

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GLOUCESTER FISH EXCHANGE, INC.,

Plaintiff,

v.

GARY LOCKE, SECRETARY OF
COMMERCE, UNITED STATES
DEPARTMENT OF COMMERCE /
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION AND
UNITED STATES OF AMERICA,

Defendants.

Civil Action No.: 09-cv-10694-DPW

AFFIDAVIT OF ANDREW R. COHEN

1. I am the Special Agent in Charge (SAC) of NOAA Fisheries Office of Law Enforcement's Northeast Enforcement Division. In that capacity, I supervise fisheries enforcement operations in nineteen states, including the ten coastal states from the Canadian border through Virginia. I am submitting this affidavit in response to a request by the Court in the above captioned matter.
2. I have been the Special Agent in Charge since March, 2004. I have been employed by NOAA as a criminal investigator since November, 1987.
3. On Thursday, June 18, 2009, I called Boston Globe reporter Beth Daley, as follow-up to a March, 2009 series of phone calls and email regarding the criminal prosecutions of endangered species/ marine mammal cases. At that time Ms. Daley had asked me to call her and update her on two pending cases. I have known Ms. Daley for approximately eight years and we speak occasionally.
4. During the call, Ms. Daley asked me what was going on in Gloucester. I was surprised

and did not respond initially, because I was uncertain as to what she was inquiring about. Ms. Daley then asked me again what was going on in Gloucester. I told her that something was going to happen on the following day and that if she called me on the following day, I could give her information that she might want to cover. I did not mention the Gloucester Fish Exchange (GFX). Ms. Daley said she would not be at work the following day due to a prior commitment, but would have reporter Brian MacQuarrie call me. I commented that recently there had been some reporting in the Gloucester Daily Times (GDT) that had omitted relevant factual information and presented an inaccurate factual explanation of NOAA enforcement actions. I did not elaborate further, or mention the GFX and told her that I could not speak about it until the following afternoon. I told Ms. Daley that I would be out of the state the following day but could be contacted on my cell phone.

5. Ms. Daley asked if she should send a reporter and photographer to Gloucester. I replied that it probably was unnecessary; a press release would be issued, outlining the facts.
6. At approximately 5:00 PM on Thursday, June 18, 2009, Boston Globe reporter Brian MacQuarrie left a message on my office phone asking me to return his call. I did not get the message immediately and did not return the call on June 18, 2009.
7. At approximately 9:30 AM on Friday, June 19, 2009, Brian MacQuarrie called my cell phone as I was driving to New York for the weekend. I told him that the case involved a violation in 2000 and was going to result in a permit sanction of the GFX that had previously been agreed upon by NOAA and the GFX. I specifically told Mr. MacQuarrie not to discuss what I told him until I called him later in the afternoon. He indicated that

he would honor that request.

8. I told Mr. MacQuarrie that the GFX was not yet aware of the action, but would receive a letter from the Office of General Counsel that day. There was no mention of a photographer going to the GFX, or a request that I meet anyone from the Boston Globe. I told Mr. MacQuarrie that I was driving to New York for the weekend. Mr. MacQuarrie said that he "might take a ride to Gloucester." This made me uncomfortable and I told him for a second time, not to interview anyone until I called him. He indicated that he understood.
9. I also told Mr. MacQuarie, in substance, that it would be refreshing to see accurate factual reporting of NOAA enforcement activities, as much of the press coverage in the GDT had not been factually accurate.
10. At approximately 9:50 AM, Friday, June 19, 2009, I sent Mr. MacQuarrie an email with Q&As and a press release attached (Exhibit A), so that he would have accurate information about the agency action being taken. I sent the email from my car on my government laptop computer, which has mobile internet service. The text portion of the e-mail said: "Brian, here is an early heads-up. Please don't distribute this until I call you, at about 1:30 PM. I will be sending you several other documents today, as they are finalized. Legal questions and case-specific questions can be directed to attorney Mitch MacDonald, NOAA Office of General Counsel for Enforcement and Litigation. His cell phone number is 508-523-6211. I can answer enforcement and operational questions and speak to why the regulations are important." The "other documents" I referred to pertained to the press release, which was not finalized. My use of the plural,

“documents” was in error as I was only referring to the press release.

