Fisheries Law Update

TOPICS

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Florida Sues Georgia, Local Oyster Industry Caught in the Mix *By Lauren Bernadett*

In an extension of a battle over freshwater that has been building for decades, Florida filed a lawsuit against Georgia in the U.S. Supreme Court over Georgia's use of water from interstate rivers. The rivers at issue connect in southern Georgia and pass through Florida's panhandle before meeting the Gulf of Mexico at Florida's Apalachicola Bay. Because the freshwater from these rivers regulates the growing conditions of the Bay's Eastern oysters, Florida's Eastern oyster industry and its recent collapse is a focal point of Florida's complaint.

Oysters' Preferred Salinity

Eastern oysters (*Crassostrea virginica* - also known as American, Atlantic, or Virginia oysters) naturally grow in waters with a salinity of 5-30 parts per thousand (ppt), or brackish water. Brackish water is lower in salinity than average seawater (35 ppt) but higher in salinity than freshwater (<0.5 ppt). Eastern oysters are commonly grown in estuaries, where freshwater meets and mixes with the ocean, because of the brackish qualities of estuarine water. In short, oysters need at least some freshwater for commercial-level growth.

The Rivers at Issue and Resources at Stake

Florida, Alabama, and Georgia have been in water battles concerning Georgia's use of the Chattahoochee and Flint Rivers for decades. Both rivers' headwaters originate in Georgia and are riddled with dams regulated by the Army Corps of Engineers to meet Georgia's water demand. The Chattahoochee splits the Georgia-Alabama border and both rivers converge at Lake Seminole at the Georgia-Florida border to form the Apalachicola River. The Apalachicola River flows through the Florida panhandle to meet with the Gulf of Mexico.

Florida says that Georgia's increasing extractions from the Chattahoochee and Flint Rivers are drying up the Apalachicola River, basin, and surrounding floodplains. The Apalachicola River region hosts Florida's largest river floodplain forest; the greatest number of freshwater fish species in Florida; over one hundred species that are endangered, threatened, or species of concern under federal or state law; the second largest national estuarine research reserve; and, until recently, 12% of the nation's Eastern oyster harvest. In an effort to protect these and other resources, Florida recently filed a lawsuit against Georgia in the U.S. Supreme Court.

Florida v. Georgia

According to Florida's complaint, Florida, Alabama, and Georgia have been involved in litigation and attempts at negotiation since 1992, when the states began a comprehensive study to determine the needs of the states and the Apalachicola-Chattahoochee-Flint Basin (ACF Basin) to allocate the water supply. The litigation did not address equitable shares of the ACF Basin waters between states and the states never reached an agreement through negotiations.

Florida alleges that Georgia has been extracting significantly more water from the Chattahoochee and Flint Rivers to meet its growing municipal, industrial, and agricultural demand for water. Flows in the Apalachicola River in 2011 and 2012 were two of the lowest flow years since the U.S. Geological Survey started monitoring the river in 1923. As a result, less water has been reaching the Apalachicola Bay, one of the most productive areas for growing shellfish in the Gulf of Mexico. Georgia's water extractions from the ACF Basin are predicted to double by 2040.

Florida's complaint states that, until recently, oyster farmers in the Apalachicola Bay produced about 12% of the United States' Eastern oysters. In the 2012-2013 winter harvest season, oyster landings collapsed. Landings were 62.3% lower than the previous five years' average and the lowest that the Florida Marine Fisheries Information System ever recorded in the Bay. The surrounding economy suffered. In August 2013, the U.S. Department of Commerce declared the Apalachicola Bay collapse a commercial fishery failure. This 2013-2014 winter season is reportedly already experiencing another diminished harvest.

Florida's complaint alleges that depletions in Georgia's portion of the ACF Basin altered the salinity of the Bay and caused the oyster collapse. Florida is asking the Supreme Court to enter a decree equitably apportioning the ACF Basin waters, to enjoin Georgia "from interfering with Florida's rights," and to cap Georgia's water uses at 1992 levels.

It is not new for neighboring states to battle at the Supreme Court over waters that affect the oyster industry. In 1931, the Supreme Court decided a similar case, *New Jersey v. New York*, 283 U.S. 336 (1931), involving New York's growing diversions from the Delaware River and, among many other issues, its injurious effects on New Jersey's oysters due to increased salinity.

Although other harms to New Jersey would have been avoided by limiting New York's extraction to 600 million gallons per day, the Court instead limited New York to 440 million gallons per day – the level that would avoid harm to New Jersey's recreation and oyster fisheries. Even if the Supreme Court takes Florida's case, it will likely not issue a decision for years.

