

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
THE CITY OF NEW BEDFORD, et al.,)	
)	
Plaintiffs)	CIVIL ACTION NO. 10-10789-RWZ
)	
v.)	
)	
GARY LOCKE, et al.,)	
)	
Defendants)	
_____)	
LOVGREN, et al.,)	
)	
Plaintiffs)	
)	
v.)	
)	
GARY LOCKE, et al.,)	
)	
Defendants)	
_____)	

**PLAINTIFF CITY OF NEW BEDFORD’S MEMORANDUM IN SUPPORT OF ITS
FIRST MOTION FOR DISCOVERY AND COMPLETION OR SUPPLEMENTATION
OF THE RECORD**

The Plaintiff City of New Bedford (“City of New Bedford”) respectfully moves this court to allow plaintiff to take the depositions of the following defendant agency officials: (1) Jane Lubchenco, National Oceanic and Atmospheric Administration (“NOAA”) Administrator,¹ (2) Monica Medina, Special Advisor to the NOAA Administrator, (3) Patricia Kurkul, Regional Administrator for the Northeast Regional Office of the NOAA Fisheries Office (“NMFS”), and

¹ The National Marine Fisheries Service (“NMFS”) is a component of NOAA. NMFS, NOAA, and the Department of Commerce are listed as the “agency” responsible for issuing the regulation that is the subject of this litigation (“Amendment 16”). April 9, 2010; 75 FR 18262.

the following witnesses who are not agency officials: (4) John Pappalardo, Chair of the New England Fisheries Management Council (NEFMC), and (5) Sally McGee, member of the NEFMC. The City of New Bedford requests permission to move for completion or supplementation of the agency's administrative record, as appropriate, upon completion of its factual discovery.

Background

This case concerns the agency's regulation and management of a fishery that has existed since the 1600s. This fishery continues to play a critical role, economically and socially, in the city of New Bedford, as well as to feed people all over the world. Irreversible socioeconomic damage to a number of communities and stakeholders will occur as Amendment 16 continues to be implemented. The measures included in Amendment 16 will economically devastate New Bedford's fishing community and collapse the economy of stakeholders far beyond New Bedford. As a result, the agency's adoption of Amendment 16, which included the rapid adoption and application of a "catch share" system, have engendered significant controversy.

Factual Discovery in this Case is Necessary and Appropriate

The City of New Bedford contends that discovery in this case is necessary and appropriate because (1) not all claims in this case are governed by the Administrative Procedure Act ("APA") and thereby subject to the conditions for consideration of "extra record" evidence that have developed in the case law interpreting the APA. Count Three of the Amended Complaint is a constitutional takings claim; (2) the conditions under which factual discovery and consideration of extra record evidence have been deemed appropriate under case law exist here; and (3) discovery is necessary to understand why the agency was so committed to ensuring the selection and imposition of a particular fishing management system known to cause serious and

widespread harm, particularly when poorly designed and implemented in an unduly rushed manner without proper consideration of the alternatives, as is the case here, when such system in itself does nothing to conserve fish or ensure optimum yields and when such system required state of the art, “real time” data collection systems which did not exist. The requested depositions are necessary to fully disclose the bases for the agency’s actions affecting an entire ecosystem at the center of an important public policy debate. They are also essential to an accurate evaluation of the agency’s fulfillment of its statutory mandates. In this motion, the plaintiff City of New Bedford contends that the agency has improperly skewed and influenced the administrative process to secure a pre-determined outcome, and that these actions constitute bad faith and improper behavior justifying the depositions requested.

Standards for Review of Extra-Record Evidence

First, a complete record must be presented before a court can meaningfully engage in any judicial review of it. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 at 420 (1971). The City of New Bedford has now received a copy of the defendant agency’s administrative record, but not yet had an opportunity to complete its review of it and cannot agree that the agency has submitted a complete administrative record. Failing to submit a “complete administrative record,” withholding clearly relevant documents from the administrative record, and withholding relevant records to skew the record in favor of the agency’s decision have all been found to constitute bad faith or impropriety serious enough to justify consideration of extra-record evidence. Maritime Mgt. v. U.S. 242 F. 3d 1326, 1335, n. 9, 11, 14 (11th Cir. 2001); Theodore Roosevelt Conservation Partnership v. Salazar, Nos. 09-5162, 09-5193, 7 (U.S. Ct. of App., DC Circuit, July 23, 2010) citing EDF v. Blum 458 F.Supp. 650, 660-661 (D.D.C. 1978). To the extent Plaintiff’s review of the record lodged September 1, 2010 raises any issues as to its

completeness, Plaintiff reserves the right to move that the record be completed, and, as appropriate, supplemented through factual discovery.

