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Re: Legal Recourse for Outdated Seafood Watch Information (NSGLC-10-04-03)

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Dear Tom,

Please find below the information requested by the Virginia Sea Grant Marine Extension Program. The following advisory opinion addresses whether groups, such as Seafood Watch, expose themselves to liability by publishing or listing out-of-date strictures on "seafoods to avoid." Specifically, you presented the example of flounder, which is rated as "avoid" despite the fact that scientific information shows that the Summer flounder is sustainable.

Seafood Watch

The Monterey Bay Aquarium Seafood Watch Program, according to its website, "helps consumers and businesses make choices for healthy oceans."¹ The program makes recommendations of which seafood items are "best choices," "good alternatives," and which to

¹ *What is Seafood Watch?* MONTEREY BAY AQUARIUM,
http://www.montereybayaquarium.org/cr/cr_seafoodwatch/sfw_aboutsfw.aspx (last visited Sept. 9, 2010).

“avoid.” The Program distributes the information through pocket guides, its website, mobile applications, and other outreach efforts. The Program claims that since 1999, it has “distributed tens of millions of pocket guides, [the] iPhone application has been downloaded more than 240,000 times, and [they] have close to 200 partners across North America, including the two largest food service companies in the U.S.” According to the Program, “Seafood Watch recommendations are science-based, peer reviewed, and use ecosystem-based criteria.” Regional pocket guides are updated twice a year, and “Seafood Watch research analysts incorporate any changes in stock status as this information becomes available.”²

Summer Flounder

The Summer flounder or fluke is a demersal flatfish distributed from the southern Gulf of Maine to South Carolina. The Summer flounder is an important commercial and recreational fish, which is managed as a unit stock from North Carolina to Maine. Seafood Watch has rated flounder as “avoid,” claiming that Atlantic flatfish, such as flounder and sole, have been overfished.³ In addition, the program states that flounder are “mainly” caught with bottom trawls, causing damage to seafloor habitats and high rates of bycatch. The Environmental Defense Fund, which also produces a seafood guide in collaboration with Monterey Bay Aquarium, rates the Summer flounder as an “eco-worst choice” and advises against consumption until “improvements are made.”⁴ The EDF also cites elevated PCB levels as a reason to avoid the fish.⁵

The Atlantic States Marine Fisheries Commission (ASMFC) and the Mid-Atlantic Fishery Management Council (MAFMC) jointly manage U.S. commercial and recreational fisheries for Summer flounder under the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan (FMP). In its species stock status for the Summer flounder, the MAFMC concludes that the species is not overfished and is rebuilding and that overfishing is not occurring.⁶ A stock is “overfished” “[w]hen the size of a fish stock is smaller than the sustainable target set by the National Marine Fisheries Service.” Overfishing occurs “[w]hen a fish stock is being fished at a fishing mortality rate that exceeds the overfishing threshold set by the National Marine Fisheries Service.”⁷

² For more specific information on how the program develops recommendations, see *Developing Sustainable Seafood Recommendations*, MONTEREY BAY AQUARIUM, http://www.montereybayaquarium.org/cr/cr_seafoodwatch/content/media/MBA_SeafoodWatch_RecommendationsProcess.pdf.

³ *Seafood WATCH Seafood Search-Flounder*, MONTEREY BAY AQUARIUM, http://www.montereybayaquarium.org/cr/SeafoodWatch/web/sfw_factsheet.aspx?gid=39 (last visited Sept. 9, 2010).

⁴ *Seafood Selector-Summer Flounder*, ENVIRONMENTAL DEFENSE FUND, <http://www.edf.org/page.cfm?tagID=15865> (last visited Sept. 9, 2010).

⁵ *Id.*

⁶ *Species Stock Status*, MID-ATLANTIC FISHERY COUNCIL, http://www.mafmc.org/MAFMC_Stock_Status_CURRENT.pdf.