Oyster Farmers Cannot Wait

Unfortunately, current oyster farmers may not be able to keep the Apalachicola Bay oyster industry afloat until the Supreme Court makes a decision. If there is not enough fresh water in the Apalachicola Bay to support a commercial oyster fishery, it will likely not be economically viable for oyster farmers to wait and hope for Florida to succeed in bringing more freshwater back to the Bay.

It would likely be faster for the states to come to an agreement through negotiations but, considering past efforts and tenacious statements by both states' Governors, the likelihood of that happening seems slim.

China's SFDA becomes the CDFA *By Daniel Zummo*

In early March 2013, the State Council announced the formation of the China Food and Drug Administration (CFDA) that replaces China's State Food and Drug Administration (SFDA). This reorganization has elevated the CFDA back to the ministerial level that will expand its control over several food regulatory bodies and increase vertical integration and focused oversight of food safety regulations. The Chinese News Agency, Xinhua News Agency, has reported that the elevation in status is intended to reduce bureaucracy and help promote innovation. It is important to note that the CFDA also has the title of the State Council Food and Safety Commission Office. This means that, although there is only one Administration, the CFDA has two official titles.

It is important to understand China's regulatory scheme in order to research, comply with, and analyze China's food safety regulations. China is the world's leader in the production and exportation of seafood products, which makes knowledge of their domestic regulations critical. Many of the SFDA's licensing responsibilities have been abolished and replaced with the follow list:

Major Responsibilities of the CFDA

1. CFDA develops draft laws, regulations, policies and plans for supervision over food safety (including food additives and health foods; this applies to the rest of the Provisions), drugs (including Chinese medicine and minority drugs; this applies to the rest of the Provision), medical devices and cosmetics; encourages food manufacturers to take the primary responsibility, local municipal governments take overall responsibility; CFDA establishes a direct notification system for significant food and drug issues, with oversight over the system; CFDA focuses on preventing regional food and drug safety risks and risks caused by system defects.

2. CFDA formulates implementation measures for food-related administrative licensing and supervises implementation. It establishes food safety risk detection and prevention mechanisms; it develops an annual national food safety inspection and improvement plan and organizes implementations of such plan. CFDA establishes a unified food safety information publicity system, which discloses information regarding severe food safety issues. CFDA participates in developing food safety risk surveillance plans and food safety standard development; CFDA carries out food safety risk surveillance work based on the food safety risk surveillance plan.

3. CFDA develops, publishes and supervises implementation of drug and medical device standards (such as the pharmacopoeia), and categorization of drugs/medical devices. CFDA develops and supervises implementation of good manufacturing practice (GMP) in drugs and medical device research, production, trading and usage. CFDA is in charge of drug and medical device registration and registration inspection. It oversees the surveillance mechanism for adverse drug reactions and medical device adverse events, conducts surveillance and responds to such events. CFDA designs and improves the licensed pharmacists qualification system, supervises licensed pharmacists registration. It participates in the development of the national basic drugs catalogue and implementation. CFDA develops measures for supervision over cosmetics and oversees its implementation.

4. CFDA designs and implements inspection over food, drug, medical devices and cosmetics; CFDA also investigates severe law violations. It is in charge of recall and disposal of problematic products.

5. CFDA is in charge of the food and drug safety incident response system; it organizes and guides incident response actions, investigates and provides follow-up work; CFDA shall make sure investigation results are followed by rectification and/or punishment.

6. CFDA formulates science and technology development plans for food and drug safety; it improves the food and drug testing and detection system, the electronic supervision system and tracking system.

7. CFDA is in charge of publicity, education, international exchange and cooperation on food and drug safety issues; it advances establishment of the social credit system.

8. CFDA guides local authorities' food and drug supervision work; it regulates enforcement and improves the link between administrative enforcement and criminal justice work.

9. CFDA conducts routine Food Safety Commission (under the State Council) work. It coordinates comprehensive food safety supervision work, and encourages coordinated action (by all relevant agencies). It supervises and advises provincial governments in food safety supervision work and assesses their performance.

Source: USDA Foreign Agricultural Service, Global Agricultural Information Network

EU – Canada Free Trade Update *By Tyler Omichinski*

Despite the political assertions that the new EU-Canada free trade deal will be a major boon for fisheries industries, the situation is actually more complex. The trade deal, as currently reported, will result in the removal of tariffs on seafood within seven years.[1] Government representatives have touted the advantages that there will be for shrimp and lobster producers in expanding into Europe. It is true that the opening of the EU will make nearly 500 million new consumers open to the market of Canadian producers, but it remains to be seen what this will do the small scale fisheries. Please note that without the final text of the Comprehensive Economic and Trade Agreement (CETA) released, which could take as long as 18 months according to some,[2] the following is based upon general free trade principles and the announced portions of the agreement-in-principle.

