; full-timers would be given 800 traps and part-timers would be given 400 traps.<sup>89</sup> Individual traps would not be made transferable under this plan; instead, lobstermen could transfer licenses along with the accompanying trap allocation, but would be subject to a 50% reduction with license transfers.<sup>90</sup> Once consolidated, licenses could not be unconsolidated.<sup>91</sup>

Ultimately, the Rhode Island lobster-license restructuring process resulted in a limited-entry system for licenses in Rhode Island, but did not take action on trap reduction.<sup>92</sup> Trap-based effort control went back to being the province of the LCMT.<sup>93</sup> Rhode Island's main contribution to the restructuring meetings, and to the course of history in this regard, was its role as an incubator of the Effort Control and Consolidation plan.

When presented to the LCMT, the Effort Control and Consolidation plan met with resistance from the members who had developed what was known as the LCMT plan.<sup>94</sup> Referring to the former plan as the "non-LCMT plan," these members criticized the Effort Control and Consolidation plan's initiator, who was an LCMT alternate, for taking a "back door" approach.<sup>95</sup> Nonetheless, this plan was forwarded to the Lobster Management Board along with the LCMT plan for consideration as options to control trap effort in Area 2.<sup>96</sup> The LCMT's submission of

Subcomm., R.I. Dep't of Env'tl Mgmt, Fisheries Mgmt. Project—Phase 2, *Meeting Summary*, Meeting of Nov. 13, 2001 (on file with *Vermont Law Review*); Lobster Mgmt. Subcomm., R.I. Dep't of Env'tl Mgmt, Fisheries Mgmt. Project—Phase 2, *Meeting Summary*, Meeting of Nov. 6, 2001 (on file with *Vermont Law Review*); Lobster Mgmt. Subcomm., R.I. Dep't of Env'tl Mgmt, Fisheries Mgmt. Project—Phase 2, *Meeting Summary*, Meeting of Oct. 23, 2001 (on file with *Vermont Law Review*).

88. See *supra* note 87 (outlining series of Rhode Island Department of Environmental Management meetings regarding commercial-fishing-license restructuring).

89. Lobster Mgmt. Subcomm., R.I. Dep't of Env'tl Mgmt, Fisheries Mgmt. Project—Phase 2, *Meeting Summary*, Meeting of Oct. 23, 2001 (on file with *Vermont Law Review*).

90. *Id.*

91. *Id.*

92. See 2002 R.I. Pub. Laws 47; see also L.C. 01698, Gen. Assem. Jan. Sess. (R.I. 2002) (making all of Area 2 subject to this form of effort control because Massachusetts had imposed limited entry in the 1970s, and federal regulations governing the EEZ banned the issuing of federal permits in 1994).

93. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Nov. 28, 2001 (on file with *Vermont Law Review*).

94. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Feb. 5, 2002, at 4, available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingsummaries/lcmts/area2/lcmt2min020502.pdf>.

95. *Id.*

96. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Feb. 5,

two competing plans raised suspicion on the Lobster Management Board and signaled to the board members that the LCMT plan did not have enough support to be seriously considered for implementation.<sup>97</sup> As a consequence, the Lobster Management Board declined to review either plan until the LCMT came up with a single plan representing an industry-wide compromise.<sup>98</sup>

Thus motivated, in March 2002, the LCMT set about reducing the two plans to a single plan.<sup>99</sup> Since active reductions were a major sticking point for proponents of the Effort Control and Consolidation plan,<sup>100</sup> this component was removed from the LCMT plan.<sup>101</sup> Around this time, LCMT meetings became more adversarial, with new industry members showing up and questioning the need for any plan.<sup>102</sup> After all, since Addendum I had satisfied the Lobster Management Board's mandate for effort control in Area 2, the new proposed plan was entirely an LCMT initiative. Many participants in these meetings concluded that the plan was more about achieving competitive gain for larger lobster businesses than about conserving the resource.<sup>103</sup> The Lobster Management Board approved the combined LCMT plan April 2002 by a margin of just one vote.<sup>104</sup> This was the last LCMT meeting until February 2003; during this time, the rift that had become evident at the last few meetings deepened, and would define the next few years of lobster management in Area 2.

### 3. The "RILA Revolution" and the Declaration of Crisis

The LCMT plan was then in the hands of the Lobster Management Board, which continued to delay considering it for implementation, and questioned the need for additional effort control that would go above and

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2002, at 1–3, available at <http://www.asmfcr.org/speciesDocuments/lobster/minutesandmeetingssummaries/lcmts/area2/lcmt2min020502.pdf>.

97. *Id.* at 50–57.

98. *Id.* at 57.

99. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Mar. 13, 2002 (on file with *Vermont Law Review*). See also Area 2 LCMT, Atl. States Marine Fisheries Comm'n, Plan Modification Proposal (Mar. 13, 2002) (on file with *Vermont Law Review*).

100. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Mar. 26, 2002 (on file with *Vermont Law Review*) (statement of William McElroy).

101. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Apr. 23, 2002 (on file with *Vermont Law Review*).

102. *Id.*; Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Mar. 26, 2002 (on file with *Vermont Law Review*).

103. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Mar. 26, 2002 (on file with *Vermont Law Review*).

104. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Apr. 23, 2002 (on file with *Vermont Law Review*).



beyond established conservation requirements.<sup>105</sup> However, anecdotal evidence of declining lobster stocks, cited frequently by the plan's proponents in their lobbying efforts at Lobster Management Board meetings,<sup>106</sup> convinced the Lobster Management Board in August 2002 to request the opinion of the Technical Committee on the magnitude of the problem.<sup>107</sup>

The Technical Committee reported back in October 2002, affirming industry concerns of a stock collapse.<sup>108</sup> Not only was the stock in trouble, the Technical Committee declared, but current measures were insufficient to reverse the decline.<sup>109</sup> Much more would be needed: not only did the biologists recommend tasking the LCMT "to develop a plan that immediately reduces system wide effective effort," they also urged the Lobster Management Board to reduce fishing mortality.<sup>110</sup> In a subsequent declaration, a Technical Committee subcommittee defined optimal mortality as no more than 920,000 pounds of lobsters landed per year.<sup>111</sup> This echoed the comments of a Lobster Management Board member and Rhode Island state manager, who said at the August 2002 Lobster Management Board meeting, "I doubt that including transferable trap tag programs in [the next Addendum] is going to get us any faster [a] response to this problem than we have right now. We probably need immediate fishing mortality reductions in these areas."<sup>112</sup> Shortly thereafter, an Area 2 Subcommittee formed and recommended that the Lobster Management Board take emergency action to save the Area 2 fishery.<sup>113</sup>

The LCMT reconvened in February 2003, under a directive from the Lobster Management Board, to develop measures that responded to the Technical Committee's declared need for reduced mortality.<sup>114</sup> During the

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105. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm'n, *Transcript*, Proceedings of May 20, 2002, at 34-40, available at <http://www.asmfc.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/2002/may02proceedings.pdf>.

106. *E.g.*, *id.* at 39 (statement of John Sorlien, LCMT member).

107. *Id.*

108. LOBSTER TECHNICAL COMM., ATL. STATES MARINE FISHERIES COMM'N, TECHNICAL ANALYSIS OF THE CHRONOLOGY AND SPATIAL EXTENT OF AREA 2 STOCK DECLINES, at 1 (2002).

109. *Id.*

110. *Id.*

111. Lobster Modeling Subcomm., Atl. States Marine Fisheries Comm'n, Total Allowable Landings for Area 2, at 1 (Jan. 30, 2003)

112. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm'n, *Transcript*, Proceedings of Aug. 26, 2002, at 45, available at <http://www.asmfc.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/2002/aug02proceedings.pdf> (statement of Bob Gibson, R.I. Lobstermen's Ass'n Bd. Member).

113. Atl. States Marine Fisheries Comm'n, ASMFC Plan Review Team Report Area 2 Emergency Action (Feb. 2003) (on file with *Vermont Law Review*).

114. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Feb. 5, 2003, at 1, available at <http://www.asmfc.org/speciesDocuments/lobster/minutesandmeeting>

lapse in LCMT meetings, the Rhode Island Lobstermen's Association experienced a change of leadership, brought about in large part by ideological differences within the organization concerning the idea of transferability and stringent trap caps. As a result of this change, the Association no longer pushed the LCMT plan of the previous year,<sup>115</sup> and instead favored a buy-out program combined with a temporary trap freeze and biological measures.<sup>116</sup> Encouraged by rumors of government financial assistance, the LCMT voted unanimously to declare that a biological crisis was affecting the Area 2 lobster resource.<sup>117</sup> Their vote on the option of freezing effort reflected the changing composition of the LCMT; half of the members abstained from the vote, and the Chair had to break a tie to approve a motion to continue work on some sort of effort-control plan.<sup>118</sup> Clearly, a shift had occurred since the year before, when the LCMT led the charge for a transferable-trap plan.

Despite the LCMT's new reluctance on effort control, the ball was already rolling, and it was in the Lobster Management Board's court.<sup>119</sup> A Technical Committee review of the LCMT submission at the February 2003 Lobster Management Board meeting concluded that the LCMT's latest submission reduced neither effort nor mortality.<sup>120</sup> This finding

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summaries/lcmts/area2/area2lcmt02053.pdf.

115. The Massachusetts Lobstermen's Association was apparently not pushing the LCMT plan either, although it is not clear to us what its involvement, if any, had been all along. In a letter to the Lobster Management Board, Henry Cebula, LCMT Chair of Area 2, criticized the Massachusetts Lobstermen's Association for giving in "to the whims of Area 1" lobstermen, who form the bulk of the Association's membership, and were afraid that a transferable-trap program in Area 2 would set a precedent they were not comfortable with. Am. Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm'n, *Transcript*, Proceedings of Feb. 26, 2003, at 28-30, available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/2003/feb03proceedings.pdf> [hereinafter ALMB Proceedings of Feb. 26, 2003] (statement of Henry Cebula, Chairman, Area 2 LCMT).

116. R.I. Lobstermen's Ass'n, Draft Development of a Management Plan for Area 2 (Feb. 4, 2003). The Rhode Island Lobstermen's Association Board also voted unanimously to reject any limit on landings such as that recommended by the Technical Committee. *Id.*

117. Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Feb. 5, 2003, at 6, available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingsummaries/lcmts/area2/area2lcmt020503.pdf>.

118. *Id.*

119. During this time, the State of Massachusetts was engaged in a process that culminated in a transferable-trap program for the Outer Cape area in that state. MASS. DIV. OF MARINE FISHERIES, EXECUTIVE SUMMARY: PROPOSED EFFORT CONTROL PLAN FOR THE MASSACHUSETTS COMMERCIAL LOBSTER FISHERY 3 (2003). As we will discuss below, the Outer Cape plan was to play an important role in the development of the plan that became Addendum VII. The pioneering effort by Massachusetts and recognition of its wider influence are found in: Memorandum from Paul Diodati, Dir., Commonwealth of Mass. Div. of Marine Fisheries, on DMF Recommendations Regarding 2002 Regulation Changes for American Lobster Commercial Fisheries (Apr. 3, 2002) (on file with *Vermont Law Review*).

120. ALMB Proceedings of Feb. 26, 2003, *supra* note 115, at 32. See also TECHNICAL COMM.,

moved at least one Lobster Management Board member to go so far as to suggest ignoring the LCMT process and relying on the Lobster Management Board and Technical Committee to develop a proposal.<sup>121</sup> Instead, the Lobster Management Board voted to take emergency action: it sped up the schedule for two additional gauge increases and committed itself and the Area 2 LCMT to the development of effort-control measures.<sup>122</sup> The LCMT's aspirations of financial assistance failed to materialize; instead, the LCMT faced an uphill battle to come up with a new plan that was acceptable to a divided industry no longer in favor of effort control. As managers are wont to say of the incident, "if you ask for an emergency, you'd better treat it like an emergency."<sup>123</sup> It was then on the shoulders of the LCMT to get itself out of this bind.

It was around this time that industry members began to make the case that the effort had already been reduced—passively, when lobstermen were forced to look elsewhere for income.<sup>124</sup> The claim that this passive reduction should satisfy at least some of the requirements for effort reduction led the Rhode Island Lobstermen's Association to track attrition as part of satisfying the Lobster Management Board mandate.<sup>125</sup> However, the Lobster Management Board stepped up its supervision of the LCMT process, and the Board's alarm, caused by the Technical Committee report, was not likely to be so easily allayed. The Lobster Management Board appointed a Plan Development Team to help the LCMT identify effort-control options; based on meetings with the LCMT, the Plan Development Team recommended combining effort control and reduction with other measures, such as a landings quota or a closed season.<sup>126</sup>

Then, in May of 2003, the Rhode Island Lobstermen's Association suddenly delivered a proposal to the LCMT that mustered enough industry support to become a draft plan.<sup>127</sup> This plan would allow anyone with landings of more than 999 pounds in any year between 1999 and 2003 to

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ATL. STATES MARINE FISHERIES COMM'N, AREA 2 LCMT PROPOSAL (2003) (commenting on the Area 2 LCMT proposal) (on file with *Vermont Law Review*).

121. ALMB Proceedings of Feb. 26, 2003, *supra* note 115, at 31–32.

122. *Id.* at 39.

123. Interview with Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

124. R.I. Lobstermen's Ass'n, Draft of RILA Lobster Fishery Mgmt. Plan and Statements on Data Used for Technical Committee Decisions, at 1 (Apr. 4, 2003) (on file with *Vermont Law Review*).

125. *Id.* at 6.

126. Plan Dev. Team, Management Options for Lobster Conservation Management Area 2, at 2 (May 2003) (on file with *Vermont Law Review*).

