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Fed court raps NOAA on bycatch programs

By Richard Gaines
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A federal appeals court has overturned a lower court ruling and ordered NOAA to clearly and consistently quantify bycatch in the Northeastern Atlantic fisheries.

The decision has the potential to compel the National Oceanic and Atmospheric Administration to seek more funds for observers, alter its budget or create an unfunded mandate for fishermen.

The ruling by Justice Douglas Ginsberg in the U.S. Court of Appeals for Washington, D.C. will force NOAA to spend more money and play a more active role in observing the work of commercial fishermen at sea from the Canadian border through the Carolinas — a region regulated from NOAA's Northeast regional headquarters in Gloucester's Blackburn Industrial Park.

The ruling will also likely force ungraded bycatch methodologies in the Southeast and Gulf of Mexico. The term bycatch refers to fish that is incidentally caught and hauled up with the fish stocks fishermen are targeting.

The lawsuit was filed in 2008 by Oceana, which argued that NOAA's bycatch program did not amount to a bonafide effort as required by the Magnuson-Stevens Act as reauthorized in 2006 as the Sustainable Fisheries Act.

In the New England groundfishery, which was placed under a catch share regimen in 2010, NOAA is funding observers through the 2012 fishing year, but has made no commitment beyond that and any such money is contingent on congressional action.

"For more than 15 years (NOAA Fisheries) has violated the law, managing America's fisheries without reliable information about how much fish and other marine wildlife is being shoveled over the side of boats, often dead or dying," said Gilbert Brogan, northeast representative for Oceana for the non-profit environmental group — whose most prominent backer is actor Ted Danson. "This ruling is a significant step toward improving the management of U.S. fisheries in the Atlantic."

"This ruling has the potential to be very significant," said Andrew Minkiewicz, an attorney who represents the Fisheries Survival Fund, which was established to ensure the long-term sustainability of the Atlantic sea scallop fishery.

"Depending on how NOAA and the New England and Mid-Atlantic Fishery Management Councils choose to respond," Minkiewicz added in a report by the web daily SavingSeafood.com, "fishermen could potentially have to pay for really high levels of observer coverage."

NOAA did not indicate how it would satisfy the demands in the ruling.

The district court approved NOAA's new 2010 program on bycatch — which counts any bycatch brought in by fishermen toward landings of that stock, regardless of whether the catch was targeted.

In its ruling, the lower court found that policy was consistent with the Administrative Practices Act and the National Environmental Policy Act, and it had rejected Oceana's "motion to compel completion of the record" with documents NOAA contended were privileged, according to Ginsberg's July 19 ruling.

Ginsberg, however, explained in his 11-page order that he was looking beyond the judgment of the lower court to NOAA's "action directly" to comply with bycatch requirements of the law.

But Ginsberg did consider an omnibus amendment to the 13 fisheries in the Northeast region, which was created by the NOAA and the New England and Mid-Atlantic councils to guide efforts on gathering information on bycatch.

The judge treated the amendment disdainfully.

"(It) fails to survive (an) indulgent standard of review because it creates an exception so vague as to make the rule meaningless. (NOAA) apparently has given itself complete discretion ... " he wrote.

Ginsberg went on to conclude that NOAA had argued that its plan for bycatch applied only when it wanted it to.

"The agency appears to mean the methodology is 'established' in some Platonic sense, serving as the model to which the agency will aspire, though it is never itself fully realized," the judge wrote. In parentheses, he added, "Ah, but a man's reach should exceed his grasp, or what's a heaven for?"

The ruling, rejecting the argument by NOAA that it could do only what its budget from Congress allowed, places the agency between a rock and a hard place, pressed for funds and under pressure to expand scientific research among other elements of fisheries management.

Ginsberg wrote that, if NOAA was unable to finance an effective bycatch measurement program, "it should take those concerns to Congress.

The NOAA leadership appointed by President Obama has been passive when facing funding or policy conundrums. That reticence has showed in disputes with the fishing industry, which has pressed NOAA to acknowledge that it either had more latitude to increase fish allocations or seek Congressional authorization to do so.

"NOAA needs to confront the observer issue head-on, and devise a solution that balances the need for good information with economic reality," said David Frulla, a partner at the law firm of Kelley Drye & Warren and a columnist in National Fisherman.

"We are reviewing the Appeals Court decision and its implications for NOAA Fisheries and the fishery management plans administered by the New England and Mid-Atlantic Fishery Management Councils," said NOAA spokeswoman Monica Allen.

"Oceana is confident that this ruling will lead to better information about these important fisheries," said Oceana's Brogan. "Improved data that is provided to the public will force fisheries managers to get serious about reducing the destruction and waste of valuable ocean resources."

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