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Newsroom

Goldstein on Fisheries Regulation Lawsuits

Professor Jared Goldstein spoke to Massachusetts Lawyers Weekly about lawsuits challenging federal regulations that limit local fisheries.

From MASSACHUSETTS LAWYERS WEEKLY: "[New Bedford, Gloucester sue to stop 'illegal' fishing rules](#)" by Dan McDonald



January 19th, 2012: Two iconic

Massachusetts fishing ports are in court battling federal regulations that they say are economically crippling their communities and undoing a New England way of life that has spanned generations.

The regulations are intended to keep fish stocks healthy, but the plaintiffs, including the cities of New Bedford and Gloucester, claim they were illegally implemented.

Under the regulations, fishermen no longer have a set number of days in which to fish. Rather, the ocean is divided into different "sectors," and only a certain number of fish are allowed to be caught in each sector. There is also a system through which vessel owners can buy and sell the right to catch a certain number of fish.

The new rules benefit larger operations that can spread their costs over many boats, but the plaintiffs say they are devastating for smaller fisherman who can no longer catch enough fish to make a living.

"The regulations are wreaking havoc," said Scott W. Lang, an attorney representing the plaintiffs and former mayor of New Bedford.

If the new rules are allowed to stand, “traditional fishing communities [will] go the way of the American family farm by administrative fiat,” according to the plaintiffs’ appeal brief.

Fleets are shrinking

The plaintiffs, including the two cities and numerous fishing associations, seafood processors and vessel owners, claim the federal government improperly implemented the regulations in the spring of 2010. They claim the government was required to put the matter before a referendum of fishing permit holders, and was also obligated to conduct a study of the economic and social ripple effects.

After U.S. District Court Judge Rya Zobel found against the plaintiffs last year, they appealed to the 1st U.S. Circuit Court of Appeals, where the case currently sits. Briefs for defendants, including the U.S. Secretary of Commerce, the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service, are due Jan. 30.

The government should “comply with the law and come up with a system that balances the need to conserve [fish populations] with the needs of the port,” said Lang, who added that about a third of New Bedford’s groundfish fleet is tied up at the dock thanks to the new rules.

“And the economic viability of families that fish on those boats is in question,” said Lang.

“Fishing families here in New Bedford are, after generations of work, getting out of the business. That’s not a positive trend for us,” said Jonathan F. Mitchell, a former federal prosecutor and current New Bedford mayor.

In Gloucester, about 20 to 30 percent of the fleet has remained docked because of the rules, according to Stephen M. Ouellette, a Gloucester attorney who is representing the plaintiffs. That port, he said, is down to about 70 to 80 boats.

The new regulations mean that a smaller business model is no longer feasible for fishermen, said Ouellette. Smaller fishing ports are also becoming irrelevant as the New England groundfish fleet rapidly consolidates, he said.

An additional problem is that there is no appeals process in which fishermen who are unhappy with the number of fish that can be caught in a particular ocean sector can challenge it, said Pamela Lafreniere, a New Bedford-based attorney who is representing the plaintiffs.

Such a process is required under federal law, but is not included in the regulations, she said. “We would like to see NOAA follow the law.”

‘Not a slam dunk’

The defendants claim that the regulations were properly implemented, and that while a referendum of permit holders is required by federal law in certain situations, it’s not required when the government implements a “sector management” program.

“Fishery managers were very careful when they developed this,” said Peter Shelley, senior counsel for the Conservation Law Foundation, which is supporting the government in the case. “They made sure not to develop a program where those provisions would apply.”

Andrew E. Minkiewicz, a partner at the Washington D.C. office of Kelley Drye & Warren, was the senior counsel for the U.S. Senate’s Oceans, Fisheries and Coast Guard subcommittee at the time the underlying statute was passed. He told Lawyers Weekly that the referendum provision specifically stated that it does not apply to sector-management programs.

“That’s what we wrote, but what we wrote and what the court sees can be two different things,” said Minkiewicz. “Obviously, it’s open to interpretation.”



Minkiewicz added that the sector-management exception was added to the law at the request of certain elements within the fishing industry.

Jared A. Goldstein, a professor at Roger Williams University School of Law in Bristol, R.I., who is not involved in the appeal, said the case “is not a slam dunk for either side.”

But **Goldstein, who teaches a course that specializes in fisheries law and policy**, noted that the “standard of review is very favorable” to the defendants. Because the National Marine Fisheries Service is “interpreting its own statute,” the plaintiffs “have to overcome a very strong deference to the government,” he said.

Calls to NOAA seeking comment for this story went unreturned.

An ongoing battle

The case is the latest chapter in a battle between federal regulators and fishermen over fish stock sustainability that has “been an ongoing thing for 15 years,” said Brian P. Flanagan, a maritime attorney who teaches admiralty law at Suffolk University School of Law.

The two sides often disagree over how endangered the fish population really is, notes Flanagan, who is not directly associated with the case.

“What’s been happening is scientists are saying one thing and fishermen are seeing another thing when they’re hauling back their nets,” he said.

The new regulations are having a tendency to divide the fishing industry itself into haves and have-nots, some lawyers believe.

Under the new system that allows vessel owners to trade the right to catch fish, “people who have the ability to acquire more slices of the pie, they’re doing okay. Those who don’t have the ability to buy slices, they’re not doing well,” said Minkiewicz.

Shaun M. Gehan, an attorney from the same firm, concurs, saying the new system “has been very good for...a number of the bigger operators...but it has also left a lot of folks behind.”

“Regulators face difficult choices; fishermen face difficult choices. It doesn’t help when the science seems to change from one moment to the next,” said Gehan.

Shelley commented that “The people who benefitted from this system are happy to keep it, and the people who do not benefit from it want to blow it up and have gotten pols in Gloucester and New Bedford to go to bat for them.”

He said the new regs are “generally taking the fishery in the right direction” and allow vessel owners to “be more efficient in how and when they fish,” although he acknowledged that the government could better focus on the needs of smaller fishermen. He said the new system “isn’t the final word on sectors; this was a starting point.”

Mitchell, the New Bedford mayor, said the remedy to the problem is not necessarily a “complete undoing of the catch-share system.”

“What we’re looking for, ultimately, is a process that, as required under [the federal statute], takes into full account proposed regulations affecting fishing communities,” he said.

Dr. Brian Rothschild, a former dean of the School of Marine Science and Technology at UMass Dartmouth, said there is no chance of returning to a days-at-sea model, but added, “The best outcome of all this would be to get a reformation of the way NOAA does business, make it more lawful and address some of these issues like variability in stock assessments.”

The sector-management system is not something “that can simply turned on and off,” he said, and the government has to find a way to make [...]

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