127. See Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of May 28, 2003, available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingsummaries/lcmts/area2/asmfcaarea2lcmt052803.pdf> (noting that the Management Team voted to adopt the RILA proposal and submit it to the Lobster Management Board at their June meeting).

fish 800 transferable traps, and anyone with between 1 and 999 pounds to fish 100 transferable traps.<sup>128</sup> Though not the government financial assistance much of industry hoped for, this plan was met with little resistance from industry because it allowed most lobstermen to continue fishing at current levels.<sup>129</sup> In August 2003, the LCMT approved the plan and forwarded it to the Lobster Management Board for consideration in Addendum IV.<sup>130</sup>

At first, it appeared that the plan had no greater chance of success at the Lobster Management Board than the buyout proposal of earlier that year.<sup>131</sup> The Technical Committee review of the LCMT plan warned that the plan “was not stringent enough and would not effectively cap or reduce fishing effort in the short term,” because it “has the potential to allow a trap increase over current numbers.”<sup>132</sup> The Lobster Management Board’s Socio-Economic Subcommittee pointed out that, far from removing latent effort, the LCMT plan “formalizes much of the latent effort in the lobster fishery in this area, because many of the license holders who currently fish less than 800 traps will be allocated 800 traps to either fish themselves or to sell.”<sup>133</sup> The NMFS, too, had concerns with the proposed plan. The agency stressed that it would not allow implementation of a plan allocating 100 traps to fisherman with landings of 999 pounds while allocating eight times as many traps to those landing one pound more.<sup>134</sup>

Defying all predictions,<sup>135</sup> the Lobster Management Board approved the plan as part of Addendum IV at their December 2003 meeting,<sup>136</sup> with

128. *Id.*

129. *Id.*

130. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of Aug. 21, 2003 (on file with *Vermont Law Review*). At this time, the LCMT also made a motion to declare that there was not a crisis in the Area 2 lobster stock and to urge the Lobster Management Board to cancel the emergency action. *Id.*

131. *E.g.*, American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of Dec. 17, 2003, at 53, available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/2003/dec03proceedings.pdf> [hereinafter ALMB Proceedings of Dec. 17, 2003] (statement of George Lapointe, Chairman, Am. Lobster Mgmt. Bd.).

132. *Id.* at 52 (statement of Bob Glenn, Chairman, Technical Comm.).

133. *Id.* at 51 (statement of Carrie Selberg, Staff Member, Atl. States Marine Fisheries Comm’n.).

134. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of Nov. 17, 2003 (on file with *Vermont Law Review*). This sentiment was echoed by Harry Mears (of the NMFS) at the December 2003, Lobster Management Board meeting: “One comment I have is that I look at that knife-edge differential as incredibly discriminatory in terms of making that decision at that specific point and allowing that differential in effort.” ALMB Proceedings of Dec. 17, 2003, *supra* note 131, at 60 (statement of Harry Mears, Board Member, Am. Lobster Mgmt. Bd.).

135. Even Massachusetts and Rhode Island managers, who themselves promoted and voted in favor of the plan, were shocked when it was actually approved. Interview with Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

136. *See* ATL. STATES MARINE FISHERIES COMM’N, ADDENDUM IV TO AMENDMENT 3 TO

one minor change in the cut-off-poundage criterion.<sup>137</sup> Curiously, Massachusetts and Rhode Island managers (who introduced the plan into the addendum), voted against the plan.<sup>138</sup> A second surprise came seconds later when the representative of the Rhode Island management agency made a motion to further increase the gauge size in Area 2 to match that of Area 3.<sup>139</sup> Despite opposition from his Massachusetts counterpart<sup>140</sup> and by the Rhode Island Lobstermen’s Association,<sup>141</sup> the motion carried, thus establishing four additional gauge increases to be implemented over the next four years.<sup>142</sup> A year in the making, Addendum IV took its final shape in a matter of minutes, with minimal deliberation from the Lobster Management Board and despite the clear objections of many experts.

#### 4. The Retreat

It was scarcely a surprise then, when soon after passage of Addendum IV, the jurisdictions affected—Rhode Island, Massachusetts, and the NMFS—began struggling with many of the same details that were identified during the plan’s formation. The first problem to arise was the challenge of implementing a transferable-trap program. At the March 2004 Lobster Management Board meeting, an ASMFC staff member announced that “I would go as far as to say I’ve been flooded with calls from those jurisdictions, as well as the fishermen from those areas, asking about the details of the transferability program.”<sup>143</sup> The Lobster Management Board

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THE INTERSTATE FISHERY MGMT. PLAN FOR AMERICAN LOBSTER, at 2 (2003), *available at* <http://www.asmfc.org/speciesDocuments/lobster/fimps/lobsterAddendumIV.pdf> [hereinafter *ADDENDUM IV*]. (explaining that the Area 2 effort-control plan was one of several components of Addendum IV, which was created “to address four different issues: a proposal from the Area 3 LCMT; concern about stock conditions in Area 2; new information about vent selectivity; and a desire to change the interpretation of the most restrictive rule”).

137. ALMB Proceedings of Dec. 17, 2003, *supra* note 131, at 61. The final version of Addendum IV allowed fishermen with documented landings of 2000 pounds or more, in any year between 1999 and 2003, to continue fishing the 800 traps allowed under the current uniform trap limit, and gave all others an allocation of 100 trap tags. *ADDENDUM IV*, *supra* note 134, at 13.

138. Interview with Industry Member & Alternate on Am. Lobster Mgmt. Bd. (on file with *Vermont Law Review*).

139. ALMB Proceedings of Dec. 17, 2003, *supra* note 131, at 61 (statement of Mark Gibson, Board Member, Am. Lobster Mgmt. Bd.).

140. Massachusetts’ opposition was based on the fact that the state manages three Lobster Conservation and Management Areas and tends to strive for consistency between the three to simplify its management requirements. *Id.* at 62 (statement of Paul Diodati, Board Member, Am. Lobster Mgmt. Bd.).

141. *Id.* at 63.

142. *Id.* (statement of George Lapointe, Chairman, Am. Lobster Mgmt. Bd.).

143. Am. Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of Mar. 8, 2004, at 29, *available at* <http://www.asmfc.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/2004/march04Proceedings.pdf> (statement of Carrie Selberg, Staff

responded by appointing a Transferability Subcommittee,<sup>144</sup> which met in May 2004 and advised the Lobster Management Board to postpone implementation of the Area 2 portion of Addendum IV.<sup>145</sup>

According to the Transferability Subcommittee, the implementation stalled because NMFS preferred to wait until Congress acted upon the U.S. Commission on Ocean Policy's recommendation to direct NMFS to issue national guidelines on "Dedicated Access Privileges."<sup>146</sup> But soon more problems became apparent at Lobster Management Board meetings. For one, the "plan [was] ineffective at controlling effort"<sup>147</sup> because it allowed lobstermen to build up within their trap brackets, prompting one Lobster Management Board member to "estimate that it would take probably 20 years or more before we saw the number of traps actually reduced to below the current levels."<sup>148</sup> While Lobster Management Board members went back and forth on these issues, the June 1, 2005 Addendum IV implementation deadline was fast approaching.

With no hope of resolving these issues in such a short timeframe, the Lobster Management Board began, in August 2004, to consider the Transferability Subcommittee's suggestion to revoke the Area 2 effort-control plan.<sup>149</sup> Taking their cue even before the Lobster Management Board made a decision, the LCMT called a meeting to discuss formation of a new plan.<sup>150</sup> The Board passed Addendum VI in February 2005, revoking the effort-control portion of the Area 2 section of Addendum IV<sup>151</sup> and instructing the LCMT to "develop a new effort control plan, which caps effort at or near current levels with the potential to adjust the levels based

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Member, Atl. States Marine Fisheries Comm'n).

144. *Id.*

145. Lobster Transferability Subcomm., Atl. States Marine Fisheries Comm'n, May 2004 Progress Report and Recommendations, at 1 (May 2004) (on file with *Vermont Law Review*).

146. *Id.* See also U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT OF THE U.S. COMMISSION ON OCEAN POLICY 288-90 (2004), available at [http://oceancommission.gov/documents/full\\_color\\_rpt/19\\_chapter19.pdf](http://oceancommission.gov/documents/full_color_rpt/19_chapter19.pdf).

147. Am. Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm'n, *Transcript*, Proceedings of Aug. 17, 2004, at 5-6, available at <http://www.asmf.org/meetings/63rdAnnualMeeting/documents/LOBSTERBOARD.pdf> [hereinafter ALMB Proceedings of Aug. 17, 2004] (statement of Dan McKiernan, Bd. Member, Am. Lobster Mgmt. Bd.).

148. *Id.* at 6.

149. *Id.* at 7-8.

150. ATL. STATES MARINE FISHERIES COMM'N, PROCEEDINGS OF THE ATL. STATES MARINE FISHERIES COMM'N AMERICAN LOBSTER MGMT. BD. 13 (Nov. 2004) (statement of Patten D. White, Chairman, Am. Lobster Mgmt. Bd.).

151. Only the effort-control portion was canceled; the gauge-increase schedule remained in place, due to a decision by the Lobster Management Board to keep them as "the negotiating chip put on the table at the first LCMT; we'll work hard with you on effort control, but you've got to show us some flexibility on the gauge." *Id.* at 16 (statement of Mark Gibson, Bd. Member, Am. Lobster Mgmt. Bd.).

on the outcome of the upcoming stock assessment.”<sup>152</sup> By this time, the LCMT had already held two meetings on the subject.<sup>153</sup>

Almost from the start, the only type of plan seriously considered by the LCMT was a transferable-trap program featuring initial allocations based on past history (performance-based).<sup>154</sup> Rather than just use reported history of trap usage, the initial allocations would be based on a mathematical formula relating traps to landings (ultimately, this type of formula was instituted in Addendum VII).<sup>155</sup> The LCMT embraced this format due not to a sudden spark of inspiration, but because of a “straw man” proposal offered by Massachusetts’ managers at the January 2005 LCMT meeting.<sup>156</sup> Modeled after the effort-control program recently established for the lobster fishery in the Outer Cape Cod Lobster Conservation and Management Area,<sup>157</sup> this plan clearly had the backing of managers<sup>158</sup> and was a likely candidate to end the cycle of plan development.<sup>159</sup>

Between the January 2005 and the April 2005 LCMT meetings, the Boards of Directors of the Rhode Island Lobstermen’s Association and the Massachusetts Lobstermen’s Association held a series of five meetings with two hired facilitators.<sup>160</sup> The facilitators were individuals knowledgeable

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152. ATL. STATES MARINE FISHERIES COMM’N, ADDENDUM VI TO AMENDMENT 3 OF THE INTERSTATE FISHERY MANAGEMENT PLAN FOR AMERICAN LOBSTER 1, 3 (2005), available at <http://www.asmf.org/speciesDocuments/lobster/fimps/lobsterAddendumVI.pdf> [hereinafter ADDENDUM VI].

153. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of Feb. 2005, at 17 (on file with *Vermont Law Review*).

154. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of Jan. 19, 2005 (on file with *Vermont Law Review*).

155. *Id.* Industry and managers feared that there was widespread misreporting of the number of traps used and that basing an allocation on reported trap usage would effectively reward those who had over-reported their trap usage the most. The formula was developed in response to the over-reporting fear and essentially based allocations on the relationship of pounds landed to traps reported, averaged over the entire fleet. *Id.*

156. *Id.*

157. See MASS. DIV. OF MARINE FISHERIES, NEW REGULATIONS ON ISSUANCE OF OFFSHORE AND COASTAL LOBSTER PERMITS AND FINAL DETAILS ON THE OUTER CAPE COD LOBSTER TRAP EFFORT CONTROL PLAN 1–3 (2003), available at [http://www.mass.gov/dfele/dmf/marinefisheriesnotices/nov\\_mfc\\_actions\\_120403.pdf](http://www.mass.gov/dfele/dmf/marinefisheriesnotices/nov_mfc_actions_120403.pdf); ADDENDUM IV, *supra* note 136, at 2, 6 (enlarging circular-escape-vent size requirements).

158. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of May 28, 2003, available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingssummaries/lcmts/area2/asmfcaarea2lcmt052803.pdf>.

159. Am. Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of Feb. 2005, at 15 (on file with *Vermont Law Review*) (statement of Mr. Gibson).

160. The minutes from February 9 and 16 refer to a meeting on February 2, 2005. The February 16 minutes also refer to the “next” meeting on February 22. We were unable to locate minutes from either February 2 or February 22. R.I. Lobstermen’s Ass’n & Mass. Lobstermen’s Assn, *Meeting Summary*, Board of Directors Meeting of Mar. 2, 2005 (on file with *Vermont Law Review*); R.I. Lobstermen’s Ass’n & Mass. Lobstermen’s Assn, *Meeting Summary*, Board of Directors Meeting of Feb. 16, 2005 (on file with *Vermont Law Review*); R.I. Lobstermen’s Ass’n & Mass. Lobstermen’s Assn,

about fisheries management in Rhode Island due to past involvement in various aspects of management. The idea of facilitation came about because of tensions within the group and because the Rhode Island Lobstermen's Association leadership thought that facilitator involvement would lend more legitimacy to the process when the proposal came up for Lobster Management Board review.<sup>161</sup> Facilitation was financed by Rhode Island Sea Grant, which also contributed the participation of a technical expert.<sup>162</sup> Following the same process used in the Outer Cape Cod allocation process, Massachusetts' managers contributed a trial run of aggregate trap-allocation numbers using different sets of qualifying years.<sup>163</sup>

The facilitators first took steps to help the board members of the Rhode Island Lobstermen's Association and Massachusetts Lobstermen's Association rank categories of lobstermen according to how important it was to preserve their current status in the fishery.<sup>164</sup> The resulting priority scheme emphasized protecting long-standing full-time lobstermen—as opposed to part-time lobstermen, new entrants, and those who diversified during the crisis.<sup>165</sup> The Outer Cape Cod-style plan appeared to satisfy these conditions, and the remainder of the meetings focused on honing the details of the initial allocation scheme (e.g., number and range of qualifying years),<sup>166</sup> transferability (e.g., whether to include a trap-transfer tax),<sup>167</sup> and whether to make all or only some traps transferable.<sup>168</sup> The Rhode Island Lobstermen's Association held a general meeting, and the membership elected to approve the contours of the plan for LCMT consideration.<sup>169</sup>

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*Meeting Summary*, Board of Directors Meeting of Feb. 9, 2005 (on file with *Vermont Law Review*).

