

# REGULATION OF LOBSTER BAIT ALTERNATIVES IN NEW ENGLAND

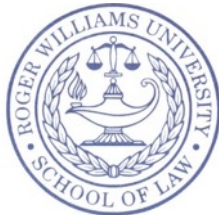
Read Porter

Marine Affairs Institute/Rhode Island Sea Grant Legal Program

Roger Williams University School Of Law

*NEANS Panel Meeting*

*May 6, 2020*



THE  
UNIVERSITY  
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# ABOUT THE MARINE AFFAIRS INSTITUTE



- Partnership of RWU, Rhode Island Sea Grant, and the University of Rhode Island
- Located in Bristol, RI at Roger Williams University School of Law, Rhode Island's only law school
  - Concentration in ocean and coastal law and policy
- Home of the Rhode Island Sea Grant Legal Program
  - Only Sea Grant Legal Program in northeast
  - Supports informed decision-making by regional coastal stakeholders through applied legal research and analysis
- Joint degree program (Juris doctor at RWU, Masters of Marine Affairs at URI)



# RHODE ISLAND SEA GRANT LAW FELLOW PROGRAM



- Matches highly-qualified law students with outside organizations
- Provides legal research and analysis on topics related to ocean and coastal law and policy
- Non-partisan and non-advocacy: no litigation or lobbying