New Markets

As it stands now, the tariffs on lobster and other seafood is as high as 20% in terms of export into Europe.[3] The removal of this tariff results in an increased ease in exporting these goods to Europe. The increase in capacity to reach this market will certainly be an attractive aspect of the free trade deal for these fishermen. This includes the capacity to utilize the processing facilities in the UK. Opening these markets provides a viable methodology for lobster to be exported as a luxury item to the European markets. The EU has become one of the largest fish importers in the world, and provides an opportunity for fishery market as a whole to gain some major opportunities.[4]

Environmental Downsides

The International Institute for Sustainable Development (IISD), produced a paper on the environmental impacts of trade liberalization. The scale and intensity of fish processing has increased drastically in line with the liberalization. The environmental impacts of these processing considerations are entirely unknown due to the lack of data on the subject. Similarly, the aquaculture programs often involved with production of shrimp and other seafood can result in environmental effects.[5] Though not exclusively, there is a general trend revealed in the study is such that increases to trade liberalization tends to result in environmental degradation as demand goes up, resulting in the intensity of production going up to meet it.

The increase in international trade has repeatedly run up against the environmental considerations of developing nations. In what has been colloquially referred to as the “race to the bottom,” many nations are lowering their environmental regulations in order to remain competitive in situations where the trade has been increasingly liberalized.[6] Environmental treaties are one of the major considerations that have been able to limit the environmental degradation as a result of said liberalization.

These examples lie in line with the general trend of the demands of sudden trade liberalization has upon environmental concerns.[7] The pressures put upon the locals to compete on the international stage drastically increases the level of exploitation and the intensity of it. This includes a predilection to be more willing to have larger by-catch, compounding the environmental effects.[8]

Damage to Small Scale Fishermen

The Senegalese experience with the liberalization of their fisheries resulted in a wide-scale structural adjustment.[9] This structural adjustment resulted in the industrial modernization of the fisheries and a dismantling of the former small-scale fisheries. It similarly resulted in the development of small-scale fisheries in directions that were not environmentally or socially responsible. The resulting fishery does not support the same number of fishermen, nor does it maintain the previous, traditional, way of life.

Scientific models have further predicted damage due to the inequality between small scale fishermen and the larger fishermen.[10] Shrimp trawlers, for example, result in high intensity fishing methodologies which prefer larger trawling vessels. The corporatist model favoured by free trade agreements furthermore supports a lack of any individual feeling accountable. Furthermore, the corporate system, including by-catch, can degrade the culture of accountability within a fishery.[11]

There exists a difference between the small-scale fisheries in developing countries and those in Canada. Canada has a more developed and accountable governmental system. Using the capacity for enforcing economic rents and the like can be integral for ensuring the environmental stability of the Canadian fisheries. The limitation to this, however, is that in practice these policies have not been the best to small-scale fisheries.[12] Extra burdens, whether they be in the form of quotas, tracking, etc, are often easier for larger fishing organizations to bear the costs of. A light touch is required for balancing these impositions on the small-scale fisheries with the increased competitiveness of free-trade agreements.

Lessons from NAFTA

The North American Free Trade Agreement remains one of the major free-trade agreements which provides guidance on the Canadian experience. The UPS case provides a particular example of the type of actions which will regularly be brought.[13] In this case, UPS brought litigation against the Canadian government alleging that there was preferential treatment being offered to Canadian operations. Similarly, the softwood lumber disputes have become a being of public knowledge amongst the Canadian population. These disputes have cost either the government or the individuals involved both time and money to stake and defend their claims. Small-scale fishermen may not have the resources, time, or capacity to engage in such a defence of their work.

As I have written elsewhere,[14] free-trade agreements have the capacity to be further shaped and taken advantage of by commercial interests. Even if Canadian interests are able to defend their position in arbitration, the time and cost required to do so may provide opportunities for commercial interests to move in and take advantage of the situation. Strategic use of lawsuits has been reported on in the USA as a means of silencing criticism and engaging in economic warfare.[15]

Conclusions

The small-scale fisheries seem likely to be in the proverbial line of fire in regards to the changes likely to occur from the new free trade agreement. This new free trade agreement, especially in consideration of the burdens already placed upon fishermen from the WTO and other agreements places them in a precarious position. Though lobster and shrimp fishermen are eyeing the deal with excitement, it remains to be seen what will happen to the small-scale fishermen for non-shellfish seafood. Historically, free trade agreements have not been friendly to the "little guy." The increased level of competition seems poised to further strain some of the already extremely limited small-scale fishers.

