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Challenging NOAA stand on past cases

By Richard Gaines

Staff Writer

Members of the East Coast congressional fishing caucus are prepared to challenge the announced intention of top fisheries regulators to tackle systemic failings in law enforcement — including excessive penalties and possible vindictive motives — without reviewing past miscarriages of justice by federal enforcement agents against fishermen and related businesses.

Sens. John Kerry and Scott Brown and Congressman John Tierney said they believe it essential that acts of improperly used authority by the agents of now-former National Oceanic and Atmospheric Administration police chief Dale J. Jones and NOAA's office of general counsel be fully explored in the process of reforming the scandalized agency.

Kerry and Tierney said they would raise their concern during an emergency meeting set for Wednesday with Commerce Secretary Gary Locke that he granted to a 23-member caucus to discuss a suite of suggested actions by the secretary to relieve concerns over the viability of the New England groundfishing industry.

"Sometimes, you have to look back in order to move forward," said Kerry.

"I will work with other members of the delegation to fully investigate the reported acts of impropriety," said Brown.

Won't stand for 'silence'

Tierney added that "we will not tolerate NOAA's silence on this matter."

Republican Congressman Walter B. Jones of North Carolina, most members of the caucus as well as lawyers and lawmakers from New England ports have asserted similar opinions.

"Congressman Jones feels that it is unacceptable for NOAA not to look back at the problems or what caused them," his press secretary, Catherine Fodor, said Friday.

In addition, Congressman Barney Frank, who could not be reached for this story, has been outspoken in urging that NOAA look back at law enforcement acts that warrant review.

The decision to reform NOAA law enforcement without first reviewing past excessive penalties and actions against the industry was found in a memo to NOAA administrator Jane Lubchenco by Eric Schwaab, director of the National Marine Fisheries Service, and NOAA Chief Counsel Lois Schiffer.

No 're-examination'

"Our goal and approach are to look forward toward building an improved, effective and fair program," Schwaab and Schiffer wrote to Lubchenco. "We are not here re-examining specific cases or data mentioned in the report or looking at the history of our offices."

Lubchenco released their memo on March 18 along with multiple documents and addenda in announcing the planned response to a scathing report from Inspector General Todd Zinser on policing and legal actions by NOAA agents in the name of enforcing the Magnuson-Stevens Act and other fisheries laws.

Lubchenco said she was "adopting" the message of the Schwaab-Schiffer letter, and noted the need for "strong leadership, procedural changes" and "certain changes in the culture of NOAA's program."

Commerce Department Inspector General Zinser undertook a six-month, national investigation on Lubchenco's request in June 2009. But Lubchenco did not act until protests starting in Gloucester — in support of the Gloucester Seafood Display Auction which had been targeted repeatedly by NOAA agents and government lawyers — brought demands for independent review from state lawmakers and then the state's congressional delegation.

Lubchenco also played a crucial role in setting in motion actions by NOAA agents and lawyers against the auction that brought a rebuke from a federal judge last summer.

Within days of her March 2009 Senate confirmation, Lubchenco — acting as an administrative appeals judge — upheld a finding and reduced

penalties against the auction that had been ordered by her predecessor, Conrad Lautenbacher Jr.

The 'one-fish case'

Lautenbacher had rejected a trial judge's decision to essentially broom a case investigated by Jones' agents and brought by the office of general counsel; after a full trial, the administrative judge found no validity to allegations that the auction had brokered a small excess weight of cod — the "one-fish case," as it is now widely termed.

Faced with Lautenbacher's directive, the judge imposed the minimal possible penalties, and the auction appealed into the federal court system. But with a district court appeal active, Andrew Cohen, Jones' agent in charge of the Gloucester office, sent out a press release last June announcing that the auction faced closing. U.S. District Court Judge Douglas Woodlock chastised Cohen and NOAA for attempting to impose punishment while the appeal was still pending.

At the time, the government was attempting to negotiate a settlement of a massive 59-count claim against the auction filed in February 2009. That case was also in the administrative law system.

The judge ordered the government to surrender reams of internal e-mails and documents to the auction that might have proved the vindictive motives for action against the auction.

However, large quantities of the disputed e-mails and files were never turned over to auction lawyers.

Shredding, asset fund

Days after Lubchenco released her response to the IG's report together with the Schwaab-Schiffer memo, IG Zinser announced to House oversight subcommittee hearings in March that his investigators had evidence Jones had ordered a mass document shredding and had used a \$8.4 million asset forfeiture fund for his own foreign travel.