⁷ *Glossary*, NOAA FISHERIES OFFICE OF PROTECTED RESOURCES, <http://www.nmfs.noaa.gov/pr/glossary.htm#o> (last visited Sept. 9, 2010).

FishWatch, a program of NOAA's National Marine Fisheries Service, provides consumers with information on seafood.⁸ The program uses data from NOAA sources, including fish stock assessments, fishery evaluations, and fishery management plans and amendments. According to FishWatch, "The [Summer flounder] stock is rebuilding and is expected to be fully rebuilt by January 1, 2013. Overfishing is not occurring and the stock is not overfished. Management measures, which include seasons, quotas, and size limits, are increasing population size."⁹ Additionally, in a subcategory of the flounder fishery involving the inshore catch, fish are caught by hook and line, pound nets, gillnets, pots, traps or seine and the by-catch impact on other fisheries is minimal. In addition, the Virginia Department of Environmental Quality performs a Fish Tissue and Sediment Monitoring Plan that has found minimal to no PCBs or metal levels in fish flesh tested in certain waters.¹⁰

Cause of Action

Clearly, the Monterey Bay seafood programs' information conflicts with information collected by the Mid-Atlantic Fishery Management Council, NMFS, as well as state agencies. Although the Seafood Watch program claims to update its information twice annually, the Summer flounder has retained the "avoid" label despite the scientific information available showing that the fish is not currently overfished, overfishing is not occurring, nor does testing of the fish in certain waters show harmful levels of PCBs or metal. Given the high public profile of the Seafood Water program, the distribution of the Monterey Bay's information is likely to have caused some consumers to avoid purchasing Summer flounder, thereby causing injury to businesses operating in the Summer flounder fisheries.

A tort similar to defamation¹¹ is disparagement. However, disparagement relates to the injury to an economic or property interest due to a false statement of fact, rather than a person's reputation. The *Second Restatement of Torts* provides the following on product disparagement, also known as trade libel: "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity."¹² Generally, the six elements to disparagement include the "(1) intentional and (2) unprivileged (3) publication of

⁸ *About FishWatch*, NOAA FISHERIES, http://www.nmfs.noaa.gov/fishwatch/about_us.htm (last visited Sept. 9, 2010).

⁹ *Summer Flounder*, NOAA FISHERIES, http://www.nmfs.noaa.gov/fishwatch/species/summer_flounder.htm (last visited Sept. 9, 2010).

¹⁰ *2008 Fish PCBs Results*, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, http://www.deq.virginia.gov/export/sites/default/fishtissue/documents/2008_fish_pcb.xls.

2008 Fish Metals Results, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, http://www.deq.virginia.gov/export/sites/default/fishtissue/documents/2008_fish_metals.xls.

¹¹ Defamation may include both libel and slander, which are claims for false statements of fact about a person that are printed, broadcast, spoken or otherwise communicated to others. Libel refers to statements or visual depictions in written or other permanent form, while slander refers to verbal statements and gestures.

¹² RESTATEMENT (SECOND) OF TORTS: INJURIOUS FALSEHOOD § 623A (1977).

(4) a false statement that (5) disparages the property of another (6) in a manner that can be measured.¹³

In 1990, eleven Washington apple farmers filed a class action suit against the Natural Resources Defense Council (NRDC) and CBS, alleging trade disparagement. The NRDC had published a report on the risks of pesticides and CBS subsequently ran a documentary on the report.¹⁴ Shortly after the documentary aired, apple sales severely declined. The apple growers lost the case because they could not prove the "false statement" element. The apple growers were only able to prove that the statements were ambiguous or possibly false. Shortly thereafter, many states began to consider agricultural product disparagement legislation to protect products that are important to their economies. The laws impose civil or criminal liability for disparaging agricultural and food products.