Sources:

1. James McLeod, "Free Trade Deal with Europe Good for Province's Fishery: Hutchings", published in The Telegram October 18, 2013.
2. Anrea Janus, "Canada-EU Trade Agreement 'a big-deal,' but not as big as NAFTA: Mulrony", quoting former Prime Minister Brian Mulrony, CTV News, published October 20, 2013.
3. "Lobster Fisherman Eye Canada-EU Trade Deal," bilaterals.org, published January 28, 2013.
4. "Fisheries," EU-Canada Partnership, published online at eu-canada.com.
5. Heike Baumuller, Fisheries – Environmental Impacts of Trade Liberalization, International Institute of Sustainable Development, June 2007.
6. Comparing EU free trade agreements: Fisheries, CFFA - Coalition for Fair Fisheries Arrangements (InBrief 6J). Maastricht: ECDPM. (http://www.ecdpm.org/inbrief6j).
7. Howard Epstein, "NAFTA, Other International Agreements And Local Government Jurisdiction — Comments on United Mexican States v. Metalclad Corp," 34 MPLR (3d) 44.
8. Daniel Pauly, Jackie Alder, Elena Bennett, Villy Christensen, Peter Tyedmers and Reg Watson, "The Future for Fisheries", 302 American Association for the Advancement of Science 5649.
9. Integrated Assessment of Trade Liberalization and Trade-Related Policies, UNEP/ETB/2002/0010, United Nations Publication.
10. Daniel Pauly, Jackie Alder, Elena Bennett, Villy Christensen, Peter Tyedmers and Reg Watson, "The Future for Fisheries", 302 American Association for the Advancement of Science 5649.
11. John Ward, Lee Benaka, Christopher Moore, and Steve Meyers, "Bycatch in Marine Fisheries", 74 Marine Fisheries Review 2.
12. Stephen Cunningham, Arthur Neiland, Michael Arbuckle, and Tim Bostock, "Wealth-based Fisheries Management: Using Fisheries Wealth to Orchestrate Sound Fisheries Policy in Practice," 24 Marine Resource Economics 3.
13. United Parcel Services of America Inc. v. Government of Canada, Award on the Merits of the Arbitral Tribunal (11 June 2007), online: Government of Canada.
14. Tyler Omichinski, "Is Employment Insurance a Subsidy for Fishers?", www.fishlaw.org , published July 14, 2013.
15. Ralph Nader and Wesley J Smith, No Contest: Corporate Lawyers and the Perversion of Justice in America, Random House, Dec 22, 1998. See also Thomas Walden, "SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation", 39 UCLA L Rev 979 and Bryant Garth, "From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values", 59 Brook L Rev 931.

Case Law Update USA

Oceana Inc. v. Pritzker

Civil Action No. 13–770 (JEB) (October 28, 2013) (2013 WL 5801755) - F.Supp.2d ---- (2013)

Oceana Inc., a international not-for-profit organization claiming 195,000 members who use and enjoy the oceans for a variety of purposes, including commercial and recreational uses of fish stocks for consumption, brought the lawsuit "challenging procedural and substantive aspects of the National Marine Fisheries Service's at-sea monitoring program in its Northeast Multispecies Fishery." (2013 WL 5801755 at 1). The decision provided a good brief background of the relevant federal fisheries management law.

> "In recognition of the persistence of overfishing and habitat loss that threaten fish populations off the coasts of the United States, and with the aim of maintaining a balance between conserving fishery resources and promoting the American fishing industry, Congress enacted the Magnuson–Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq. The Act created eight Regional Fishery Management Councils to monitor and oversee multiple fisheries in each region's waters. 16 U.S.C. § 1852. Each Council is responsible for developing and maintaining a Fishery Management Plan for each fishery under its control. The Act imposes content requirements on these FMPs, see § 1853(a)(15), which must ultimately be approved by the National Marine Fisheries Service, acting on behalf of the Secretary of Commerce. See § 1854." (id.).

Oceana's action alleged the Fisheries Service has failed to adequately establish accountability measures or catch monitoring systems, specifically challenging two agency actions that relate directly to fisheries off the coast of New England. (Id. at 2). This opinion was limited to the question of venue. The Defendant federal government challenged the venue – U.S. District Court, District of Columbia – and moved to have the case transferred to Massachusetts. After a thorough venue analysis, the court ruled in favor of Plaintiff Oceana, Inc., in part because Oceana had only one staff member in the State of Massachusetts. (Id. at 7).