In April, Schwaab announced that an interim chief of police had been appointed. But no further mention of Jones was ever made. The Times has filed a Freedom of Information Act request for documents relating to Jones' status and that of others within his regime's hierarchy. Zinser has said his staff was continuing to investigate the document shredding and possible misuse of the asset forfeiture fund, which was comprised of fines

— the highest levels by far from New England and the Mid-Atlantic states
— but no information has been released about those investigations.

Zinser's 28-page report on his probe of NOAA law enforcement also said he would produce addenda on the most notorious cases. Yet only one was named — the decade-long effort by NOAA agents and litigators to punish and shut down the Gloucester auction.

The night before Jones made his final public appearance, at a House oversight subcommittee hearing in Gloucester, the government and the auction announced a settlement of three cases. The auction, owned by the Ciulla family, agreed to pay \$85,000 in fines without admitting any violations.

The settlement rendered moot the auction's effort to obtain the remaining volume of internal files generated by agents and government lawyers about efforts to close the business that NOAA had been ordered to release.

But Kerry explained his decision to challenge NOAA's intention to not look back in a statement to the Times last week.

An 'exclamation point'

"NOAA's excessive penalties and retaliatory enforcement actions have caused deep distrust among our fishermen," Kerry said. "The Dale Jones scandal was an exclamation point and an underline of what was already a frayed relationship ... We need a full accounting of what happened so we can put the pieces back together and move forward together. I look forward to talking with Secretary Locke about this."

Gloucester state Rep. Ann-Margaret Ferrante, a lawyer who once represented the auction, said she was "astounded" that Schiffer proposed leaving "wrongs unaddressed."

The New England congressional fishing caucus sought the meeting with the aim to convince Locke to use his emergency powers to increase the allocation of fish for the groundfishery.

"In 2007 (the last year for which we have data)," the caucus wrote on April 21, "only 27 percent of the total allowable catch was harvested because of regulatory measures designed to protect the weakest stocks. Thus, 73 percent of the allowable, sustainable catch was left in the ocean, costing our fishermen and our coastal economies approximately \$500 million.

"Without an emergency action to adjust the 2010 allocation levels for these stocks," they wrote, "fishermen will yet again be forced to walk away from abundant species within the groundfishery, leading to significant job loss and tens or even hundreds of millions of dollars in forfeited revenue."

Richard Gaines can be reached at 978-283-7000, x3464, or rgaines@gloucestertimes.com

GloucesterTimes.com, Gloucester, MA

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Suit filed to challenge NOAA rules

Gloucester joins effort to halt fishery catch share system

By Richard Gaines
Staff Writer

The leading ports for the New England fishing industry, Gloucester and New Bedford — joined by a far flung coalition of commercial fishing interests — have teamed up to file suit against the federal government for creating and implementing what plaintiffs say is a ruinous new management system on the groundfishery.

The filing of the suit — plus a related class action claim from New Jersey — ratchets up of protests against the Obama administration's fisheries management policies under National Oceanic and Atmospheric Administration chief Jane Lubchenco that began in the parking lot of the regional offices in Gloucester last October and expanded into a mass national rally at the side of the Capitol in February.

The new system was activated on May 1, and, in recent days, fishermen have testified at open meetings in both cities that business failures seemed inevitable.

Amendment 16, as the New England groundfish regimen is known, "drives yet another sword through the very heart of the fishing industry and fishing communities," New Bedford Mayor Scott Lang said in a letter sent Monday to Commerce Secretary Gary Locke.

Locke is scheduled to meet Wednesday with a New England and coastal congressional delegation that had appealed to him for emergency action to mitigate the unraveling of the industry.

Congressman Barney Frank and Sen. Olympia Snowe, R-Maine, coordinated the appeal to Locke. Their letter with 23 signatures pointedly did not "cc" Lubchenco, who presides over the oceans and atmosphere for Locke's Cabinet department.

After two decades of intense conservation, many fishing stocks have "substantially recovered," the plaintiffs argued, yet even so, they said, the combined policies are continuing to weaken the industry.

In a statement to the Times last spring, Lubchenco said, "Recent analysis suggests a significant fraction of the vessels will need to be removed to make the fishery sustainable and profitable."