161. Interview with R.I. Lobstermen's Ass'n Member (on file with *Vermont Law Review*).

162. R.I. Lobstermen's Ass'n & Mass. Lobstermen's Assn, *Meeting Summary*, Board of Directors Meeting of Feb. 9, 2005 (on file with *Vermont Law Review*).

163. R.I. Lobstermen's Ass'n & Mass. Lobstermen's Assn, *Meeting Summary*, Board of Directors Meeting of Mar. 2, 2005 (on file with *Vermont Law Review*).

164. R.I. Lobstermen's Ass'n & Mass. Lobstermen's Assn, *Meeting Summary*, Board of Directors Meeting of Feb. 16, 2005 (on file with *Vermont Law Review*).

165. R.I. Lobstermen's Ass'n & Mass. Lobstermen's Assn, *Meeting Summary*, Board of Directors Meeting of Mar. 2, 2005 (on file with *Vermont Law Review*).

166. Margaret E. Petruny-Parker et al., Project Report: Summary of the Facilitated Process Used to Develop an Industry Response to the Directive from the ASMFC Lobster Management Board for Area 2, at 3–4 (Apr. 1, 2005). Options included using a single year or the average of two years. In terms of range, options discussed were 1999–2003, as stated in Addendum VI, and 2001–2003, when fewer people were fishing and data collection was more complete. The Board preferred using a single year for allocation and the range from 2001–2003 for qualifying years. *Id.*

167. *Id.* at 6 (explaining that the Board preferred a transfer tax of ten percent).

168. *Id.* at 5. The Board preferred designation of two types of traps: A-traps, which would be allocated based on landings and would be fully transferable; and B-traps, which would be equal to the difference between 800 and each individual's A-trap allocation, usable only as stocks improved, and would be non-transferable). *Id.*

169. The only part of the plan that proved contentious to members at the Rhode Island



Between two meetings in April and May of 2005, the LCMT reviewed the proposal produced by the facilitated Board meetings and approved by the Rhode Island Lobstermen’s Association.<sup>170</sup> At the first meeting, the LCMT moved to adopt the plan as its own and begin work on it;<sup>171</sup> at the second, it moved to call the plan final and forward it to the Lobster Management Board.<sup>172</sup> Very little discussion of the plan or its components actually occurred at these meetings; in large part, this is because many industry representatives on the LCMT were also on the Board of Directors for the Rhode Island Lobstermen’s Association or the Massachusetts Lobstermen’s Association, and thus the conversations that would have taken place at the LCMT instead took place at the facilitated board meetings.

The Lobster Management Board was receptive towards the plan and drafted a suite of options for Addendum VII, sending them out for public comment between August and October of 2005. Three public hearings were held during the month of October—in Rhode Island, Massachusetts, and Connecticut. The dominant sentiment at the Rhode Island hearing was one of approval;<sup>173</sup> that of the Massachusetts hearing was one of opposition,<sup>174</sup>

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Lobstermen’s Association general meeting was the transferability provision, which received ten votes in its favor and seventeen votes in opposition. *Id.* at 10. Non-members were in the audience, and their votes were recorded separately (non-members objected to many elements of the plan, including the transferability provision). *Id.* The vote of members on the overall plan was nine in favor and two against. *Id.* When the motion was rephrased to accept the plan “with revisions,” Rhode Island Lobstermen’s Association members unanimously approved it (19–0). *Id.* However, these “revisions” were not defined. As can be seen by the unequal vote totals, some people in attendance did not cast a vote on all issues. *Id.* The membership was also unanimous in rejecting an even trap cap, which would have divided traps equally among all license holders. *Id.* Non-members rejected the plan by a vote of 13–1, but they also unanimously approved (17–0) the plan with the unspecified revisions. *Id.*

170. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of May 31, 2005 (on file with *Vermont Law Review*); Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of Apr. 14, 2005 (on file with *Vermont Law Review*). It should be noted that the LCMT is the only industry body in Area 2 officially tasked with providing management advice to the Lobster Management Board. However, strong overlap enables the Rhode Island Lobstermen’s Association to be very influential in Area 2 LCMT proceedings. In Addendum VII, most of the debate and decision-making that went into the plan occurred at the Rhode Island Lobstermen’s Association Board meetings, outside of the public arena.

171. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of Apr. 14, 2005 (on file with *Vermont Law Review*).

172. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of May 31, 2005 (on file with *Vermont Law Review*).

173. Thirty-five people attended the Rhode Island public hearing; eleven spoke against the plan, and seven spoke in favor. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of Oct. 31, 2005, at 46, available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/2005/nov05Proceedings.pdf> (statement of Toni Kerns, Staff Member, Am. States Marine Fisheries Comm’n). Although more people spoke publicly against the plan than spoke in its favor, we attended the hearing, and the supporters’ arguments clearly dominated the evening.

174. Twenty-eight people attended the Massachusetts public hearing; eighteen spoke against the plan, and one spoke in favor. *Id.*

and the Connecticut hearing was attended by only one industry member, who had participated in the plan-development process as an LCMT representative.<sup>175</sup> The Lobster Management Board also received written comments from 130 people, including signatures on petitions; of these, 79 were in favor of the plan and 51 were opposed.<sup>176</sup> Encouraged by these results, the Lobster Management Board approved Addendum VII at its October 31, 2005 meeting.

## II. ANALYSIS

We now turn to the research question we proposed earlier regarding the purpose of Addendum VII and basis of support for the plan, beginning with the most apparent interpretation of the plan's inception. It is natural, although perhaps overly simplistic, to assume that management actions aspire to provide "solutions," and that these solutions address existing problems. One approach to understanding Addendum VII is to ascertain what problem is being addressed, and what Addendum VII does to solve it.

### *A. Understanding Addendum VII: It's About Effort Control*

The text of Addendum VII introduces the "problem" by citing an alarming Technical Committee report from 2002.<sup>177</sup> Summarizing that report, the Addendum states, "[t]here was consensus among the [Technical Committee] that the current [management approach], in combination with the proposed management measures, were not sufficient to remedy the current stock declines observed in Area 2 and spawning stock biomass needed to be rebuilt."<sup>178</sup> The Addendum also addressed two Technical Committee recommendations from the 2002 report: reduce mortality and control fishing effort.<sup>179</sup> Addendum VII ostensibly attempts to follow these recommendations, but the text of the Addendum itself also includes a third goal: "to capture the attrition from the fishery, caused by stock decline, thereby preventing a return of overall fishing levels to [the] historic highs of the late 1990's."<sup>180</sup> Thus, three key words—mortality, effort, and attrition—establish the rationale underlying the transferable-trap program. The linkages between these terms, however, are more complex than their brief mention in the Addendum suggests.

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175. *Id.*

176. *Id.* at 46–47.

177. ADDENDUM VII, *supra* note 7, at 2.

178. *Id.*

179. *Id.*

180. *Id.* at 3.

*B. From Mortality to Effort*

One of the primary objectives of fisheries management is to ensure that fishing does not affect fish stocks to such an extent that future fishing is jeopardized. The scientific community generally concurs that the Area 2 lobster stock is overfished—that is, the level of mortality inflicted by the commercial fishery is too high.<sup>181</sup> In fisheries management, the most direct method of controlling mortality is simply to limit the total number of fish (or in this case lobsters) caught and killed by the fishery. Such an approach is known as a total allowable catch (TAC) or total allowable landings (TAL) strategy.<sup>182</sup> However, catch restrictions are not popular among the New England fishing industry, and the Area 2 lobster fishery is no exception.<sup>183</sup> Because of resistance to catch limits, lobster-fishery management in New England follows an approach that attempts to limit mortality indirectly by limiting the amount of “effort” exerted by the fleet. Such an approach is known as effort control, where “effort” refers to the number of fishers, vessels, days at sea, traps, and other facets of catching lobsters.<sup>184</sup>

“Effort” is one of the more elusive terms in the lexicon of fisheries management. In principle, effort represents the catching capacity of the fleet in question. However, vagueness enters the picture when one attempts to define or measure this capacity. There are many factors that go into the production process known as fishing, and any number of these factors could conceivably be used as a proxy for overall effort. For example, effort can be represented by the number of boats in a particular fishery. Yet all boats are not alike and a raw count of vessels of widely varying catching capacities is arguably not a very precise measure of the collective capacity of the fleet. Measuring and limiting horsepower of the engines installed in the boats,

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181. Am. Lobster Stock Assessment Subcomm., Atl. States Marine Fisheries Comm’n, Stock Assessment Report No. 06-03 (Supplement) of the Atl. States Marine Fisheries Comm’n American Lobster Stock Assessment for Peer Review, at iv (Aug. 29–31, 2005) (on file with *Vermont Law Review*).

182. For a basic outline of the theory of setting a TAC, see TONY PITCHER & PAUL HART, FISHERIES ECOLOGY 245–49 (1982). Although TAC is the term widely used in most fisheries discussions, the ASMFC Technical Committee interchangeably refers to total allowable landings (TAL). E.g. Lobster Modeling Subcomm., Atl. States Marine Fisheries Comm’n, Total Allowable Landings for Area 2 (Jan. 30, 2003).

183. See Memorandum from Dan McKiernan, Bd. Member, Am. Lobster Mgmt. Bd., and Mark Gibson, Bd. Member, Am. Lobster Mgmt. Bd., on behalf of the Area 2 Effort Control Plan Implementation Committee, to Pat White, Chairman, Atl. States Marine Fisheries Comm’n Lobster Mgmt. Bd, at 2 (July 27, 2005) (on file with *Vermont Law Review*) (emphasizing that LCMT members urged the Lobster Management Board not to adopt a cap on landings during the 2002–2003 development of Addendum IV). This statement is repeated in the introductory text of Addendum VII, *supra* note 7, at 3.

184. In practice, limitations on the effort exerted by the fleet are often combined with measures that attempt to focus this effort on certain portions of the stock. For example, in the Area 2 lobster fishery, a minimum legal size has been established. ADDENDUM VII, *supra* note 7, at 7.

units of gear deployed by the fleet, or days at sea are ways to target effort more specifically. Lobster management, for instance, takes multiple approaches to controlling effort. All jurisdictions that form part of Area 2 practice “limited-entry,” meaning that there is a fixed number of permits and new permits are not issued. The facet of effort controlled under the limited-entry approach is the size of the fleet. More recently, the currently reigning view of effort control in the Area 2 lobster fishery has expanded to include the gear-based conceptualization of the effort option mentioned above, in this case focusing on lobster traps.

Because effort is an abstract notion, all measures of effort are approximate, although some are more specific than others. Thus, the linkage between effort and mortality, while assumed, is unknown in any definite sense. Not only is it not quantifiable, but it is not static: two identical boats with identical fishing practices can fish at the same spot on consecutive days and have widely disparate catches. Even a comprehensive effort-management system controlling every facet of how people fish would not limit mortality in the same way that direct catch controls would. Management programs focusing on trap numbers are no exception to this generalization.<sup>185</sup>

Problems with using traps to reduce mortality were openly acknowledged throughout the development of Addendum VII. As one manager central to the plan’s development admitted, “we don’t know very well what the connection is between traps deployed and fishing mortality.”<sup>186</sup> Not only are trap numbers a single facet of the multifaceted concept of effort, but the relationship between mortality and effort is not direct. As another participant noted:

I don't see in this plan where there is a reduction in the mortality of lobsters in the reduction of effort. If the resource increases then the fishermen are going to catch it. If the resource triples,

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185. Doubts about whether effort control can even lead to reductions in mortality have been explicitly voiced throughout the history of lobster management. Ironically, in 1978, the Northeast Marine Fisheries Board advocated trap-based effort control because “substantial reductions in the numbers of traps fished could be achieved with no significant reduction in the total catch.” NE. MARINE FISHERIES BD., AMERICAN LOBSTER FISHERY MANAGEMENT PLAN, at 84 (1978). Although trap numbers and stock status have changed since then, it is acknowledged that the changes in effort that would be required to reduce mortality are uncertain. At times, biologists have resorted to recommending nothing short of a trial-and-error approach. As one person commented at a May 31, 2001 R.I. Lobster Ass’n meeting: “In the absence of a long reliable time series of total traps fished and associated landings, the best approach may be to reduce the number of traps in a unified fashion and find the point at which the resource responds.” R.I. Lobstermen’s Ass’n, *Meeting Summary*, Meeting of May 31, 2001 (on file with *Vermont Law Review*) (statement of Josef Idione).

186. Interview with R.I. Lobstermen’s Ass’n Member, at 17 (on file with *Vermont Law Review*).

then does that mean the increase in wealth is given to a smaller group of people?<sup>187</sup>

Our next Part shows that even if effort were neatly tied to mortality, Addendum VII would hardly contribute to stock rebuilding.

*C. There’s Effort, and then There’s Latent Effort*

The theory that the trap-based effort-control plan embodied in Addendum VII is somehow related to reducing mortality—and that this reduction in mortality is related to reducing effort—is complicated by the fact that the plan does not actively reduce effort.<sup>188</sup> Instead of reducing effort, Addendum VII reduces *latent* effort—an important distinction only alluded to in the Addendum itself.