Marilley v. Bonham

No. C-11-02418 DMR (Filed October 16, 2013) (2013 WL 5745342) - Not Reported in F.Supp.2d (2013)

A class of commercial fishermen, those who have purchased and/or renewed certain commercial fishing permits in California waters since 2009 and who are not California residents, filed this lawsuit challenging California's commercial fishing licensing statutes. The Plaintiffs sought both a declaratory judgment and injunctive relief. Plaintiffs, and those similarly situated, have been charged two to three times more than their California-resident competitors as required by California's commercial fish licensing statute. (2013 WL 5745342 at 1). The two Constitutional claims at issue fall under the Privileges and Immunities Clause (P&I) and the Equal Protection Clause (EPC), and both the Defendant and Plaintiffs filed cross-motions for summary judgment as well as motions to exclude experts. After a quick review of each claim, the court denied the Plaintiffs' motions, leaving Plaintiffs with the sole option of bringing the claims to the Court of Appeals.

Wild Fish Conservancy v. Jewell

No. 10-35303 (Sept. 11, 2013) (730 F.3d 791)

The Ninth Circuit U.S. Court of Appeals dismissed a lawsuit brought by the Wild Fish Conservancy on the grounds that the conservancy lacked standing to bring the suit under the Administrative Procedure Act. The action was filed in the U.S. District Court's Eastern District against the U.S. Fish and Wildlife Service, the Leavenworth National Fish Hatchery, and others and alleged that the U.S. is "improperly diverting water from Icicle Creek to the Leavenworth National Fish Hatchery (the "Hatchery") and otherwise violating Washington state law." (730 F.3d 791, 794). While the court noted the importance and value of protecting the Columbia River Basin, the Wild Fish Conservancy was not in a position to bring the suit. "The State of Washington has elected to delegate authority to enforce its water code to the Department of Ecology and has not recognized a public right to independently enforce the permit requirement." (Id. at 799). Because the private conservation group was not empowered by Washington's Water Reclamation Act to enforce the state laws, and the federal Administrative Procedure Act is "predicated on cooperative federalism and respect for state sovereignty" (Id. at 798), it is apparently only the Washington State authorities that would be in a position to commence such an action.

Resources: Environmental Defense Fund recently launched new "fishery tools" that were created with the insight and input from more than 80 global experts and are meant to help guide fishermen and managers as they make challenging management decisions. (Courtesy of Rahel Marsie-Hazen)

- An updated Catch Share Design Manual that guides fishermen and fishery managers through a step-by-step process to design catch shares, an approach to managing fisheries that allocates secure areas or shares of the catch to participants
- A dedicated volume on designing Cooperative Catch Shares, which includes in-depth guidance on effective co-management of fisheries
- A dedicated volume on designing Territorial Use Rights for Fishing (TURFs), including new concepts for addressing the unique challenges of nearshore fisheries
- Guides on science-based management for fisheries that have limited data and transferable effort share programs, a form of rights-based management that has served as a stepping stone towards more effective, long-term management solutions
- More than a dozen in-depth reports on fisheries, from Samoa to Spain, that have customized catch shares to meet their goals
- A searchable database of global catch share fisheries, accessed through an interactive map
- "What's the Catch?," an online game that allows players to captain their own vessel and experience the ups and downs of commercial fishing

Case Commentary: Drakes Bay Oyster Co. v. Jewell

No. 13-15227, 729 F.3d 967 (9th Cir. Sept. 3, 2013) *By Lauren Bernadett*

Drakes Bay Oyster Company (DBOC) is an oyster farm located in Drakes Estero in Point Reyes National Seashore on the northern California coast. Oysters have been farmed in Drakes Estero since the 1930s. In 1964, Congress passed the Wilderness Act, which permitted the Secretary of the Interior (Secretary) to designate wilderness areas within national parks. The Wilderness Act prohibited commercial enterprise in the wilderness areas, subject to existing private rights.

Johnson Oyster Company, which operated an oyster farm in Drakes Estero, sold its land to the United States in 1972 for $79,200. Johnson also secured a reservation of use and occupancy (RUO) and a special use permit (SUP) that allowed the oyster company to continue operating on the same five acres for another forty years. In 1976, Congress passed the Point Reyes Wilderness Act, designating parts of Point Reyes National Seashore as wilderness areas and Drakes Estero as "potential wilderness" under the Wilderness Act of 1964. Potential wilderness areas were to be subject to efforts to remove obstacles to the designation of wilderness status.

In 2004, Kevin Lunny bought the oyster farm from Johnson. At the time of Lunny's acquisition, the National Park Service (NPS) sent him a memorandum stating that the Wilderness Act, the Point Reyes Wilderness Act, and the NPS's management policies require the NPS to convert the oyster farm area to wilderness status as soon as the farm could be eliminated. Section 124 of a 2009 Appropriations Act provided that the Secretary was authorized to issue a ten-year SUP to allow for the continued operation of DBOC before the current RUO and SUP expired on November 30, 2012. DBOC applied for the ten-year SUP. On November 29, 2013, the Secretary issued a memorandum stating his decision to allow the SUP to expire and to not grant DBOC's request for a ten-year extension.