Second, the Administrative Procedure Act (APA) does not prohibit supplementing the administrative record with new evidence. While variously grouped and numbered, extra-record evidence is allowed under a “number of exceptions,” Conservation Law Foundation of New England v. Clark, 590 F.Supp. 1467, 1474 (D. Mass. 1984):

1. If necessary to determine whether the agency has considered all relevant factors and has explained its decision;
 2. When the agency has relied on documents not in the record;
 3. When supplementing the record is necessary to explain technical terms or complex subject matter; and
 4. When the plaintiffs make a showing of agency bad faith or improper behavior
- Northcoast Environmental Center v. Glickman, 136 F. 3d 660, 665 (Ct of App., 9th Cir. 1998), citing Southwest Center for Biological Diversity v. US Forest Service, 100 F3d 1443 at 1450 (9th Cir. 1996) (Additional citations omitted).

“Extra record” evidence is also allowed:

5. When evidence either confirming or denying agency predictions made in the original decision subsequently becomes available. Town of Norfolk v. US EPA, 761 F.Supp .867, 874 (D. Mass 1991) citing Conservation Law Foundation of New England v. Clark, 590 F. Supp. 1467, 1474 (D. Mass. 1984), which cites Amoco Oil v. EPA, 501 F.2d 722, 729 n. 10 (D.C.Cir. 1974).

It is anticipated that review of the administrative record will provide justification to supplement the record under the exceptions numbered 1 – 3 and 5 above, and the City of New

Bedford reserves the right to move for discovery based upon such review. The City of New Bedford contends that the agency has improperly skewed and influenced the administrative process to reach a pre-determined outcome. A number of facts presently known strongly support exception 4, bad faith and improper behavior. The City of New Bedford reserves the right to move for additional discovery as review of the administrative record may warrant.

“Indeed, where the so-called “record” looks complete on its face and appears to support the decision of the agency but there is a subsequent showing of impropriety in the process, that impropriety creates an appearance of irregularity which the agency must then show to be harmless.” Portland Audubon Society v. the Endangered Species Committee, 984 F.2d 1534, 1548 (9th Cir. 1993). Granting discovery is appropriate where, as here, there is the need for extremely prompt action and the questions presented in the petition for review are significant. Portland at 1549, citing various cases (citations omitted). Unlike the facts in some other reported cases, this case does not involve a few acres of land. This case involves an entire industry and a way of life. As one attendee at an NEFMC meeting in 2009 noted, once Amendment 16 is fully implemented, there will be miles of coastline where there will be no more of the traditional fishing communities; the infrastructure will have gone.

The Bad Faith or Improper Behavior Exception Applies to this Case

Where bad faith or improper behavior are claimed, a reviewing court is justified in looking past the administrative record and reviewing additional evidence *in camera* to decide whether it constitutes an adequate showing of bad faith or improper behavior. Town of Norfolk and Walpole v. U.S. Army Corp of Engineers, 137 F.R.D. 183, 183, 185 (D. Mass. 1991) *aff'd on other grounds* 968 F. 2d 1438 (1st Cir. 1992). “...A court’s supervisory function calls on the court to intervene not merely in case of procedural inadequacies ... but more broadly if the court

becomes aware, especially from a combination of danger signals, that the agency has not ... genuinely engaged in reasoned decision-making.” Conservation Law Foundation of New England v. Clark, 590 F. Supp. 1467, 1474 (D. Mass. 1984)(internal quotations omitted). The City of New Bedford contends that a number of such danger signals present themselves here.