Latent effort is effort that could conceivably enter, or be exerted in, the fishery under a given management regime. Where there are no restrictions on entry into the fishery or on build-up of fishing power, latent effort is infinite. In the case of the lobster fishery prior to Addendum VII—where entry of new vessels was limited and each participant was restricted to a maximum of 800 traps—latent effort, measured in terms of traps, included 800 traps apiece for all license holders not currently fishing, as well as the sum of the number of traps that each active participant would have to add to his or her gear in order to fish the maximum number of 800 traps. In 2003, for instance, when the total trap level of Area 2 was 145,000, latent effort, measured as currently licensed but not active fishers, equaled 1381 license holders.<sup>189</sup> If each of these inactive individuals returned to the fishery and fished the maximum number of traps they were permitted to prior to Addendum VII (800 traps), the total would be 1,104,800 additional traps (1381 × 800).

Participation in the Area 2 fishery has steadily declined for several years. Due to stock decline, beginning in 1999 and continuing through to the development of Addendum VII, active participants decreased by 45% in Rhode Island and by 37% in Massachusetts.<sup>190</sup> Trap levels had fallen by

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187. ATL. STATES MARINE FISHERIES COMM’N, LOBSTER ADDENDUM VII PUBLIC HEARING COMMENTS (2005) (statement of Gerry Carvalho).

188. Instead, Addendum VII reduces effort passively through a conservation tax that takes effect only in the event of transfers, and actively through across-the-board reductions only in cases of extreme stock crisis. ADDENDUM VII, *supra* note 7, at 3–4. It does not reduce traps presently in the water. *Id.* Conceivably, if transfers do not occur and if a crisis is never declared, the provisions contained in the plan may never actually have an effect on the number of traps in the water.

189. The number represents the 1212 licensed fishers reported to have not fished in Rhode Island in 2003 plus the 169 licensed fishers who did not fish in Massachusetts. *Id.* at 8.

190. *Id.* at 3.

34% in both states.<sup>191</sup> Ironically, instead of being one less thing for managers to worry about, this steady decline in active effort gave rise to a paradoxical schizophrenia. The decline in active effort meant, by definition, a rise in latent effort. Both managers and active segments of the lobster industry began to fear that latent effort would reactivate if the Area 2 lobster stock rebounded to previous levels. This fear was present in the Addendum VII discussions, where one participant declared “latent effort waiting in the wings will be eliminated one way or another.”<sup>192</sup>

Although this concern was certainly legitimate in a precautionary sense, latent effort—not mortality, and not active effort—became the focal point of lobster management. In an oddity of lobster-management discourse, latent effort *itself* (as opposed to the reactivation of latent effort) was frequently cited as the chief menace threatening lobster stocks. For instance, a proposed Massachusetts State Effort Control Plan described the problem as: “[F]ishery performance compared over the past decade is showing sign[s] of strain, dormant [latent] effort is nearly twice that of actual effort.”<sup>193</sup>

This unusual allocation of attention to latent effort rather than active effort went for the most part unnoticed, but as one lobsterman who sat on the sidelines of industry meetings was fond of exclaiming, “latent effort never killed one lobster!”<sup>194</sup> Or as a Massachusetts Lobstermen’s Association letter stated: “What is so often missed by regulators when looking at trap plans is that all these numbers are ‘potentials’ and not real . . . [i]t is only what is being fished that *may* conserve a lobster, and even that is debatable.”<sup>195</sup>

#### D. From Effort to Attrition

The historical event behind the high levels of latent effort in the Area 2 lobster fishing was the stock decline that led many participants to downsize or leave the fishery. This exodus, which began in 1999, is known as “attrition” in the lobster-management community, and is the other face of latent effort. Whereas latent effort includes both vessels and traps that could potentially enter the lobster fishery under the governing management regime, attrition refers specifically to vessels (or fishermen) that previously

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191. *Id.*

192. Interview with State Manager, at 20 (on file with *Vermont Law Review*).

193. MASS. DIV. OF MARINE FISHERIES, PROPOSED EFFORT CONTROL PLAN FOR THE MASSACHUSETTS COMMERCIAL LOBSTER FISHERY, at 1 (2003).

194. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Remarks*, Meeting of April 14, 2005 (on file with *Vermont Law Review*) (statement of Dave Jordan).

195. Letter from Bernard J. Feeney, President, Mass. Lobstermen’s Ass’n, to Toni Kearns, Atl. States Marine Fisheries Comm’n (Oct. 3, 2005) (on file with *Vermont Law Review*).

fished and are no longer fishing. Rather than being a cause for fear like latent effort, attrition is seen as a cause for celebration. The concept of "capturing" recent attrition (keeping vessels from coming back into the fishery) became the veritable *idée fixe* of the Addendum VII process:

[E]ssentially what's happening in [this] addendum is the attrition that the industry has been suggesting represents a conservation measure, that attrition is trying to be more or less institutionalized, which translates into some fishermen who used to fish a while back, [but] haven't in a while, would be ineligible to continue fishing while those who were still active in the fishery would get some kind of trap allocation.<sup>196</sup>

The centrality of attrition is in part explained in a certain line of reasoning promoted by industry, summarized in the Background section of Addendum VII:

It should be noted that LCMT members and industry representatives throughout the development of Addendum IV (2002–2003) had urged the Board not to adopt a proposed cap on landings, a 1.14 million lbs. quota. They urged the Board to consider the conservation benefits of reduced fishing effort attributable to fishermen leaving the industry or the [Lobster Conservation and Management Area], and the down-sizing of many fishing operations due to declining catches and profits.<sup>197</sup>

In other words, members of industry cited declines in effort associated with attrition in hopes of avoiding unwelcome management restrictions. In effect, active fishers suggested that they should get credit for the decisions of others to leave the fishery.

Capturing attrition, like eliminating latent effort, is a logically straightforward way to justify a trap cap to assure against future increases in effort. But capturing attrition is no more related to reducing mortality than is latent effort, and does no more to advance the implied objective of Addendum VII—allowing more lobsters to reproduce, thus building the stock back up. If indeed "latent effort never killed one lobster," then capturing attrition—assuring that latent effort is forever latent—goes no further towards curtailing overfishing of the Area 2 lobster stock than does the status quo.

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196. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm'n, *Transcript*, Proceedings of Feb. 2005 (on file with *Vermont Law Review*).

197. ADDENDUM VII, *supra* note 7, at 3.

*E. “And the Purpose of this Addendum is . . .”*<sup>198</sup>

Does Addendum VII’s Problem Statement explain the rationale of the plan? Do the terms “mortality,” “effort,” and “attrition” give us a clear picture of the purpose of Addendum VII? Ultimately, the “problem” that Addendum VII was intended to address involves a somewhat ambiguous amalgamation of the terms reviewed above. A declining lobster stock combined with an aversion to managing mortality through direct catch limits led management and industry alike to opt for effort control as a proxy, where effort was conceived of in terms of total traps fished by the industry. The starting point for limiting effort was to close the door on potential build-up of effort, or in other words, to eliminate latent effort. Because reductions in effort occurred in recent years without formal intervention by managers, the hard work of kicking people out of the fishery was replaced with a focus on “capturing attrition.” In essence, Addendum VII’s main accomplishment was to freeze the lobster fishery as it stood at the time of the Addendum’s enactment. But how does this relate to the Technical Committee’s directive to stop overfishing?

The absence of a clear control over mortality (particularly in a fishery judged to be overfished) makes it hard to rationalize trap-control programs like Addendum VII as conservation tools: “Without a quota or truly effective controls of fishing effort, transferable trap programs serve as an allocation tool rather than a conservation tool.”<sup>199</sup> As one Lobster Management Board member assented, “I have no conviction . . . that [Addendum VII is about] rebuilding the resource.”<sup>200</sup> The Northeast Regional Administrator for the NMFS echoed this view in her comments on the public-comment draft of Addendum VII:

We noted [at the public hearings attended by NMFS staff] that there seemed to be considerable public comment and confusion relative to Addendum VII’s objective. Specifically, some participants questioned whether the Addendum was in response to the Area 2 Emergency Action declared by the Commission in

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198. Remark by Informant at a Connecticut Public Hearing about Addendum VII (on file with *Vermont Law Review*).

199. ATL. STATES MARINE FISHERIES COMM’N, SPECIAL REPORT NO. 75 OF THE ATLANTIC STATES MARINE FISHERIES COMMISSION: PROCEEDINGS OF THE AMERICAN LOBSTER TRANSFERABLE TRAP WORKSHOP, at 5 (Heather Stirrat ed., 2002), available at <http://www.asmf.org/publications/specialreports/sr75LobsterTransferableTrapWorkshop.pdf>. The quotation comes from part of a “pro and con” discussion on the subject of whether transferable-trap programs can promote conservation. The “pro” argument asserts that mortality can be reduced if control over effort is “effective” and enough traps are removed from the fishery. *Id.*

200. Interview with Am. Lobster Mgmt. Bd. Member, at 21 (on file with *Vermont Law Review*).



2003, others questioned whether the document was in response to a biological need, [and] still others questioned whether the addendum was an attempt to reduce overcapitalization in the Area 2 lobster fishery. Many participants seemed puzzled that the problem identified in Section 1 of the draft addendum related to spawning stock biomass, yet the Addendum’s proposals—e.g., trap caps and effort control—were measures more typically related to addressing overcapitalization.<sup>201</sup>

If it is not about conservation, then what is Addendum VII intended to accomplish? For some of those involved in the plan’s development, just establishing how many traps were in fact being fished represented a major achievement in itself. As Addendum VII’s Background section explains, “[l]imiting access and allocating a set number of traps will also allow managers to more precisely quantify the universe of known effort in Area 2 and thus facilitate overall management of the resource.”<sup>202</sup>

The exploration of Addendum VII in this Part leaves our research question unanswered. The patchwork of problems answered by Addendum VII cannot be fully understood in isolation from the management context in which the plan took shape, particularly the overarching influence of Addendum VII’s immediate predecessor, Addendum VI. We now turn to the strange events surrounding this earlier attempt at effort control.

#### *F. Understanding Addendum VII: It’s about Addendum IV*

In our second approach to understanding the success of Addendum VII, we adopt the explanation offered by one state manager. Addendum VII, he said, is less an example of “managers strategically and rationally trying to control mortality” and more “a crude surrogate for a bad plan [Addendum IV] that was already approved.”<sup>203</sup> Also referred to as the “infamous effort control plan,”<sup>204</sup> Addendum IV was as much or more of a driving force behind Addendum VII than the mortality–latent-effort–attrition logic

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201. Letter from Patricia Kurkul, Reg’l Adm’r, Ne. Region, Nat’l Marine Fisheries Serv., to John V. O’Shea, Executive Director, Atl. States Marine Fisheries Comm’n (Oct. 13, 2005), in ATL. STATES MARINE FISHERIES COMM’N, AMERICAN LOBSTER: ADDITIONAL ADDENDUM VII PUBLIC COMMENTS RECEIVED BY OCTOBER 14, 2005 (2005).

202. Addendum VII, *supra* note 7, at 3.

203. Interview with State Manager & Am. Lobster Management Bd. Member, at 1 (on file with *Vermont Law Review*).

204. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of Aug. 17, 2005, at 20 (statement of Dan McKiernan, Bd. Member, Am. Lobster Mgmt. Bd.), available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/2005/aug05LobsterBoardMinutes.pdf>.

jumble discussed above. In this sense, the “problem” addressed by Addendum VII is the quandary that managers got themselves into when they approved a plan they could not implement.

To recap a pivotal part of the historical narrative presented in Part I, the Lobster Management Board’s reasons for abandoning Addendum IV were its “concerns with the Area 2 effort control plan including the inability of several jurisdictions to implement portions of the plan.”<sup>205</sup> The plan’s major flaw, as explained in Addendum VII, was that it “was ineffective at controlling trap growth over current levels” because it allowed lobstermen to build up within their trap brackets.<sup>206</sup> Furthermore, managers felt that the high trap tax would discourage transfers, requiring an estimated twenty years to eliminate this excess of traps and get back to current levels.<sup>207</sup> Another problem was the arbitrary “knife-edge differential cut-off” that would give operations either 100 or 800 traps,<sup>208</sup> depending on whether they caught more or less than 2000 pounds. National trends in fishery management came into play, too, leading the NMFS to voice “concerns about their ability to immediately implement transferability programs, based on recent draft recommendations by the U.S. Commission on Ocean Policy (USCOP) that identified the potential value of ‘Dedicated Access Programs,’ but acknowledged that many issues still needed resolution.”<sup>209</sup>

Clearly, the Lobster Management Board considered Addendum IV a mistake. The question is, how did a management board in full possession of its wits make such a glaring mistake? This curiosity is shared by the former chairman of the Lobster Management Board, who admonished his fellow Board members at a Lobster Management Board meeting, “I think it behooves us to spend some time looking at how we got this far without realizing the issue came up before now.”<sup>210</sup> One school of thought puts the blame on under-supervised industry participation. “[We] have placed too

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205. ADDENDUM VII, *supra* note 7, at 2.

206. *Id.*

207. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of Feb. 2005, at 17 (on file with *Vermont Law Review*).

208. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of May 2005, at 60 (on file with *Vermont Law Review*) (statement of Harry Mears).

209. Lobster Transferability Subcomm., Atl. States Marine Fisheries Comm’n, May 2004 Progress Report and Recommendations, at 1 (May 2004) (on file with *Vermont Law Review*). Exactly what it was about the pending report from the USCOP that complicated the implementation of Addendum IV is a mystery. In our field interviews, the authors were unable to discover an explanation of this curious rationale for the lack of support for Addendum VII. It is true that the USCOP was meeting and expected to comment on “dedicated access privileges” (a new term of art introduced by the USCOP to cover all restricted entry schemes including license limitation, ITQs, and ITTs), but there seems to be nowhere in the country where anticipation of this report was used as a basis for inaction.