District Court – Drakes Bay Oyster Co. v. Salazar, 921 F. Supp. 2d 972 (2013)

DBOC and Lunny sought review and a preliminary injunction of the Secretary's decision in federal court. The district court held that it lacked jurisdiction to hear DBOC's challenge because "any agency action 'committed to agency discretion by law[,]'" such as the decision whether to grant a new SUP, is exempt from judicial review under the Administrative Procedure Act.

The court also stated that even if it did have jurisdiction, it would not grant DBOC's request for a preliminary injunction. Its rationale was that even though DBOC could show irreparable harm, it could not demonstrate a likelihood of success on the merits because it could not show that the Secretary's decision was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'"

The court reasoned that this was so because the Secretary's decision "had a basis in law and policy, showed a 'rational connection' between the choices made, and was not 'so implausible' that differences in opinion could not account for the result." Additionally, the court stated that the balance of the equities and the public interest did not weigh in favor of granting a preliminary injunction.

Ninth Circuit Court of Appeals – Drakes Bay Oyster Co. v. Jewell, 729 F.3d 967 (9th Cir. 2013)

DBOC appealed the district court's decision to the Ninth Circuit Court of Appeals. The case was heard by a three judge panel. The court held that, contrary to the district court's decision, the court did "have jurisdiction to review whether the Secretary violated any legal mandate contained in Section 124 or elsewhere." However, the appeals court majority agreed with the district court that DBOC did not show a likelihood of success on the merits of its claim to warrant a preliminary injunction.

Judge Watford dissented, stating that DBOC is likely to prevail on the merits because the Secretary misinterpreted the Point Reyes Wilderness Act and Section 124's effect, making his decision "arbitrary, capricious, or otherwise not in accordance with law." Judge Watford explained the legislative history of the Point Reyes Wilderness Act. He emphasized that Congress, as well as civic, environmental, and conservation groups, did not perceive the oyster farm to be inconsistent with Drakes Estero's original designation as wilderness. Drakes Estero was designated as "potential wilderness" in the final bill only to compromise with the Interior Department, which objected to non-conforming uses in wilderness areas.

Judge Watford stated that given this legislative history, it is bizarre that the Interior Department concluded in 2005 that "Congress had 'mandated' elimination of the oyster farm." While Congress instructed the Interior Department to remove obstacles to converting "potential wilderness" into wilderness areas, no one in Congress expressed that the oyster farm was an obstacle to the conversion of Drakes Estero. Legislative history indicates "that Congress viewed the oyster farm as a beneficial, pre-existing use whose continuation was fully compatible with wilderness status."

Judge Watford continued that Congress intended Section 124 of the Appropriations Act to override the Interior Department's misinterpretation of the Point Reyes Wilderness Act. He stated that the Secretary, whose decision heavily depended on the Point Reyes Wilderness Act, misinterpreted the Wilderness Act and the Point Reyes Wilderness Act to assume that they prohibited the oyster farm's continued operation. Because of these errors of statutory interpretation, Judge Watford stated that DBOC is likely to prevail on the merits of its claim. Because the other three factors required for a preliminary injunction also tip in favor of DBOC, Judge Watford would grant DBOC's request for a preliminary injunction.

After the Ninth Circuit opinion and Judge Watford's dissent came down on September 3, 2013, DBOC announced that it would be requesting a rehearing in front of the full Ninth Circuit panel.

Case Law Update Canada

Mainstream Canada v Staniford

2013 CarswellBC 2205, 2013 BCCA 341

Staniford is an activist and an environmental campaigner while Mainstream Canada is a producer of farmed salmon. Mainstream Canada claimed defamation by Staniford for posts on his website, especially one entitled "Salmon Farming Kills – Global Health Warning Issued on Farmed Salmon". The post made comparisons between the health risks posed by cigarettes and farmed salmon.

Staniford attempted a defence based upon fair comment. The court, however, found that the comments he made were not adequately tied to any scientific facts. This ran contrary to the trial judge who determined that an "informed" layperson would be able to determine the comment which Staniford thought to make, in contrast to the average lay person. Essentially, the court of appeal found that the 'facts', in the form of a handful of scientific articles, were not sufficiently well known, nor were they explicitly alluded to in the communications which Staniford made. The findings of the court of appeal included $50,000 in punitive measures, holding with the precedent set by Barrick Gold Corp v Lopehandia, 71 OR (3d) 416; 239 DLR (4th) 577; 31 CPR (4th) 401; 187 OAC 238.