Only about three weeks after being appointed as NOAA Administrator and undersecretary of Commerce, Jane Lubchenco, a former vice-chairwoman for the board of directors of the Environmental Defense Fund (EDF), publicly identified the “catch share” system as NMFS’s preferred outcome. See p. 3, lines 11-15 of the Transcript of Jane Lubchenco’s opening remarks made at the April 8, 2009 meeting of the NEFMC, transcribed and attached at Exhibit 2. This pronouncement came before the administrative process for Amendment 16 had been completed. Ms. Lubchenco herself appeared at the April 8, 2009 meeting of the New England Fishing Management Council (NEFMC), telling the council members that their actions regarding catch shares would be watched closely. See p. 4, lines 9-11 of Exhibit 2. She urged the council to adopt the catch share system, and told it that the agency’s next step was to make a “rapid transition to sectors and catch shares.” See p. 7, lines 9-10 of Exhibit 2. Ms. Lubchenco’s statements reflect that NOAA intended to hold the council accountable for its upcoming vote on the catch share system: “...I intend to hold you accountable in the public view. I’m shining a light on your efforts now and we will be tracking your progress. There is too much at stake for us to allow delays” See p. 8, lines 13-17 of Exhibit 2.

By June 22, 2009, Lubchenco had announced that as “transitioning to catch shares is a priority for NOAA,” she was creating a special committee staffed by high-level appointees, including a Special Advisor to the NOAA Administrator who, as an attorney, previously represented the EDF. This Committee would be dedicated to promoting catch shares and

developing ways to get fisherman to accept catch shares. This occurred before the regulatory process had developed sufficient information to determine that catch shares were a reasonable choice. See copy of NOAA Press Release dated June 22, 2009 at Exhibit 3. No similar level of attention or resources was devoted to examining or developing alternatives, or studying the human, social and economic impacts of the catch share system, as required by 5 U.S.C. Sec. 603(c), 604 (RFA), 16 USC Sec. 1851(a)(FCMA), and 42 USC Sec. 4321 (NEPA).

In setting catch allocations for Amendment 16, the agency accepted from the NEFMC an unfair and unreasonable allocation process that inexplicably used one method for identifying allocations for certain Cape Cod and recreational fishing groups and another for the remaining commercial fishers, to the benefit of the former groups and the detriment of the latter. This process was formally protested by council member David Goethle via letter dated June 27, 2009 to Gary Locke, Secretary of the Department of Commerce. See copy of David Goethle's letter at Exhibit 4.

In December 2009, John Pappalardo, the chairman of the NEFMC wrote an "urgent" letter addressed directly to Gary Locke, the Secretary of the Department of Commerce, describing the NEFMC's inability to function given the agency's inadequate resources and ineffective bureaucracy. See copy of Mr. Pappalardo's letter at Exhibit 5. Upon information and belief, Mr. Pappalardo was assisted or supported in writing this letter by NEFMC member Sally McGee. The letter reflected serious and urgent concerns regarding the agency's regulatory process and the information upon which major decisions were being made.

The agency also used unreasonably flawed scientific and statistical information for setting catch limits in Amendment 16. Within only about two months of setting species catch limits, the amount of Pollock allowed to be caught was increased at least five-fold. See copy of

Cape Cod Commercial Hook Fishermen's Association Press Release dated June 16, 2010, at Exhibit 6, and "Small Entity Compliance Guide: Revised Pollock Annual Catch Limits for Fishing Year 2010," dated July 16, 2010, at Exhibit 7.

While these facts alone raise the issue of bad faith and improper behavior, additional information shows that this is not an agency whose administrative record can be accepted at face value without a meaningful factual inquiry into the reasons why it acted as it did.

The statements made by NOAA Administrator Jane Lubchenco to the NEFMC and the actions of the agency in processing and promulgating Amendment 16 must be viewed in the context of an agency that the Commerce Department's own Inspector General found, in a series of reports over twelve years, to "have systemic, nationwide issues adversely affecting NOAA's ability to effectively carry out its mission of regulating the fishing industry." Zinser, Todd, "Review of NOAA Fisheries Enforcement Programs and Operations," January 21, 2010, pp. 2, 3, 10 and 11. See copy of Excerpt from this report at Exhibit 1. These issues included inadequate management information systems, arbitrary, inconsistent and excessive prosecution of and collection of penalties and fines from fishermen, particularly in the New England Region, for unintentional non-compliance with confusing rules and restrictions, as well as systemic issues regarding non-compliance with FOIA. See Exhibit 1. Also, Zinser, Todd, "Report from U.S. Department of Commerce Inspector General to Sen. Olympia Snowe," dated February 26, 2009.