210. ALMB Proceedings of Aug. 17, 2004, *supra* note 147, at 7 (statement of George LaPointe, Bd. Member, Am. Lobster Mgmt. Bd.).

much emphasis, in my view, on the LCMT process . . . . I think we simply let them run—placed too much burden on them and let them run too far afield on their own and then didn’t put sufficient scrutiny on the product that they developed.”<sup>211</sup> The culpability of the LCMT process is a theme we return to in the final section of this paper.

What is less clear is how industry felt about this turn of events. Area 2 LCMT members agree that they received little guidance from managers, but some challenge the notion that managers were not paying attention. Memories differ, for example, over whether managers were present at LCMT meetings and whether they calculated how many traps the plan would allocate before approving it.<sup>212</sup> Whether the Lobster Management Board is creating excuses, or whether it really did approve an industry plan without evaluating it first, it seems that the LCMT and the Lobster Management Board have a poorly defined relationship.

When charged to create a new effort-control plan to replace Addendum IV, the LCMT claimed to be upset that the Lobster Management Board did not take them seriously.<sup>213</sup> Nevertheless Addendum IV, even though developed by industry, had never received full industry backing. One member of the Area 2 LCMT admitted that the Addendum IV plan had been a “shell game” conceived to create the impression that industry would be making sacrifices, when in fact most fishing operations would be allowed to continue unchanged or to build up fishing effort.<sup>214</sup>

If the “bad plan” embodied in Addendum IV was, for the Lobster Management Board, the bad move that led to Addendum VII, the oft-regretted crisis declaration had the same function for industry. Addendum VII was, for both groups, the way out of the trap. This path-dependent explanation goes further toward explaining the strong impetus that was evident in Addendum VII proceedings, and provides clues to the question of why this plan succeeded when so many prior plans failed. However, the historical forces reviewed in this Part and the logical justification for the plan reviewed in the last Part may not be enough to explain the success of Addendum VII. In the next Part, we complete the picture.

### *G. Understanding Addendum VII: It’s About Politics*

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211. *Id.* (statement of Mark Gibson, Bd. Member, Am. Lobster Mgmt. Bd.).

212. *See, e.g.*, Interview with Industry Member & R.I. Lobstermen’s Ass’n Member (on file with *Vermont Law Review*).

213. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of Jan. 19, 2005 (on file with *Vermont Law Review*).

214. Interview with two Industry Members & R.I. Lobstermen’s Ass’n Member (on file with *Vermont Law Review*).

If Addendum IV created the need for Addendum VII and effort control provided the rationale, an array of forces propelled it to success and determined the specific shape it ultimately took. Much of the answer to the question we asked in the beginning—Why did Addendum VII break the curse that spelled the end to many a transferable-trap program in lobster management?—lies in the tactics of politics and persuasion explored in this Part.

#### *H. Enlisting Industry*

The success of Addendum VII depended in no small part on having industry, or at least a core group of vocal industry members, behind the plan. This is because the LCMT process is premised on industry participation, so no plan would be politically or procedurally possible without the support of industry.<sup>215</sup> Addendum VI entrusted the industry group with a level of responsibility equal to that of state managers when it stated that “all jurisdictions with Area 2 permit holders and the Area 2 LCMT will develop a new effort control plan.”<sup>216</sup> Thus, industry support for the plan was indispensable.

There was no reason to expect that after participating in vain in the development of Addendum IV, industry would be eager to comply with the Lobster Management Board’s directive. But in fact, several industry members were so keen on developing Addendum VII that they began work on a transferable-trap plan even before Addendum VI formally instructed them to do so.<sup>217</sup> What explains this early and enthusiastic involvement on the part of industry?

Industry members generally offer two explanations for their willing participation in the Addendum VII process after having been opposed to effort control during the Addendum IV process. One explanation heard from industry members who do not hold seats on the LCMT is that self-interest motivated LCMT members driving the plan.<sup>218</sup> They were the members near retirement who “need a chunk of money” and wanted to “get it off the backs of these young guys” through the plan’s transferability

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215. Though the LCMT is in theory “just” an advisory body, the Lobster Management Board demonstrates a strong commitment to involving industry and assuring that measures are accepted by the LCMT.

216. ADDENDUM VI, *supra* note 152, at 2.

217. American Lobster Mgmt. Bd., Atl. States Marine Fisheries Comm’n, *Transcript*, Proceedings of Feb. 2005, at 15–17 (on file with *Vermont Law Review*).

218. Interview with Industry Member (on file with *Vermont Law Review*).

provision.<sup>219</sup> Those who actively pushed the plan clearly had a different take on what motivated them, saying that they were not fans of the plan but threats and the promise of favors from managers forced them to go along with it. "I think we had no other choice," one industry member said.<sup>220</sup> "[W]ith no repercussions, they'd kill the plan in a heartbeat."<sup>221</sup>

One of the most influential forces in Addendum VII development was the lobstermen's belief that if they did not come up with a plan amenable to the Lobster Management Board, managers would impose a plan similar to the transferable-trap program recently approved for the Outer Cape Cod Lobster Conservation and Management Area.<sup>222</sup> Another motivator was the fear that if the LCMT did not deliver anything, the Lobster Management Board would impose an equal trap cap for everyone (estimated to be 240 traps per person), a catch limit, or more-stringent biological measures (e.g., gauge increases).<sup>223</sup>

Were these threats real or imagined? Managers admit sowing the seeds of these fears in industry leaders,<sup>224</sup> and industry leaders did their best to propagate those fears. In one instance, a letter from the Rhode Island Lobstermen's Association Board to its general membership in March 2005 communicated that the consequences of doing nothing could be worse than going along:

At the ASMFC meeting in Alexandria, Va. on Feb. 9th the commission decided that if the LCMT could not come up with a new plan that we (Area 2) would get a straight out bin style plan . . . . We asked about filing a law suit, trying to stop this. We were told it would cost us over a hundred thousand dollars and in the end we would lose.<sup>225</sup>

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219. *Id.*

220. *Id.*

221. *Id.*

222. Letter from Michael L. Marchetti, President, R.I. Lobstermen's Ass'n Bd., to R.I. Lobstermen's Ass'n Members (Mar. 3, 2005) (on file with *Vermont Law Review*); see also Letter from R.I. Lobstermen's Ass'n Bd. to R.I. Lobstermen's Ass'n members (Mar. 2005) (on file with *Vermont Law Review*) (asserting that the association can "do nothing and take the Outer Cape type bin plan they come up with"). On the Outer Cape Cod (OCC) plan, see MASS. DIV. OF MARINE FISHERIES, *supra* note 157, at 1–3. Ironically, the plan that the LCMT came up with to avoid the OCC plan is nearly identical to the OCC plan. When asked about this outcome, an industry leader seemed to indicate that they wanted an OCC plan on their own terms. Interview with Industry & R.I. Lobstermen's Ass'n Leader (on file with *Vermont Law Review*).

223. Interview with Industry & R.I. Lobstermen's Ass'n Leader (on file with *Vermont Law Review*). See also Letter from R.I. Lobstermen's Ass'n Bd. to R.I. Lobstermen's Ass'n Members (Mar. 2005) (on file with *Vermont Law Review*) (outlining possible outcomes if no action was taken).

224. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

225. Letter from R.I. Lobstermen's Ass'n Bd. to R.I. Lobstermen's Ass'n Members (Mar. 2005) (on file with *Vermont Law Review*).

The letter offered three options: a flat cap at 240 traps, an Outer Cape Cod-type plan, or “we work with the cards we are dealt,” the latter apparently referring to a history-based transferable-trap program.<sup>226</sup> In response to those who would accuse the Rhode Island Lobstermen’s Association Board of self-interest, the letter concluded, “[W]e keep hearing that we want this to happen. Nothing pisses us off more than this . . . . They have us backed into a pretty good corner.”<sup>227</sup> We tried, in our interviews, to trace the precise origins of these threats, and responses spared no one, ranging from industry itself to state managers to industry lawyers and process facilitators.

Threats were not acting alone on the minds of industry, for they had an accomplice in the form of an incentive—the promised deferral of a dreaded set of gauge increases (that control the minimum legal size) scheduled to begin in 2005. These increases were the only part of Addendum IV pertaining to Area 2 that was not revoked by Addendum VI, and industry was unanimous in reviling them.<sup>228</sup> Did the Lobster Management Board offer the size-increase deferral to the LCMT as an incentive to comply, or did industry come up with it as a precondition for its cooperation?

It appears that leaving the size increases untouched during Addendum IV’s amendment was not accidental. Rhode Island and Massachusetts delegates urged fellow Lobster Management Board members not to remove the gauge increases in Addendum VI so that they could be used as a bargaining tool, saying: “It would be nice to have at least a light at the end of the tunnel that if meaningful trap reductions were enacted, that maybe the gauge increase could be readdressed because it wasn’t necessary.”<sup>229</sup> Rhode Island and Massachusetts state managers then took the message to industry: “We’ll get rid of the gauge increases for you, but talk turkey with us on effort control.”<sup>230</sup> And the message was received. In March 2005 the president of the Rhode Island Lobstermen’s Association informed his constituents that “progress here will affect whether or not we get the next series of gauge increases scheduled to begin in July 2005.”<sup>231</sup> Although there was no written record of this agreement, the scheduled increase was eliminated, as expected, in Addendum VII.<sup>232</sup>

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226. *Id.*

227. *Id.*

228. Interview with two Industry Members & R.I. Lobstermen’s Ass’n Leaders (on file with *Vermont Law Review*).

229. ALMB Proceedings of Aug. 17, 2004, *supra* note 147, at 11 (statement of Dan McKiernan, Bd. Member, Am. Lobster Mgmt. Bd.).

230. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

231. Letter from Mike Marchetti, *supra* note 222.

232. ADDENDUM VII, *supra* note 7. Before the plan (which formally deferred the gauge

*I. Transferable Traps . . . or Transferable Traps?*

Although effort control can mean many things—and there were no specific instructions from the Lobster Management Board to develop a transferable-trap program—no other options were considered during the Addendum VII process. From the beginning, all parties involved seemed to equate effort control with a history-based transferable-trap program.<sup>233</sup> This was not contested, at least in public, with debate focusing instead on more minor aspects of the plan, such as qualifying years.<sup>234</sup> But then, it can be assumed that much of the plan’s development took place out of public view. According to one LCMT member, the bulk of the discussion took place through “e-mails at midnight” sent back and forth by a “clique” of Rhode Island Lobstermen’s Association Board members.<sup>235</sup>

As noted in the Introduction to this Article, the real origin of the ideas behind Addendum VII originated long before this year. Individual transferable traps (ITTs) have been the passion and downfall of many a plan and person in the Area 2 lobster fishery. The most notable example is the “RILA revolution” of 2002, where the organization’s leadership was deposed due to ideological differences surrounding this very issue,<sup>236</sup> which now seems to be embraced, if not by the group at large, at least by the Board. As one former proponent of ITTs, who suffered politically because

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increases) was approved, it was not clear to us what the fate of the gauge increases would be. During the year that industry was working on the plan, the increases were still on the books and ready to go into place in July 2005. When the Lobster Management Board first discussed passing Addendum VI to undo parts of Addendum IV, they tossed around the idea of removing the gauge increases along with the effort-control portion. A state manager said: “It would be nice to have at least a light at the end of the tunnel that if meaningful trap reductions were enacted, that maybe the gauge increase could be readdressed because it wasn’t necessary.” ALMB Proceedings of Aug. 17, 2004, *supra* note 147, at 11 (statement of Dan McKiernan, Bd. Member, Am. Lobster Mgmt. Bd). Yet this suggestion met with disagreement, and the gauge increases were retained. *Id.* at 12. State managers, such as McKiernan, anticipated being found out of compliance with the gauge increase. At the August 2005 Lobster Management Board meeting, Rhode Island and Massachusetts were not found out of compliance with the increase, even though they had not implemented it, because, according to one source, the ASMFC agreed to let the states use the increase as a bargaining tool. Interview with LCMT Manager (on file with *Vermont Law Review*). During this time, despite the informality of the promises, industry was confident that the gauge increases would be realized, whereas some Lobster Management Board members felt that since Rhode Island and Massachusetts had no authority to make these promises without formal Lobster Management Board support, there was no certainty that the increases would be removed. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

233. Interview with Facilitator (on file with *Vermont Law Review*).

234. Interview with Industry & LCMT Member (on file with *Vermont Law Review*).

235. *Id.*

236. See *supra* Part I.B.3.

of his allegiance to the concept, pointed out, “[t]he irony, of course, is that the things we were pushing for then are now taking place.”<sup>237</sup>

The seeming mass conversion of Rhode Island lobstermen to the idea of ITTs is intriguing. Many attribute it to a “change in players over time. . . . There’s been an evolution in the process as well as in the power structure of [the Rhode Island] LCMT. And it’s still shaking out.”<sup>238</sup> This refers to the fact that the individuals connected with the ITT idea five years ago, whose way of doing things was generally disliked,<sup>239</sup> were removed with the change of leadership, allowing the idea of ITTs to become disassociated from these individuals and evaluated on its own merit. Even the individuals who pushed the idea years ago recognize that “personalities play an awful lot into this.”<sup>240</sup>

This sudden conversion surprised and disappointed those who did not convert. As one lobsterman who was not convinced said, “I never in a million years thought guys would go for this. I thought it would be like [the former ITT proponents], a lone voice in the wilderness—turns out we’re the voice in the wilderness.”<sup>241</sup>

Vocal opposition was generally absent from the Addendum VII process, especially at LCMT and Lobster Management Board meetings. State-specific public hearings held late in the game, after LCMT approval, were more contentious: at the Rhode Island public hearing, seven people spoke in favor and eleven against; in Massachusetts eighteen were opposed and only one person spoke in favor of the plan. Interestingly, most of the people expressing opposition at these meetings had never appeared at LCMT meetings. The relative lack of opposition during the majority of the process may be one reason behind the plan’s success.