Newfoundland (Workplace Health, Safety & Compensation Commission) v Ryan Estate

2013 CarswellNfld 282, 2013 SCC 44, 229 A.C.W.S. (3d) 404, 361 D.L.R. (4th) 195

Two brothers, last name Ryan, drowned when their vessel capsized during a fishing voyage. Their estate sought a negligence claim in line with the federal Maritime Liability Act. The provincial Workplace Health, Safety & Compensation Act (WHSC) bars negligence actions under s.44. The Ryans' estate claimed federal paramountcy ruled the WHSC inoperable. The court found that both are applicable and operative. Despite frustrating the MLA in this instance, it does not specifically legislate against maritime issues, which rest under a federal head of power. Provincial workplace acts, thus, can frustrate the avenue of the MLA for fishermen seeking negligence actions under it.

Nordica Foods A/S v. Eimskip, USA Icelandic Steamship Inc.

2013 CarswellNfld 269, 2013 NLTD(G) 114, 230 A.C.W.S. (3d) 558

Nordica Foods is attempting to amend a statement of claim in regards to a claim brought against Eimskip et al alleging the "blockading" of shrimp boats. Eimskip took control of shrimp in cold storage by informing those involve that henceforth direction should only be taken from them. As a result of the loss of the shrimp, Nordica has experienced a significant loss of customers. Nordica has alleged that Eimskip undertook this method of recouping the alleged debt which Nordica owed to them to assist another company interested in purchasing a controlling share of Nordica by driving prices down. From the piece, "[in] order to survive commercially Nordica Foods and Nordica Fishery yielded to the pressure and under extreme duress of goods, undue influence, coercion and urgency of persuasion the Plaintiffs executed the document called the FINAL AGREEMENT with Nasco Ltd."

Cases were brought simultaneously in both Norway and Canada, but the parties ultimately agreed that the bulk of the case would be brought in Norway underneath Norweigan law. After the trial resolved in Norway, Nordica made its intentions known that it would pursue a case in Canada related to some of the issues as it felt that, as the trial developed, decisions would have to be made under public policy grounds. The intent to pursue this action in Canada was made known during the Norweigan case and they did not file a counterclaim in that jurisdiction. The court ruled that it would be unfair to disallow the action in Canada, especially after costs had been posted and the trial date was fast approaching. The court did not exercise their capacity to apply issue estoppel to the claim in this instance. This was based upon the above mentioned reasons and the fact that a finding of a defence due to public policy in another jurisdiction does not de facto apply in Canada.

R v Abbott

2013 BCSC 1494, [2013] B.C.W.L.D. 6701, [2013] B.C.W.L.D. 6637, [2013] B.C.W.L.D. 6627

Abbott was charged with exceeding his quota for catch from the Newfoundland fishery. This case is in an appeal where he claims the trial judge misinterpreted the evidence and the Fisheries Act. In the case, it was held that Abbott was on a boat which the evidence found to have sequestered a bag of cod he had caught attached to a buoy at the entrance to the harbour. Also on the boat, found to have been owned by Abbott, were a number of fresh cod tongues and gonads which would further support the claim that there was fishing in excess of the quota.

Abbott first appealed that this was a misapprehension of the evidence and that the presence of the tongues on his boat did not meet the actus reus requirement for the crime. The case was, ultimately, circumstantial. Despite this, Abbott proffered no other reasonable explanation as to the presence of the cod tongues, etc.

The court held that the standard of review was that of a “palpable and overriding error”, the likes of which was not met by the trial judge. Though the trial judge appears to have been less expressive in his findings than Abbott would have liked, the appellate judge found that the findings of fact and law presented by the judge as a result of the trial, though brief, were sufficient to maintain a logical connection between them and the verdict.

FLC’s vision is to ensure family fishermens’ access to justice, to protect our marine environment, to help coastal communities become more resilient, and to assist consumers in accessing safe and sustainable seafood.

EU Law Update

Commission Regulation No 982/2013

The regulation establishes a prohibition on the fishing for herring in EU and international waters of Vb, VIb and VIaN by vessels flying the flag of France. This regulation was established becuase the fishing quota allocated to France was deemed to have been exhausted. This regulation prohibits the retention on board, relocation, transhipment or landing of fish from the stocks listed above by French vessels as of October 11th, 2013.

Commission Regulation No 983/2013

The regulation establishes a prohibition on the fishing for tusk in EU and international waters of I, II and XIV by vessels flying the flag of France. This regulation was established because the fishing quota allocated to France was deemed to have been exhausted. This regulation prohibits the retention on board, relocation, transhipment or landing of fish from the stocks above by French vessels as of October 11th, 2013.