Food Disparagement Laws

Thirteen states have passed laws giving causes of action for food defamation: Louisiana, Idaho, Alabama, Georgia, Mississippi, South Dakota, Arizona, Florida, Oklahoma, Texas, Ohio, North Dakota, and Colorado. Alabama, Florida, Georgia, Louisiana, Mississippi, and Ohio's statutes include: (1) a statement of legislative intent, (2) a definitions section, (3) a statement of a cause of action for disparagement, and (4) a statute of limitations.¹⁵ Idaho and Oklahoma's statutes have no statute of limitations requirement, while Arizona, South Dakota, and Texas statutes omit an express legislative intent.¹⁶ Colorado's statute makes it unlawful to knowingly make false statements about food products.¹⁷

Below is a sample of agricultural product disparagement statutes:

Texas:

TEX. CIV. PRAC. & REM. CODE § 96.002 (2010)

(a) A person is liable as provided by Subsection (b) if:

- (1) the person disseminates in any manner information relating to a perishable food product to the public;
- (2) the person knows the information is false; and
- (3) the information states or implies that the perishable food product is not safe for consumption by the public.

(b) A person who is liable under Subsection (a) is liable to the producer of the perishable food product for damages and any other appropriate relief arising from the person's dissemination of the information.

¹³Eric Jan Hansum, *Where's the Beef? A Reconciliation of Commercial Speech and Defamation Cases in the Context of Texas's Agricultural Disparagement Law*, 19 REV. LITIG. 261, 267-268.

¹⁴*Auvil v. CBS "60 Minutes,"* 67 F.3d 816 (9th Cir. 1995).

¹⁵J. Brent Hagy, *Let Them Eat Beef: The Constitutionality of the Texas False Disparagement of Perishable Food Products Act*, 29 TEX. TECH L. REV. 851 (1998).

¹⁶*Id.*

¹⁷*Id.*

“Perishable food product” means a food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time. (§ 96.001).

In determining if information is false, the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data. (§ 96.003).

Georgia:

GA. CODE ANN. § 2-16-3 (2010)

Any person who produces, markets, or sells a perishable food product or commodity and suffers damage as a result of another person’s disparagement of such perishable food products or commodities has a cause of action for damages and for any other relief a court of competent jurisdiction deems appropriate, including, but not limited to, compensatory and punitive damages.

“Disparagement” means the willful or malicious dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption. The information shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data.

“Perishable food product or commodity” means any agricultural or aquacultural food product which is sold and distributed in a form that will perish or decay beyond marketability within a period of time.

“Producers, processors, marketers, and sellers” shall include the entire chain from grower to consumer. (§ 2-16-2).

Statute of limitations: 2 years. (§ 2-16-4).

Florida:

FLA. STAT. § 865.065 (2010)

(3) Any producer or any association representing producers or perishable agricultural food products which suffers damages as a result of another person’s disparagement of any such perishable agricultural food product may bring an action for damages and for any other relief a court of competent jurisdiction deems appropriate, including, but not limited to, compensatory and punitive damages.

Florida’s definitions of “disparagement” and “perishable agricultural food product” are the same as Georgia’s listed above.

“Producer” means the person who actually grows or produces perishable agricultural food products. (§ 865.065(2)).

Statute of Limitations: 2 years. (§ 865.065(4)).

Food Disparagement in Court

Following the passage of the food disparagement statutes, there have been several claims. The most high-profile case involved talk show host Oprah Winfrey.¹⁸ On a show looking at "dangerous food," Winfrey and one of her talk show guests made statements regarding the risk of mad cow disease in the U.S. Shortly thereafter, beef sales declined and a group of cattle ranchers filed suit, alleging that Winfrey violated Texas' False Disparagement of Perishable Foods Act. The Act imposes liability if "the person disseminates in any manner information relating to a perishable food product to the public; (1) the person knows the information is false; and (2) the information states or implies that the perishable food product is not safe for consumption by the public." To determine whether the information is false, "the trier of fact must consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data." The court ruled for Winfrey on the food disparagement claim, finding that cattle are not a "perishable" agricultural product within the meaning of the statute, and, even if cattle were perishable under the statute, the plaintiffs did not show that Winfrey knew that the statements about the cattle were false.