Drafted by attorneys Stephen Ouellette of Gloucester and Pamela LaFraniere of New Bedford, the suit brings together arguments made with increasing passion at government meetings since Lubchenco, confirmed as NOAA administrator a year ago, demanded the federal regional management council whip through final votes on the system, which fuses three important changes.

Those are the introduction of guild-like companies for efficient operations, the conversion of common wealth wild fish stocks into assigned catching rights or catch shares that can be bought, sold or traded — and hard catch limits made hyper tight to achieve 10-year stock restoration deadlines.

The council complied with Lubchenco's directive, but also voted two special interests — recreational boats, and a small cadre of Cape Cod fishermen favored by environmental groups — preferable allocation formulas to those given the larger commercial sector.

As a result, said suit co-plaintiff Paul Theriault, a Rockport commercial fisherman, the commercial boats were denied their fair share of the allocation.

"I signed onto the suit for equality," he told the Times Monday. "The allocation of the fish was supposed to be fair and equitable, but it wasn't."

Theriault said that, by higher allocations granted the Cape Cod Commercial Hook Fishermen's Association and the recreational sector

and party boats, the commercial boats lost an average of 10,000 pounds, worth more than \$10,000.

A formal objection to the shift of value was filed by David Goethel, a New Hampshire commercial fisherman and New England council member, and rejected by Locke weeks ago.

A parallel class action suit to the named plaintiffs' suit filed in Boston Sunday — both beat a 30-day deadline from the formal publication of Amendment 16 — was filed in federal district court in Trenton, N.J., and focuses on the inequities created by using faulty data.

NOAA has also acknowledged that it was using faulty catch history records to allocate the total allowable catch between fishermen, but said it could not fix the records in time for the 2010 fishing season.

The Gloucester-New Bedford suit, meanwhile, alleges that the changeover from the days at sea system to the catch share approach using catch histories effectively constituted a "property taking" akin to eminent domain.

The plaintiffs did not ask to have Amendment 16 overturned, but sought compensation for losses suffered by illegal actions that were "arbitrary, capricious and an abuse of discretion."

The suit alleged that the sector system, touted as insulating the fleet from bureaucracy, actually imposed operating cost burdens of "as much as \$17,000 to \$27,000 per vessel — as much as 20 percent of the average boat gross revenue of \$130,000.

"As a result," the suit argued, "it is anticipated the regulatory burden will force the fleet to consolidate and reduce its numbers from 600 active vessels (down from 1,400 in 1994) to as few as 100-200 vessels, forever altering the economics of coastal communities."

The vast changes in the groundfishing industry were made with the enthusiastic support of the environmental sector, notably the Environmental Defense Fund, the Pew Environment Group and Conservation Law Foundation.

The first major modification was creation of new industry structures, known as sectors or guild-like companies as alternatives to the iconic individualism that set fishermen apart from each other and land based industries.

The approach was modeled by the Cape Cod fishermen, but they fished primarily for a single species, cod, whereas the system rolled out for New England 10 days ago covers the 19 stocks in the groundfish complex.

The use of 10-year catch histories for the bulk of the commercial fleet meant inevitably that one or multiple species would have little history, and thus put the boat at risk of overfishing quickly. Also, the hard catch limits came with deterrence, and no allowance for bycatch — fish that are accidentally hauled up in the nets of fishermen who are seeking other species.

Over the first week of the new system, most fishermen stayed in port rather than risk hauling up bycatch of the most limited species, and this facing an immediate shutdown.

Locke and Lubchenco were both named in the suit, which was filed by fishermen and fishing interests as far away from each other North Carolina's Roanoke Fish Co., Inc. and the New Hampshire Commercial Fishermen's Association.

"When it comes to catch shares, one size does not fit all," Mayor Kirk said in her statement announcing the city's agreement to join the legal challenge.

"Taking a single-species program and replicating it in the multi-species complex just won't work without putting the entire groundfishery out of business," she said. "Reports of job and income loss are rolling in, and we are asking the court to intervene on behalf of fishermen."

NOAA officials, meanwhile, stood by the new format Monday.

"We are aware that two lawsuits have been filed," said NOAA spokeswoman Monica Allen. "We take these lawsuits seriously.

"We have a strong record for adopting Amendment 16 which includes the New England Fishery Management Council vote of 14-1, in favor of its adoption in June 2009," she said. "It will continue to be implemented."

Richard Gaines can be reached at 978-283-7000, x3464, or rgaines@gloucestertimes.com