The agency was not only unfairly and arbitrarily prosecuting and collecting fines from fishermen for technical infractions of confusing and constantly changing rules, it was accumulating these fees in an unregulated fund. This fund was discovered when the Inspector General conducted in-person interviews with agency staff while investigating his previous report, "Review of NOAA Fisheries Enforcement Programs and Operations," dated January 21, 2010.

See Exhibit 1 at page 2. The fund had so little in the way of internal controls that the actual size of the fund, while estimated to well exceed \$8 million, was unable to be determined by special forensic audit. The fees were used to pay for agency staff cars, extensive foreign travel, a luxury boat, and numerous items and services with little or no internal controls or documentation.

Zinser, Todd J. "Review of NOAA Fisheries Enforcement Asset Forfeiture Fund," July 1, 2010.

This is an agency where the Department of Commerce's own Inspector General has found numerous systemic problems persisting over years. The Inspector General has found a failure to provide the level of information to the public required by the Freedom of Information Act (FOIA), arbitrary persecution and fining of fishermen for technical violations of ever-changing rules, and uncontrolled and un-accounted for collection and use of fines and penalties taken from fishermen. It is an agency where the top official in charge of enforcement shredded documents during the Inspector General's inquiries.

This is an agency that believes it is above the law, and accountable to no one in explaining its actions. Factual discovery is warranted here, and plaintiff City of New Bedford should be allowed to present to the court any additional facts so discovered that support the conditions under which judicial review of extra-record evidence is warranted.

The City of New Bedford needs the opportunity to at least depose the following agency officials: (1) Jane Lubchenco, NOAA Administrator, (2) Monica Medina, Special Advisor to the Administrator, (3) Patricia Kurkul, Regional Administrator for the Northeast Regional Office of the NOAA Fisheries Office ("NMFS"), and the following witnesses who are not agency officials: (4) John Pappalardo, Chair of the NEFMC, and (5) Sally McGee, member of the NEFMC. Upon completion of such depositions, the City of New Bedford will re-evaluate the

need for any further discovery. Assuming the availability of these witnesses, the City of New Bedford proposes to complete these depositions by December 15, 2010.

WHEREFORE, for all of the reasons stated above, the plaintiff City of New Bedford respectfully moves this court to allow the depositions requested and the opportunity to present for the court's review any relevant evidence so discovered.

Dated: September 9, 2010

Respectfully submitted,

Plaintiff City of New Bedford by its attorneys,

/s/ John F. Folan
John F. Folan, Esquire
BBO No. 173300
Folan & McGlone
401 County Street
New Bedford, MA 02740
Tel.: 508-992-9800
Fax: 508-992-9730
e-mail: folan.mcglone@verizon.net

/s/ Julie K. Peterson
Julie K. Peterson, Esquire
BBO No. 564874
26 Little River Road
South Dartmouth, MA 02748
Tel.: 508-996-6071
Fax: 508-996-6071
e-mail: juliepetersonlaw@hotmail.com

CERTIFICATE OF SERVICE

I hereby certify that this (these) document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 9, 2010.

/s/ Julie K. Peterson
Julie K. Peterson

LIST OF EXHIBITS

- Exhibit 1: Zinser, Todd, "Review of NOAA Fisheries Enforcement Programs and Operations," January 21, 2010, Excerpt , 5 pp.
- Exhibit 2: Transcript of Jane Lubchenco's opening remarks made at the April 8, 2009 meeting of the NEFMC, transcribed from mp3 audio file 090408_undersecretary at www.nefmc.org, 10 pp..
- Exhibit 3: NOAA Press Release dated June 22, 2009, "NOAA Announces Catch Share Task Force Members," 2 pp.
- Exhibit 4: Letter from David Goethel to the Honorable Gary Locke dated June 27, 2009, 3 pp.
- Exhibit 5: Letter from John Pappalardo to the Honorable Gary Locke dated December 2009, 2 pp.
- Exhibit 6: Cape Cod Commercial Hook Fishermen's Association Press Release, "National Marine Fisheries Service Announces Changes to Commercial Harvesting Levels for Atlantic Pollock," dated June 16, 2010, 2 pp.
- Exhibit 7: "Small Entity Compliance Guide: Revised Pollock Annual Catch Limits for Fishing Year 2010," dated July 16, 2010, 2 pp.