Why was there so little opposition during the Addendum VII process? Our interviewees offered several explanations: people were discouraged by the seemingly endless chain of effort-control plans that never reached implementation, or they were so upset about perceived threats to their business that they would not go to meetings, or they thought that the decisions had been made already and a challenge wouldn’t get very far. In

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237. Interview with Industry Member & former R.I. Lobstermen’s Ass’n Leader (on file with *Vermont Law Review*).

238. Interview with LCMT Manager (on file with *Vermont Law Review*).

239. Commenting on the most ardent early supporters of transferable traps, one of our interviewees noted that these individuals really did not have the “bedside manner” necessary to gain adherents to their views on transferable traps. Interview with Industry & R.I. Lobstermen’s Ass’n Leader (on file with *Vermont Law Review*).

240. Interview with Industry Member & former R.I. Lobstermen’s Ass’n Leader (on file with *Vermont Law Review*).

241. Interview with Industry Member (on file with *Vermont Law Review*).



addition, it is important to note that during the first phase of the process—the facilitated Rhode Island Lobstermen’s Association Board meetings—people other than the Rhode Island Lobstermen’s Association Board were discouraged from attending. We heard one report that these meetings were closed, and while facilitators and Rhode Island Lobstermen’s Association Board members subsequently denied this report, facilitators did stress that they limited publicizing the meetings in order to keep them small and manageable.<sup>242</sup>

*J. “A Fisherman is a Fisherman . . . but Some Count More Than Others”*

One feature of the Addendum VII process that could be very illuminating is that of representation. By “representation” we refer to the role of industry members in the decision-making process as well as to the representation of different industry interests in the final outcome. Although the lobster-management decision-making process is clearly premised on industry participation, it is important to ask whether *all* of industry is represented in the LCMT structure. State managers appoint the LCMT, and there are no guidelines from the Lobster Management Board regarding how LCMT members are to be selected. As a consequence, LCMT members have “become a fairly hand-picked group,”<sup>243</sup> as one Lobster Management Board member put it. State managers in Area 2 explained that they choose people who are going to be cooperative and committed, preferably full-time lobstermen; they claim that due to this selective criterion, “[p]eople serving [on the LCMT] now have the greatest interest in the industry as it stands today.”<sup>244</sup> But this also means that part-time lobstermen are not represented on the LCMT in proportion to their numbers. Furthermore, since the LCMT developed the structure of the plan that ultimately became Addendum VII during unpublicized Rhode Island Lobstermen’s Association Board meetings, it is also fitting to consider the representativeness of this Board. Although the association members elect the Rhode Island Lobstermen’s Association Board and do not select them according to a criterion of interest in the industry, the Board members tend to own larger, more full-time fishing operations.<sup>245</sup>

Consequently, although Addendum VII has both the Rhode Island Lobstermen’s Association and the LCMT behind it, it may not represent a

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242. Interview with Facilitator (on file with *Vermont Law Review*).

243. Interview with Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

244. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

245. *Id.*

broad industry consensus. The issue of representation is magnified depending on the role of the LCMT:

I've received complaints (but I don't know the veracity) that the LCMTs were not representative of all fishermen, that the addendum was pushed by a very narrow interest group. Which gets back to the question of the LCMT role: are they advisory or are they decision-making? If the LCMT's power is informal, if they're advisory, then failure to ensure inclusiveness isn't a problem. It's a big problem if they're decision-making.<sup>246</sup>

This may explain the sudden appearance of opposition at the state hearings. As one manager said, “[y]ou’ve got a core group of people at [the Rhode Island Lobstermen’s Association] driving a plan forward that when it hits the light of day . . . gets a lot of resistance.”<sup>247</sup> Resistance did indeed surface, most notably at the general meeting of the Rhode Island Lobstermen’s Association in March 2005, when the plan was introduced to the general membership. As detailed earlier,<sup>248</sup> the plan was favorably voted on and then passed to the LCMT for further development and subsequent transmission to the Lobster Management Board. But there was more to the story than this condensed account captures.<sup>249</sup>

The venue for the general membership meeting was at capacity seating, and the atmosphere was tense from the beginning. It was obvious that much of the crowd was anxious, if not outright opposed to the plan. After the facilitators presented the plan to the assembled audience, the facilitators suggested taking a vote to gauge support for the plan. At first, one facilitator began to layout a straightforward yes-or-no vote on the entire plan, but then another facilitator stopped the process saying it called for more detail and care than a simple up-or-down vote. This facilitator suggested moving through the plan, provision by provision, and taking votes along the way, explaining to the crowd that this would allow the facilitators to identify issues that needed more work while not necessarily tarnishing the whole plan. After a series of votes on individual components, there would then be a vote on the plan as a whole.

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246. Interview with two State Managers (on file with *Vermont Law Review*). During the same interview, we were told that “the LCMT thought of themselves as policy-makers, not advisory. That made LCMT meetings more heated, lots of bullying.” *Id.*

247. Interview with State Manager (on file with *Vermont Law Review*).

248. See *supra* notes 170–73 and accompanying text (detailing the general approval, at various group meetings, of the proposal that became Amendment VII).

249. We were in attendance at the meeting and the account that follows is drawn from our notes, which are a part of the collective field notes gathered for this research.

When the vote on the full plan came up, it was in fact put to the audience as a vote on the plan with as-yet-unspecified revisions to areas of contention revealed by previous votes. Some members of the audience objected, saying that the facilitators were asking members to vote on something with hedged promises to address points of contention but without any specificity on what revisions, if any, would actually occur. The facilitators pressed forward and the plan was “approved” by a majority in attendance. As noted earlier, when the plan came to the LCMT, there was an understanding that certain provisions needed further consideration. But no further adjustments were made to the plan. The LCMT, which has a heavy overlap with association-board membership, simply accepted the plan in total and voted to send it forward to the Lobster Management Board. The actual motion voted upon illustrates the way additional opportunities to influence the plan seemed to be offered but never materialize. The motion was “to send the package to the [LMB] managers for review and revision; then send it back to the LCMT for review.”<sup>250</sup> But revision and return to the LCMT never happened.

The details of the effort-control plan contained in Addendum VII replicated the power structure of the Rhode Island Lobstermen’s Association and the LCMT. The Addendum plainly favors full-time lobstermen over part-time lobstermen in its transferability provision, in the sense that those with more traps will have more traps to sell upon retiring from the fishery. Also, in capping each lobsterman at current levels, the Addendum allows full-timers and established lobstermen to continue fishing high numbers of traps, while freezing part-timers and new lobstermen at low trap levels and requiring them to purchase trap certificates to increase the size of their operations. Differential treatment of full-time and part-time sectors of industry was not an accident; one of the first steps taken by the Rhode Island Lobstermen’s Association Board during its facilitated meetings was to create a six-tiered priority scheme.<sup>251</sup> This scheme placed active full-time lobstermen at the top and new entrants at the bottom, and part-timers and those who had diversified into other fisheries and land jobs in between. With arguments that the biggest operations had already taken “hits” when the individual trap cap was reduced to 800 traps in 2001<sup>252</sup> and that large businesses are needed to maintain the shore-side industry support structure and market for

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250. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of May 31, 2005 (on file with *Vermont Law Review*).

251. See *supra* notes 164–68 and accompanying text.

252. Interview with Industry Member & former R.I. Lobstermen’s Ass’n Member (on file with *Vermont Law Review*).

lobsters,<sup>253</sup> the prevailing attitude on the Rhode Island Lobstermen's Association Board and LCMT was against taking from full-time fishermen. As one member said, "I think it's morally wrong for a part-time fisherman to take something away from a full-time fisherman."<sup>254</sup>

An important detail of Addendum VII—the qualifying years—manifested this partiality to the needs of current full-time lobstermen. Qualifying years were the central point of contention throughout formation of the plan. The two main options on the table were 1999–2003, a range that included many more "historical participants" (those who left the fishery), and 2001–2003, a range that was limited for the most part to "current participants."<sup>255</sup> One public-comment letter summed up the issue: "It seems that a decision had to be made to sacrifice one group or the other at the expense of one."<sup>256</sup> Full-time active lobstermen feared that if the plan gave allocations to part-time or inactive lobstermen, full-time allocations would have to be cut to accommodate these other allocations. Public comments submitted to the Lobster Management Board by lobstermen supporting the plan confirmed that this fear was a major source of industry motivation:

If that happened, I think the entire infrastructure of the industry could be lost forever. . . . Not giving the highest priority to lobstermen who are actively setting traps and trying to rely on lobster landings as a major source of their current income is a death sentence to the full time commercial lobsterman in Area 2.<sup>257</sup>

The people most active in the LCMT and Rhode Island Lobstermen's Association Board showed up at all of the Lobster Management Board meetings where the draft Addendum VII was discussed, and prevailed upon this body to pass the proposed Addendum in the interests of full-time lobstermen. The push to remove people as a means of preserving full-timers

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253. See Letter from Dennis Ingram to Atl. States Marine Fisheries Comm'n, in ATL. STATES MARINE FISHERIES COMM'N, AMERICAN LOBSTER: ADDITIONAL ADDENDUM VII PUBLIC COMMENTS RECEIVED BY OCTOBER 14, 2005, at 11 (2005) (stating that if the large-scale commercial fishing operations went under, then "the entire infrastructure of the industry could be lost forever").

254. Interview with Industry Member & LCMT Member (on file with *Vermont Law Review*).

255. Atl. States Marine Fisheries Comm'n, Draft Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster (Aug. 2005) [hereinafter DRAFT ADDENDUM VII].

256. Letter to Toni Kerns, Atl. States Marine Fisheries Comm'n, in ATL. STATES MARINE FISHERIES COMM'N, AMERICAN LOBSTER: ADDITIONAL ADDENDUM VII PUBLIC COMMENTS RECEIVED BY OCTOBER 14, 2005, at 22 (2005).

257. Letter from Dennis Ingram, *supra* note 253.

was, in this sense, a “bottom up” exercise with a clear industry-on-industry—one might even say “cannibalistic”—aspect to the process.

At the same time, the Rhode Island and Massachusetts state management agency representatives to the Lobster Management Board tended to agree with industry that equal treatment of all lobstermen would put everybody out of business, and therefore full-time lobstermen should be protected at the expense of others if a viable lobster industry was to be preserved. At least one manager from these states readily admitted such a preference for full-timers.<sup>258</sup> Lobster Management Board members from other states seemed less enthusiastic about a full-time preference and more inclined to reject the notion that management should favor one group over another, saying, for example, that management “should benefit the resource . . . . A fisherman is a fisherman.”<sup>259</sup> If management responded to a need to support full-time lobster industry, as this argument goes, it should be done “not at the expense of the other guys[;] . . . it’s a public resource, they have a right too.”<sup>260</sup> It is also important that nowhere in Amendment 3 or its addenda has the Lobster Management Board specified an intent to preserve full-time lobstermen; the full-time preference apparent among Area 2 state managers was entirely the managers’ own initiative. The concordance between state managers and full-time lobstermen in favor of preserving full-time lobstermen was an instrumental factor in the success of Addendum VII; had this alliance not solidified, it seems unlikely that the plan would have met with the success that it did.

#### *K. “A Big Guessing Game”*

Threats, rewards, and selective representation were not the only factors contributing to the political acceptance of Addendum VII; a fourth one was silence. Whether or not it was an intentional tactic, the *lack* of communication was as influential as those things that were communicated in the Addendum VII process. In particular, Rhode Island and Massachusetts state managers, who acted as go-betweens for the Lobster Management Board and the LCMT, gave an impression of reticence. As one industry member asserted, “they knew what they wanted; they just never came out and said it”; it was like “a big guessing game.”<sup>261</sup> The

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258. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

259. Interview with Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

260. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

261. Interview with LCMT Member (on file with *Vermont Law Review*).

primary example of “guessing” involved the qualifying years. In Addendum VI, the Lobster Management Board instructed the LCMT to use 1999–2003 as qualifying years for the plan it was assigned to develop.<sup>262</sup> However, the LCMT seemed oblivious to this, and Rhode Island and Massachusetts state managers neglected to inform them. Throughout the Addendum VII process, beginning with the Rhode Island Lobstermen’s Association Board meetings, different sets of qualifying years were debated, and in the version of the plan that the LCMT endorsed, the chosen years were 2001–2003.<sup>263</sup> In contrast to the threats and incentives reviewed in the beginning of this Part, which state managers readily communicated to industry despite lack of formal Lobster Management Board declaration, state managers were quite reticent about telling the LCMT that the Lobster Management Board had not allowed them this option. Ultimately, the Lobster Management Board went against its decision in Addendum VI and decided to approve the LCMT-endorsed qualifying years of 2001–2003.<sup>264</sup>

The Lobster Management Board’s vague communications also affected plan development. Addendum VI instructed the LCMT to cap effort “at or near current levels”<sup>265</sup> but did not assign a number of total allowable traps. Instead of defining “current effort” and specifying how much leeway was embodied in the words “at or near,” the Board let the LCMT formulate the plan’s structure, unsure of whether the total number of traps it allocated would satisfy the Lobster Management Board. Industry members on the Rhode Island Lobstermen’s Association Board and LCMT told us that despite their questioning of state managers, the Lobster Management Board never issued a formal edict specifying a total trap number.<sup>266</sup> The numbers estimated by state managers “kept changing,” according to our industry interviewees.<sup>267</sup> In January 2005, state managers reported that “current levels” referred to 128,000 traps.<sup>268</sup> Deliberations at the Rhode Island Lobstermen’s Association Board meetings that followed initially assumed this number to be “managers’ targeted goal.”<sup>269</sup> But by the third meeting, however, facilitators reported

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262. ADDENDUM VI, *supra* note 152, at 3.

263. *See, e.g.*, DRAFT ADDENDUM VII, *supra* note 255, at 5–6.