In the legal community, there is debate about whether the food disparagement laws are even constitutional. The U.S. Supreme Court has ruled that state *defamation* laws (see above for the difference between disparagement and defamation) must provide safeguards for freedom of speech and freedom of the press, as provided for in the First and Fourth Amendments.¹⁹ Although a disparagement suit has not been challenged on constitutional grounds, many commentators feel that "[t]he statutes would abrogate the requirement, widely established in American defamation law, that no cause of action is available unless the plaintiff can prove that the statement at issue was 'of and concerning' him or her."²⁰

Summer Flounder Disparagement

Is it likely that the Monterey Bay seafood program information violates either a common law disparagement legal principle or a food disparagement statute? First, a common law trade disparagement claim, as seen in the apple farmers' case, is a difficult standard to meet. Generally, plaintiffs must prove, "(1) intentional and (2) unprivileged (3) publication of (4) a false statement that (5) disparages the property of another (6) in a manner that can be measured."²¹ As with the apple farmers, the Summer flounder fishermen and distributors would be required to prove that Seafood Watch knowingly published false information in the seafood guides. To evaluate such a claim, a court would look at the reports and studies used by Monterey Bay/Seafood Watch to see if the group relied on reasonable and reliable data.

¹⁸ Texas Beef Group v. Winfrey, 11 F. Supp. 2d 858 (N.D. Tex. 1998), *aff'd* 201 F.3d 680 (5th Cir. 2000).

¹⁹ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²⁰ Margaret E. O'Neill, *Food Disparagement Laws*, 50 *Am. Jur. 2d Libel and Slander* § 546; See Hagy, *supra* note 14.

²¹ Hagy, *supra* note 14 at 267-268.

Whether a state food disparagement statute applies would depend on the jurisdiction in which the case was brought. In Georgia, for example, if a Summer flounder marketer, seller, or processor brought an action against Seafood Watch, it would have to prove 1) that the flounder is a perishable product; 2) the willful or malicious dissemination of the information; 3) that the information was false (not based upon reasonable and reliable scientific inquiry, facts, or data); and 4) damage as a result of Seafood Watch's publications and outreach efforts.

In the case of Summer flounder, for example, a court would start by examining whether Summer flounder is a perishable product. In Georgia's food disparagement law, "'Perishable food product or commodity' means any agricultural or aquacultural food product which is sold and distributed in a form that will perish or decay beyond marketability within a period of time." Since the fish would likely not be sold and distributed live, the court would probably find that the fish fits within the "perishable" definition.

Next, the court would look at whether the dissemination of the Seafood Watch was willful or malicious. A general definition for willful is: "voluntary and intentional, but not necessarily malicious." Since Seafood Watch actively shares its information through its website and cards, it is likely that a court would find the publication to be willful. The court would then examine whether the information in the Seafood Watch cards is false. The court would look at whether the information used by Seafood Watch is based on reasonable and reliable scientific data.

Finally, the plaintiffs would have to prove damages as a result of the publications. The plaintiffs would have to show that the publication of the information depressed sales or the price of the fish. However, even if the plaintiffs proved all of these elements, the constitutionality of the statute may still be in question.

Conclusion

Before looking to the courts, it might be helpful for fishermen to consider other avenues of recourse. One alternative would be to ask a state Attorney General's office to look into the issue. Attorney General offices serve as representatives of the public interest and may be able to provide an advisory opinion or even institute a civil suit, if necessary. Another option would be a formal letter to Monterey Bay Seafood Watch requesting information on the type of scientific information upon which the organization is basing its decisions. This would help develop a record in case of future actions.

I hope you find this information useful. The Law Center would be happy to conduct any follow-up research if you have any additional questions. The above information is intended as advisory research only and does not constitute legal Representation of Virginia Sea Grant or its constituents. It represents our interpretations of the relevant laws and regulations.

Sincerely,

Terra Bowling