# LOBSTER IN CONTEXT



## U.S. Commercial Fisheries and the Seafood Industry **Landings and Values, 2018**

National  
Totals



**9.4**  
billion pounds  
-5.3% from 2017

**\$5.6**  
billion  
+2.8% from 2017

### Highest Value Species Groups\*



LOBSTER

\$684 million



CRABS

\$645 million



SALMON

\$598 million



SCALLOPS

\$541 million

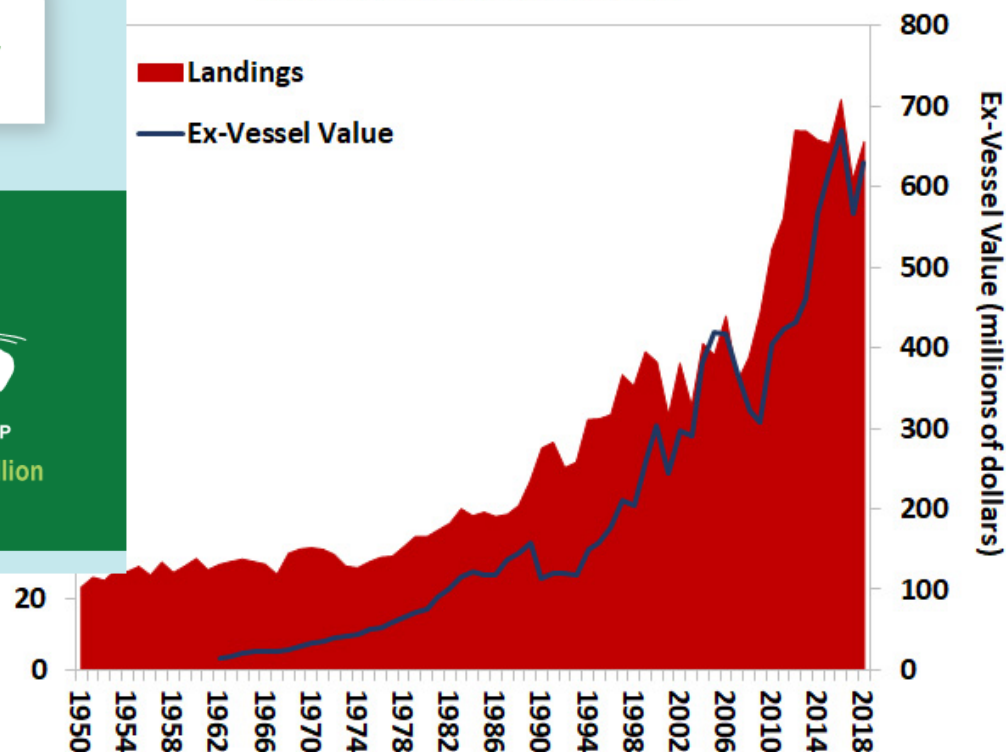


SHRIMP

\$496 million

### American Lobster Landings and Ex-Vessel Value

Source: ACCSP Data Warehouse, 2020





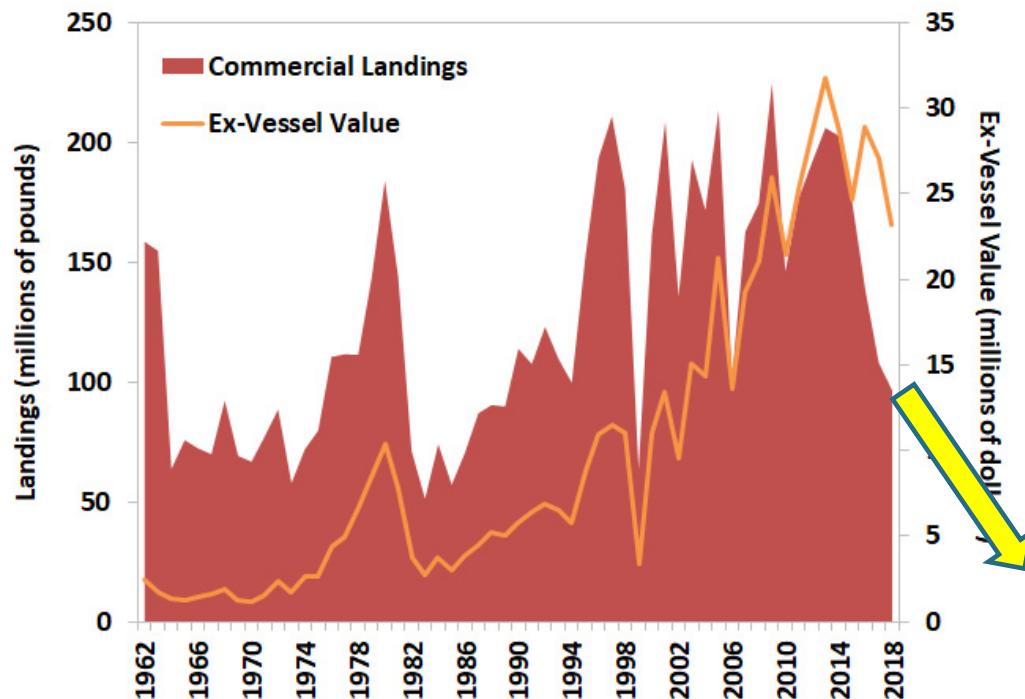
# HERRING COLLAPSE



- “In the 1980s, a study of lobster gut contents determined fish bait comprised 80 percent of lobster diets.” Pikitch et al. 2012.

**Atlantic Herring Landings and Ex-Vessel Value**

Source: ACCSP Data Warehouse, 2019



2018: 49,900 mt  
2019: 15,065 mt  
2020: 11,571 mt (25.5m lb)

# ALTERNATIVE LOBSTER BAITS PRESENT INVASION RISK



ASMFC Lobster Management Board developing a resolution “to address the threats to Interstate commerce that is created by the use of lobster bait . . . that are known to harbor viral, bacterial, parasitic, and invasive agents that could pose a risk to lobster and other indigenous species. Such measures must ensure that the use of such baits will be prohibited by December, 2020.”

USGS



## Invasion Risks:

- Live fish
- Viral hemorrhagic septicemia
- Salmon diseases and parasites

Cabela's



NOAA NOS



# RESEARCH QUESTIONS



- How do coastal New England states regulate bait?
- Is a state agency authorized to restrict bait import, sale, and use?
- What legal challenges can affect bait restrictions?

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# STATE BAIT REGULATION IN NEW ENGLAND





# RELEVANT AGENCIES



MASSWILDLIFE



DEM  
RHODE ISLAND

# MECHANISMS FOR BAIT REGULATION



- Species-based restrictions:
  - Clean list (e.g., Maine DMR)
  - Dirty list
  - single-species requirements
- Types of restrictions
  - importation
  - sale
  - Possession
- Regulated entities
  - Importers
  - Vendors
  - Users

# DIFFERENCES IN STATE APPROACHES



- Bait vendor licensing
  - Maine “lobster/crab bait dealer” permit
  - CT bait vendor permit requirement excludes lobster bait sales
- Live v dead/processed fish:
  - CT import permit limited to live fish/organisms
  - MassWildlife freshwater fish import permit applies to both live and dead/frozen, but not pickled
- Fresh v salt:
  - RI bait restrictions limit use only in fresh water
  - NHF&G regulations define “fish” to include marine species
- Geographic restrictions on bait use
  - Permitting based on ecosystem, e.g. NHF&G: no import permit needed for “marine species originating in the western portion of the North Atlantic Ocean and connected saltwater bays and estuaries, except anadromous and catadromous species”

# IMPLEMENTATION CHALLENGES



- Single agency v multiple agencies
  - Do both agencies have overlapping jurisdiction?
  - Do they need to coordinate to effectively address trade?
- Jurisdictional conflict or limitations:
  - Can a freshwater agency regulate marine bait and vendors, or would that interfere with fisheries jurisdiction?
  - Is a marine agency focused on freshwater impacts?



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# LEGAL CHALLENGES

ULTRA VIRES

DORMANT COMMERCE CLAUSE

FEDERAL PREEMPTION



# STATUTORY CHALLENGES



- Agency action is limited to statutory authorization
- Actions not supported by statute are “ultra vires” – “beyond the powers”
- *US v. Gehl*:
  - Caviar seller argued that NYSDEC lacked authority to regulate processed eggs because statute referred only to “viable” and “raw” eggs
  - Court upheld regulation by reference to another, broader section authorizing agency to protect the public interest

# DORMANT COMMERCE



- Constitution authorizes federal government to regulate interstate commerce
- This authority implies limits on state authority to regulate commerce—the “dormant” commerce clause
  - Facially-neutral: OK unless burdens on commerce are “clearly excessive in relation to the putative local benefits”
  - Facially-discriminatory: only OK if law serves a “legitimate governmental purpose and the purpose could not be achieved with less discriminatory means”
- Cases:
  - *Hughes v. OK*: Ban on export of minnows unconstitutional because state could have capped catch or used other less restrictive means of conserving local population
  - *Maine v. Taylor*: State bait import ban because no satisfactory way to ensure that shipments did not contain parasites or invasive species
- Could Maine allow only the use of local salmon scrap bait?

# FEDERAL PREEMPTION



- Constitution requires that federal laws take precedence over state laws (“supremacy”)
  - Express preemption – Statute says that it preempts state law
  - Field preemption – Statute shows an intent to “occupy the field”
  - Conflict preemption – No way for state statute to apply without conflicting with federal law
- Does Lacey Act preempt state authorization for import of Asian carp?
  - Act was intended to *support* state wildlife regulation, not preempt (no express or field preemption)
  - Asian carp are listed as injurious species under the Act
  - Listing no longer applies to interstate commerce\* (*USARK v. Zinke*), so no longer prohibitions on state import authorization for bait use



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