Commission Regulation No 989/2013

The regulation establishes a prohibition on the fishing for herring in EU and international waters of I and II by vessels flying the flag of France. This regulation was established because the fishing quota allocated to France was deemed to have been exhausted. This regulation, like the others, prohibits the retention on board, relocation, transhipment or landing of fish from the stocks above by French vessels as of October 11th, 2013.

Article: Commission proposes fishing opportunities in the Atlantic and North Sea for 2014 *By Cesare Varallo*

Last year's figures on the fish stocks in EU waters indicate that the European Commission's efforts to move toward more sustainable fishing have paid off. In a consultation document adopted on 30th May 2013 the European Commission reported on the state of European fish stocks: 39% of assessed fish stocks in EU waters of the Northeast Atlantic are now overfished, down from 47% last year and 95% in 2005. There are now 25 fish stocks in European seas which are known not to be overfished, compared to only 2 stocks in 2005.

The policy, in the view of the EU Commission is starting to show real benefits for the fishing industry, as well with the latest data on profits indicating an increase of 40% on the previous year (2011).

Nevertheless, progress still needs to be made and that will be the objective of the proposed fishing opportunities in the Atlantic and North Sea for 2014. For 2014, the Commission wants the industry to attain scientific advice. For stocks covered by the long-term management plans, total allowable catch (TACs) and effort levels should be fixed according to the plans in force. For other fish stocks, not covered by the plans, the TACs should be based on scientific advice, with the goal of phasing out overfishing by 2015. Where no advice exists, the precautionary principle stands.

On 30 October 2013, the European Commission proposed officially the fishing opportunities for 2014 for the Atlantic and the North Sea, as well as in international waters. This is the annual proposal for the amount of fish which can be caught by EU fishermen from the main commercial fish stocks next year. The proposal sets levels of TAC and fishing effort both for stocks managed exclusively by the EU, and for stocks managed with relevant third countries such as Norway or through Regional Fisheries Management Organisations across the world's oceans.

International negotiations for many of the stocks concerned are still on-going. The proposal only includes figures for about half of the TACs at this stage. It will be completed once negotiations with third parties and organizations have taken place. The Scottish Fishermen's Federation called the proposals "a mixed bag of news" and noted that the fate of TACs for stocks of major concern to the federation are still to be decided. "The total allowable catch recommendations issued by the EC today are only for some stocks and do not include shared stocks with other nations such as Norway, which will be decided upon at a later date," said Bertie Armstrong, federations chief executive. "These will include stocks of crucial interest to Scottish fishermen such as North Sea haddock and cod."

For the stocks not shared with third countries, the Commission proposes to increase or maintain the TACs for 36 stocks, and reduce them for 36 stocks, in line with the scientific advice. The Commission's ultimate goal, and one of the pillars of the reformed Common Fisheries Policy (CFP), is to have all stocks fished at sustainable levels, the so-called Maximum Sustainable Yield (MSY). Whenever possible, the scientists advise how to bring the stocks to MSY levels. This year, the so-called "MSY advice" could be issued for 22 EU stocks. This is a significant step forward as far as the availability and quality of scientific data are concerned.

Maria Damanaki, European Commissioner for Maritime Affairs and Fisheries, said: "The Commission proposal contains good news for some stocks, while some cuts are required for others. Overall, our knowledge of many stocks has improved which enables sound management decisions to be made. For stocks where negotiations are on-going we will, as ever, make every effort to obtain the best outcome for our fishermen. We hope that our partners and the international community will mirror our commitment to sustainable fisheries.” The present proposal shall be discussed by the Member States' ministers at the December Fisheries Council and will apply from 1 January 2014.

Sources: EC press release, ec.europa.eu, Scottish Fishermen’s Federation.

FLC is a not-for-profit research center in Vancouver, Canada. The center has three mandates:

to conduct research in the field of fisheries, aquaculture and seafood laws and regulations;

to build capacity by educating law students, lawyers, and other stakeholders in the area of fisheries and aquaculture laws; and

to facilitate legal representation to underprivileged small-scale fishers and NGOs wherever possible.

At FLC, our aim is to protect the environment and consumers, and to support family fishermen and coastal communities. Although we are based in Canada, our outreach is global. and seafood law is a specialized area of the law and is interdisciplinary in nature. Although highly specialized, this area is also remarkably diverse, and includes such topics as:

- Aboriginals' right to fish
- Access to justice in coastal communities
- Animal Feed Regulations
- Fisheries management schemes
- Genetically engineered fish
- Illegal, unreported, and unregulated (IUU) fishing
- Market structures
- Seafood fraud
- Seafood labelling requirements
- Seafood safety
- Sustainability certification schemes

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Due January 15, 2014