264. ADDENDUM VII, *supra* note 7, at 6.

265. ADDENDUM VI, *supra* note 152, at 3.

266. Interview with Industry Member & R.I. Lobstermen’s Ass’n Leader (on file with *Vermont Law Review*).

267. *Id.*

268. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Jan. 19, 2005 (on file with *Vermont Law Review*).

269. R.I. Lobstermen’s Ass’n & Mass. Lobstermen’s Assn, *Meeting Summary*, Board of Directors Meeting of Feb. 9, 2005 (on file with *Vermont Law Review*).

that managers “may be comfortable with a combined Rhode Island and Massachusetts level of 150,000 traps.”<sup>270</sup> This inconsistency continued at the next meeting, where they reported that managers had specified a “total allotment for traps” of 141,000<sup>271</sup> and by the following meeting, the number was up to 165,000.<sup>272</sup> At the conclusion of the facilitated process, state managers assured the LCMT that the Lobster Management Board was likely to accept a number as high as 222,000.<sup>273</sup>

The LCMT, based on this advice, endorsed a set of qualifying years estimated to yield 222,566 total traps<sup>274</sup> estimated by managers at 47% above the current number of traps being fished.<sup>275</sup> At the Lobster Management Board meeting where the plan was up for approval, the Lobster Management Board found this number to be too high, contrary to the state managers’ predictions.<sup>276</sup> Even so, after substantial discussion, the Lobster Management Board declined to specify an acceptable total trap number.<sup>277</sup> Some Board members said that anything more than 25% over then-current levels, which had been established at 145,000 traps, was too high to be considered “at or near.”<sup>278</sup> In its final language, Addendum VII explains that “[t]his cap shall be subject to Board approval and constitutes the maximum number of traps allocated among all permit holders fishing in Area 2 from states of Rhode Island, Massachusetts, Connecticut, New York, and New Jersey, and any other state with verifiable landings based on the documentation criteria established.”<sup>279</sup>

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270. R.I. Lobstermen’s Ass’n & Mass. Lobstermen’s Assn, *Meeting Summary*, Board of Directors Meeting of Feb. 16, 2005 (on file with *Vermont Law Review*).

271. R.I. Lobstermen’s Ass’n & Mass. Lobstermen’s Assn, *Meeting Summary*, Board of Directors Meeting of Feb. 9, 2005 (on file with *Vermont Law Review*).

272. The Rhode Island Lobstermen’s Association suspected flaws in the data, and discovered that there had been confusion in the logbook instructions that had caused some fishermen to underreport traps fished. To redress this, state managers boosted trap levels for these individuals to the maximum trap number, which caused the total number of traps to rise to 165,000. *Id.*

273. The LCMT-endorsed option is found in Draft Addendum VII, *supra* note 255. The number of traps allocated under this scenario is found in Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of April 14, 2005 (on file with *Vermont Law Review*).

274. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of May 31, 2005 (on file with *Vermont Law Review*).

275. DRAFT ADDENDUM VII, *supra* note 255, at 6.

276. Area 2 LCMT, Atl. States Marine Fisheries Comm’n, *Meeting Summary*, Meeting of May 9, 2005, at 2–11 [hereinafter ALMB Proceedings of May 9, 2005], available at <http://www.asmf.org/speciesDocuments/lobster/minutesandmeetingsummaries/board/2005/lobsterSpring05minutes.pdf> (discussing trap numbers).

277. *Id.* at 10.

278. *Id.* at 4 (statement of George Lapointe, Bd. Member, Am. Lobster Mgmt. Bd.).

279. ADDENDUM VII, *supra* note 7, at 5.

Addendum VII essentially defines the maximum permissible trap number as the total number of traps handed out.<sup>280</sup> Thus, although the Lobster Management Board's initial instructions were to "cap at or near current levels,"<sup>281</sup> the current permissible level of effort is whatever the plan generates. Yet that plan was developed with uncertain definitions over what constituted current or permissible levels.<sup>282</sup> A letter from the NMFS reacted to this with caution: "This mandatory element of the proposed plan appears to create an arbitrary trap cap for Area 2 without adequate explanation or any identifiable benefits . . . ."<sup>283</sup>

Another subject rarely discussed, despite its ostensible significance for the lobster industry and for the outcome of Addendum VII, was the 2005 lobster-stock assessment.<sup>284</sup> Released at the same meeting at which the Lobster Management Board approved Addendum VII, the results of this assessment were not expected to be good, and some Lobster Management Board members interviewed were not shy about admitting the possible extent of the consequences: either an emergency action, or at the extreme end of the spectrum, a closed fishery.<sup>285</sup> In fact, some Lobster Management Board members interpret Addendum VII as a mere "first step" in managing effort.<sup>286</sup> Extolling the Addendum's "scalability"—its ability to let managers adjust the total trap number once implemented—Lobster Management Board members saw the plan's role as "developing the effort

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280. *Id.*

281. ALMB Proceedings of May 9, 2005, *supra* note 276, at 3.

282. See *supra* text accompanying notes 265–83.

283. Letter from Patricia Kurkul, Reg'l Adm'r, Ne. Region, Nat'l Marine Fisheries Serv., to John V. O'Shea, Executive Director, Atl. States Marine Fisheries Comm'n (Oct. 13, 2005), in ATL. STATES MARINE FISHERIES COMM'N, AMERICAN LOBSTER: ADDITIONAL ADDENDUM VII PUBLIC COMMENTS RECEIVED BY OCTOBER 14, 2005, at 4 (2005).

284. Am. Lobster Stock Assessment Subcomm., Atl. States Marine Fisheries Comm'n, Stock Assessment Report No. 06-03 (Supplement) of the Atl. States Marine Fisheries Comm'n American Lobster Stock Assessment for Peer Review, at v (Aug. 29–31, 2005) (on file with *Vermont Law Review*).

285. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*). Although scheduling an addendum to be approved before analyzing the implications of a stock assessment seems strange, the Lobster Management Board didn't think so. Only one person involved in management thought that the Lobster Management Board was premature in going through the addendum process before the assessment was discussed. Interview with State Manager (on file with *Vermont Law Review*). Others said that if management had to wait for the stock assessment, it would be years before anything was in place. There may be another reason Addendum VII was done prior to the stock assessment and not later: if industry had known that reductions would be necessary, they would hardly have been disposed to work on a plan involving such reductions. This plan got the support it did from industry because it left some lobstermen with the impression that they could continue to fish as they had, without reductions. These fishermen—the ones who believed they would sacrifice nothing—were the ones who seemed to be driving the plan. Interview with two Industry Members & R.I. Lobstermen's Ass'n Leaders (on file with *Vermont Law Review*).

286. ALMB Proceedings of May 9, 2005, *supra* note 276, at 5 (statement of Mark Gibson, Bd. Member, Am. Lobster Mgmt. Bd.).



control machinery . . . that can be worked down through transferability as well as active adjustments as needed.”<sup>287</sup> This fact, and the fact that the bleaker the stock assessment results, the more “ratcheting down” would be necessary, seemed lost on industry participants. Few participants appeared concerned about the assessment or its impact on the Addendum they had created. Only one industry member warned that “[i]f this plan is passed it means immediate cutbacks.”<sup>288</sup> That same member criticized Addendum VII’s timing as “placing the cart before the horse in asking industry to make a decision on its so-called ‘rewards’ of traps that one will be allowed to fish going forward, before the lobster stock assessment is complete and made public.”<sup>289</sup> Other industry participants, especially those on the LCMT, had an almost blasé attitude. According to industry informants, the apathy may be explained by a behind-the-scenes promise from Rhode Island and Massachusetts state managers assuring industry members that the Lobster Management Board would not base any management decisions on the results of the stock assessment, no matter how grave its results.<sup>290</sup>

### III. THE PLAN IN PERSPECTIVE

We turn now to a consideration of the meaning of the plan from several important perspectives. That is, what exactly is the plan likely to accomplish or to mean for various actors in the overall management drama?

#### *A. What Addendum VII Means for Industry*

Even though Addendum VII does more to freeze industry in its current state than to actively change the ways in which lobsters are caught, it has the potential to significantly change industry. The largest of these changes could be the full-time–part-time distinction discussed above. As documented in the Rhode Island Lobstermen’s Association prioritization scheme,<sup>291</sup> the Area 2 lobster industry is quite diverse, comprising seasonal lobstermen, full-time lobstermen, and full-time fishermen who lobster only part of the time. It is also diverse geographically, including boats that fish in

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287. *Id.*

288. Public Comment from Peter Brodeur, in *ATL. STATES MARINE FISHERIES COMM’N, AMERICAN LOBSTER: ADDITIONAL ADDENDUM VII PUBLIC COMMENTS RECEIVED BY OCTOBER 14, 2005*, at 16 (2005).

289. *Id.*

290. Interview with two Industry Members & R.I. Lobstermen’s Ass’n Leaders (on file with *Vermont Law Review*).

291. *See supra* notes 251–54 and accompanying text. *See also supra* Part III (analyzing the Addendum VII scheme).

Narragansett and Buzzard's Bays and those who fish in the Atlantic Ocean, and in terms of scale, ranging in size from small-scale skiff fishermen to forty-foot boats. Each group has different fishing patterns, which account for a wide variation in catch. Notably, differences in frequency, location, and scale lead to variations in the relationship of traps fished to landings. Under Addendum VII, the allocations for members of all groups will be determined by an indiscriminate traps-to-pounds regression.<sup>292</sup> Because it ignores differences in the catch-to-effort relationship generated by the divergent fishing patterns of different operations, Addendum VII may not, as its proponents claim, leave lobster-fishing operations the same tomorrow as they were yesterday.<sup>293</sup> Managers concede this point, but explain that in order to make up for a general overallocation,<sup>294</sup> "the scheme as proposed reduces the allocation to those with low landings."<sup>295</sup>

Addendum VII both reflects and reinforces changes in the Southern New England lobster fishery. These changes enabled the plan, and will, in turn, be solidified by its mechanisms. The most notable change is the attrition, which has been celebrated by managers and industry alike. As one LCMT member commented, "attrition gave us the best chance" to institute a plan based on a reduced level of lobster fishing.<sup>296</sup> Industry, however, may have raised little protest over Addendum VI because the plan did not mention reductions; these had already been made on their own, and the task ahead was simply to keep the trend from reversing—as industry and state managers say, "let's capture the [attrition]."<sup>297</sup>

Attrition may not be the only change captured by Addendum VII. Although full-time lobstermen unabashedly criticize part-timers, calling them "schoolteacher[s] in skiff[s] having fun on weekends,"<sup>298</sup> it is noteworthy that traditional lobster fishing in the region was a part-time activity, with other seasons being devoted to other fisheries. In some ports, people still fish this way. Regulations on other fisheries, however, such as days at sea in the groundfish sector, have encouraged specialization. By limiting fishermen's participation in those fisheries,

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292. See ADDENDUM VII, *supra* note 7, at 6, 9, 11.

293. Interview with two Industry Members & R.I. Lobstermen's Ass'n Members (on file with *Vermont Law Review*).

294. This overallocation was due to the fact that fishermen were allowed to choose their highest landings tally out of three years. ADDENDUM VII, *supra* note 7, at 5.

295. Email from State Manager to Authors (on file with *Vermont Law Review*).

296. Interview with Industry & LCMT Member (on file with *Vermont Law Review*).

297. Interview with Industry Member & former R.I. Lobstermen's Ass'n Leader (on file with *Vermont Law Review*).

298. Interview with Industry Member & R.I. Lobstermen's Ass'n Leader (on file with *Vermont Law Review*).

those regulations led more fishermen to become full-time, rather than part-time, lobstermen. Likewise, Addendum VII will discourage seasonal lobstermen from persisting in the fishery. These lobstermen cannot build up, and may receive smaller allocations than they are presently fishing. This would have the effect of leading Southern New England fishing operations to further specialize, putting an end to the tradition of working multiple fisheries. Regulations encouraging specialization may also have had a role in enabling Addendum VII. The full-time lobstermen who were stripped of their access to other fisheries as regulations went into place are now claiming privilege over seasonal fishermen in the lobster fishery.

### *B. What Addendum VII Means for Management*

Addendum VII provides an interesting case study of both inter-jurisdictional management and co-management. Here, we examine the interactive processes taking place between states on the Lobster Management Board and between lobstermen and managers in the LCMT process: Are these instances of cooperation, or of coercion?

The ASMFC and its subsidiary body, the Lobster Management Board, establish "a forum for the states to collectively address fisheries issues under the premise that as a group, using a cooperative approach, they can achieve more than they could as individuals."<sup>299</sup> Our research suggests that efficiency is not the only benefit that managers derive from this structure. Lobster Management Board members tell us that it is common practice to trade votes on lobster for votes on other species, since many people sit on multiple boards.<sup>300</sup> Thus, the ASMFC structure provides an arena for bargaining, where each state has a chance to maximize its self-interest. Another strategy we have observed is for state delegates to promote a plan that affects their state, only to abstain or vote against the plan. The objective may be to protect themselves from industry ire by saying "the Board made me do it."<sup>301</sup> In doing so, they maintain an image as an industry ally. Addendum IV provides a good example of this. Rhode Island and Massachusetts both voted against the plan even though both states had

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299. Atl. States Marine Fisheries Comm'n, About Us, <http://www.asmfc.org/aboutUs.htm> (last visited Nov. 16, 2008).

300. Interview with Industry Advisor & One-time Alternate to Am. Lobster Mgmt. Bd. (on file with *Vermont Law Review*).

301. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

pushed for it, which enabled them to distance themselves from it during the Addendum VI process without losing face.<sup>302</sup> In the vote on Addendum VII, Massachusetts's vote was null.<sup>303</sup> Although we have no reason to suspect this was strategic, it is noteworthy that the ASMFC structure provides the opportunity for states to engage in this type of agreement.

The cooperative structure between the Lobster Management Board and the LCMT can function similarly. If either group wishes to insulate itself from criticism by its peers, it may shift accountability to the other. The Addendum VII process included several illustrations of how the LCMT avails itself of this structure. By saying it had no choice but to go along with the Lobster Management Board, the LCMT was able to defend its actions in front of other members of industry.<sup>304</sup> The Lobster Management Board's reversal on Addendum IV, meanwhile, demonstrated that it too has recourse to this tool: the Board may pass a plan simply because "industry wants it," and then, if it chooses, retreat from the plan and blame its flaws on industry.<sup>305</sup> Area 2 lobster management points out a rarely acknowledged advantage of co-management: power-sharing arrangements like this one can allow all participants to blame unpopular management measures on each other, preserving the governing structure by making no one directly accountable.

The extent of power sharing, however, is debatable, especially since ultimate authority to approve or reject measures resides with the Lobster Management Board. Managers tout the LCMT structure as a model instance of co-management, maintaining that "[t]he impetus has come from industry . . . [a]nd it's trickle-up because we found that a lot of these measures are embraced by industry."<sup>306</sup> But LCMT members we talked with see it somewhat differently, claiming that throughout the Addendum VII process, they had "a gun to [their] heads."<sup>307</sup> Some Lobster Management Board members agree, asserting that in going along with Addendum VII, the LCMT was "just doing the Lobster Management Board's bidding."<sup>308</sup>

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302. Interview with State Manager & Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

303. This description that means the Massachusetts representatives on the Lobster Management Board cancelled each other out.

304. This interpretation is based on our observations of LCMT meetings.

305. See *supra* Part II.F (describing how the industry's influence is to blame for unsuccessful management decisions).

306. Interview with State Manager (on file with *Vermont Law Review*).

307. Interview with two Industry Members & R.I. Lobstermen's Ass'n Leaders (on file with *Vermont Law Review*).

308. Interview with Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*). As one Lobster Management Board member said, "[w]e're putting them in the very difficult position of being the executioner for their own industry." *Id.*

Other Lobster Management Board members believe that the LCMTs have acquired too much power and should be reminded of their advisory role. We have seen what appeared to be steering of industry by managers, as well as instances where industry members appeared to be leading the charge; all told, the answer to this question appears far more complex than a simple percentage-wise division of power.

Finally, there is a longer-term dimension to what the plan might mean for management. As noted, there was talk by managers of the plan being a "first step."<sup>309</sup> But the referent in this phrasing was not always clear—a step towards what? A longer-term interpretation of the "first step" language is that ITTs are a stepping stone to individual transferable quotas (ITQs). Managers have not been able to limit mortality because Area 2 lobstermen are resolutely opposed to total allowable catches (TACs). The ITT program in Addendum VII is a next-best alternative, but does not guarantee that landings will not continue to increase. At least one manager sees Addendum VII as a way to push industry toward acceptance of individual quotas, as their trap numbers are reduced again and again.<sup>310</sup> One industry member compared this to playing chess, with the ITT plan and associated reductions allowing managers to finally declare "checkmate" and impose ITQs.<sup>311</sup>

### *C. What Addendum VII Means for the Lobster Resource*

As we have discussed above, the linkages between the plan and conservation of the resource seem tenuous at best. The weakness of this linkage lies in the focus on effort instead of mortality, even though it is mortality that has a direct effect on stock (and on any attempts at stock rebuilding). The history of the fishery and its management provides ample documentation of the enduring regional preference for effort-based restrictions. The reasons for this preference are easy to understand but are infrequently acknowledged in polite company. As one industry member explained, "[t]he primary reason that fishermen prefer trap allocations over catch allocations is their knowledge that trap control won't really limit their catch, as a catch limit would."<sup>312</sup> From this perspective, the plan gained industry support because it was *designed to fail* at its ostensible biological goal: restraining mortality on the depressed lobster stock.

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309. Interview with Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

310. *Id.*

311. Interview with Industry Member & R.I. Lobstermen's Ass'n Leader (on file with *Vermont Law Review*).

312. E-mail from R.B. Allen, to Dan McKiernan, Mass. Div. of Marine Fisheries, and Mark Gibson, R.I. Dp't of Envtl. Mgmt. (Feb. 17, 2005, 21:27 EST) (on file with *Vermont Law Review*).

Perhaps this kind of cynicism is to be expected from industry members with a short-term business horizon, but presumably management is supposed to provide a check in the form of a longer-term view of resource sustainability. The record of events culminating in Addendum VII unfortunately suggests that managers did not provide this check, but instead indulged (perhaps even guided) industry towards a flawed tool. The same commenter remarked upon this lapse in fiduciary responsibility: "I would question how a fishery management agency could justify the implementation of a fishery management plan that would permanently allocate a public resource while also being expected to fail in its primary mission of conserving the resource . . . ."<sup>313</sup> Even though state regulators and the Lobster Management Board were presumably not *trying* to create an ineffective conservation program, they seemed to be aware that the plan as conceived would have little to no effect on stock rebuilding; one Lobster Management Board member readily acknowledged that extreme reductions in total trap numbers would be required to get to a point where effort control would have an effect on mortality.<sup>314</sup>

The fact that managers went ahead with the effort-control plan in spite of its weak link to conservation raises the question of what benefit they believed themselves to be delivering other than the economic and competitiveness benefits that will accrue to those lobstermen remaining in the fishery. The fallback position seems to be the solace managers found in just capping effort (traps) at current levels so as to at last have a firm grasp on the overall number of traps in the fishery.

Ironically, even this modest gain may be undermined. Even while capping the overall number of traps, the plan might *increase* effort. Once trap tags become a tradable commodity, every trap is likely to be fished to its maximum earning potential. The economic theory of transferability in limited-license fisheries programs predicts that licenses will flow to those who can use them most efficiently. Those fishers, thus, will pay the most for them on the market. In essence, once traps (trap licenses) are

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313. *Id.*

314. Interview with Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*). At one extreme, if all effort was eliminated (in the form of traps), then that would eliminate all lobster fishery-induced mortality (a one-to-one relationship). But this tight correspondence between effort and mortality disappears in the context of the actual fishery. For example, if a 50% trap reduction were imposed on a fishery with 200,000 actual total traps in the water, there would not be anything near a 50% reduction in mortality on the lobster stock. State managers realized that achieving appreciable reductions in mortality would call for trap reductions far more drastic than either managers or industry would be likely to accept. A similar conclusion is expressed in the National Marine Fisheries Board's 1978 plan. *See* NE. MARINE FISHERIES BD., *supra* note 38, at 84–87 (noting that less than half the currently deployed traps could take the full regional catch reported).

individually valuable (saleable, or, depending upon program details, subject to lease), each trap has an opportunity cost of being idle or under-used. This opportunity cost (the available earnings a trap sitting in the backyard could earn on the market) will, over time, force traps into their highest and best use.

Surprisingly, we heard no discussion of this possibility during the development of Addendum VII. When we raised the specter of such an outcome during our interviews, most respondents seemed to be surprised by this possibility. However, one respondent (one of the hired facilitators during the industry board meetings that produced the original version of the plan that became Addendum VII) suggested that the scenario was not only possible, but also likely to be the result of the transformation of trap tags into individually saleable commodities.<sup>315</sup>

Managers were not acting alone in creating a program that did little to address biological concerns. In fact, the LCMT process bears a large measure of responsibility for this outcome. An industry advisory body was largely responsible for a program that does little to conserve lobster stocks. This provides a sobering challenge to the increasing emphasis in contemporary fisheries policy debates on co-management and user self-regulation. Greater devolution of management authority to the industry being managed has come to be a rather standard prescription for fixing fisheries management.<sup>316</sup> The LCMT process is clearly consistent with this emphasis on devolution of authority but it is just as clearly associated with the focus on short-term economic gains (even cannibalistic gains) that so dominated the creation story of Addendum VII.

In the biological realm, there is a "while Rome burns" aspect to the entire Addendum VII process. With the lobster stocks perilously close to collapse,<sup>317</sup> the entire management complex (industry and regulators alike) has focused on addressing anything but the real issue in terms of stock conservation. Ironically, the early honesty evident in at least portions of the pre-Addendum VII record,<sup>318</sup> when talking about effort control as a

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315. Interview with Am. Lobster Mgmt. Bd. Member (on file with *Vermont Law Review*).

316. See, e.g., Patricia Pinto da Silva & Andrew Kitts, *Collaborative Fisheries Management in the Northeast U.S.: Emerging Initiatives and Future Directions*, 30 *MARINE POL'Y* 832, 832-41 (2006) (discussing the changing nature of participation by fishing organizations in fisheries management in the northeast United States).

317. See Am. Lobster Stock Assessment Subcomm., Atl. States Marine Fisheries Comm'n, Stock Assessment Report No. 06-03 (Supplement) of the Atl. States Marine Fisheries Comm'n American Lobster Stock Assessment for Peer Review, at v (Aug. 29-31, 2005) (on file with *Vermont Law Review*) ("The [peer review] Panel recognizes that it would only take a sequence of two to three years of poor recruitment to collapse any component of the lobster resource, and the appearance of extremely low recruitments in recent times in some areas is a cause of concern if not alarm.").

318. See, e.g., Lobster Effort Mgmt. Team, *Ideas for Lobster Effort Management*, at 1 (2004) (on file with *Vermont Law Review*) (discussing possible measures that could be taken to improve the

means of providing the industry with economic benefits, was largely replaced by rhetoric focused on conservation, while actions behind the rhetoric provided none.

#### CONCLUSION: HOW PROPERTY HAPPENS

We have no doubt that people will think of the trap allocations in terms of property rights, even if those rights are not recognized by the courts. New commodities were created and new markets for establishing those commodities were envisioned and desired. And people were being fenced out *by design* in the very creation of these commodities. It seems clear that, over time, perceptions of ownership and exclusionary power will solidify to the point that, *à la Veblen*,<sup>319</sup> people will own the lobster fishery because they own it.

Indeed, there was much in the Addendum VII process that is evocative of human experience through the ages. A lot happened behind closed doors, in small meetings, and even in late night e-mails; this is not new behavior, and it seems to go with the territory, so to speak, of “property” creation. As Tawney observed, the “facts” of property are never fully revealed, “for the lords of the jungle do not hunt by daylight.”<sup>320</sup> But, even though many of the details concerning how minds were made up and alliances formed will never be publicly known, our account above shows that there *is* a record of the history of Addendum VII and its predecessors. This record shows that as much as Addendum VII’s success was about these “facts,” it was about arguments and ideas. These arguments and ideas were put forward by people with different perspectives on, and objectives for, the lobster fishery. These multiple perspectives result, as we have argued the record shows, in multiple explanations for how and why Addendum VII was designed and implemented. A convergence of interests and forces in a historical moment permitted this plan to “succeed” where so many others had failed. Addendum VII was heavily influenced by the propensity of a segment of those who fish on the water for lobsters to also fish on land for payments from the political process.<sup>321</sup> This habit coincided with a determination on the part of managers to amend past mistakes and finally get a handle on at least the broad contours of the fishery. A tendency by managers to put these

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economic health of the Lobster Industry).

319. *Cf. Veblen, supra* note 5, at 122.

320. R.H. Tawney, *Property and Creative Work*, in *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 141 (C.B. Macpherson, ed., 1978).

321. Recall how it all began with Addendum IV and how Addendum IV all began with industry visions of disaster-relief payments. See *supra* Part II.F. We would argue that that vision merely morphed into a dream of treasure in the form of ITTs.



lobstermen in pivotal positions completed the convergence. Beliefs and values were then brought in to support the final outcome. Ultimately, that outcome was put in place by the regulatory power of the government. But the record shows that at the final decision-making stage (the Lobster Management Board), remarkably little debate occurred. Old arrangements regarding commercial access to nature were changed, lives were changed—some disadvantaged so that others could be advantaged—and the medium of these profound changes was the creation of something that will come to be regarded as property.

#### POSTSCRIPT: WAITING ON TRANSFERABILITY

We began working on this article as the events we have described were unfolding. We initially paused our efforts after the Lobster Management Board adopted Addendum VII because we wanted to incorporate comments on the full implementation of the new plan. At the time of writing, 188,737 traps (trap certificates) have been issued.<sup>322</sup> In a surprise to many, implementation of the transferability provision that was the *raison d'être* of the entire plan was delayed. Complications with multiple jurisdictions, of the kind foreshadowed by analogous difficulties with the ill-fated effort-control plan in Addendum IV, are the culprit in this unexpected turn of events. To clarify, individual allocations of trap licenses have been made, but these allocations cannot yet be freely divided and transferred in increments of the seller's choosing as envisioned in the plan adopted by the Lobster Management Board.<sup>323</sup> The ASMFC Lobster Management Board and LCMTs are currently working on an Addendum XII, which promises to iron out these details, but this addendum is behind schedule. As of this writing, full transferability is still waiting, as are those who pined for it. It is still too soon to know whether this component of Addendum VII, so central to the industry buy-in it achieved, will ever fully materialize, or whether it will go the way of Addendum IV.

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322. See E-mail from Thomas Angell, R.I. Dept. of Env't'l Mgmt., to Seth Macinko (Aug. 27, 2008, 10:55:35 AM EDT) (on file with *Vermont Law Review*) (mentioning that 133,548 lobster traps were allocated in Rhode Island from the area-wide total of 188,737).

323. See Area 2 LCMT, Atl. States Marine Fisheries Comm'n, *Meeting Summary*, Meeting of Feb. 4, 2008 (statement of Toni Kerns, Staff Member, Am. States Marine Fisheries Comm'n) (on file with *Vermont Law Review*) (discussing the difficulties in implementing transferability programs). At present, the entire allocation can be transferred as part of a package involving a commercial-fishing vessel, but that is almost the same as what prevailed prior to Addendum VII in terms of transferability.