11. The Q&As attached to the email addressed the following points: What is occurring?; What is a dealer permit sanction?; Why the action is being taken now; What was the violation?; Is NOAA unfairly targeting GFX?; Will NOAA work with GFX to prevent future violations?; Is NOAA "heavy handed" or unfair? The document also stated, “...fishermen who use the facility to sell their catch will receive advance notification so...fishermen can make alternate arrangements for selling additional catches.” This information was included in MacQuarrie's article on the Web edition of the Boston Globe, *Boston.com*, posted later in the day on Friday, June 19, 2009.
12. At approximately 1:06 PM, Friday, June 19, 2009, Mitch MacDonald of the NOAA Office of General Counsel called and told me that the GFX letter had been delivered by fax. During that phone call, I told him to expect to be contacted by Mr. MacQuarrie.
13. At approximately 1:15 PM, Friday, June 19, 2009, I left telephone messages, with return contact information, at the offices of Gloucester Mayor Caroline Kirk and state Senator Bruce Tarr, informing them of the action. The purpose for making these contacts was to disseminate accurate factual information about the agency's action because it was anticipated that there would be inquiries and interest in this action.
14. At approximately 1:45PM, June 19, 2009, I emailed the press release to reporter Richard Gaines and editor Ray Lamont at the GDT and to the Eagle Tribune, which I believe is the GDT's parent publication. (Exhibit A). As with the messages for the government officials, I did so to provide the Times with accurate information about the agency's action. I also emailed the press release to two reporters at Commercial Fisheries News at

the same time.

15. At approximately 2:30 PM, Friday, June 19, 2009, I spoke to Mr. MacQuarrie again on the phone. I do not recall who initiated the phone call. He asked me several questions. I specifically recall being asked about the GFX and why enforcement of fisheries laws are important, which I explained. Mr. MacQuarrie also asked me for a description of the violation, which I provided and I suggested that he also contact attorney Mitch MacDonald. On Saturday, June 20, 2009, Mr. MacQuarrie's article, "Seafood Auction Gets Ban of 10 Days" was printed in the Boston Globe which included a recounting of our phone conversation. Exhibit B.
16. None of my comments to Mr. MacQuarrie appeared in the online edition of the Boston Globe on June 19, 2009, as stated in Mr. Cuilla's declaration. Docket No. 7, ¶ 21 and Exhibit E.
17. Later in the day, June 19, 2009, GDT editor Ray Lamont left a message at my office, indicating that the timing of the letter to the GFX was problematic for him because it was reporter Richard Gaines' day off, and requested that I return his call. Coverage of the letter to the GFX appeared in the online GDT; however I do not know if it was posted before or after Mr. Lamont's call to me. I retrieved Mr. Lamont's message on Monday, June 22, 2009, and the call was subsequently returned by Lesli Bales-Sherrod at NOAA OLE headquarters.

I declare under the penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and recollection.



Andrew R. Cohen

DATED: 7/25/09

Subject: questions and answers on Gloucester Auction Permit Sanction
From: andy cohen <andrew.cohen@noaa.gov>
Date: Fri, 19 Jun 2009 08:59:14 -0400

Brian, here is an early heads up. Please don't distribute this until I call you, at about 1:30 PM

Legal questions can be directed to Mitch MacDonald, esq, NOAA Office of General Counsel for Enforcement and Litigation. His cell phone number is 508-523-6211.

Thanks,
Andrew Cohen
Special Agent in Charge
NOAA Fisheries Service Office of Law Enforcement
cell: 508-612-1213

QUESTIONS/ANSWERS

10-day Permit Sanction on Gloucester Seafood Display Auction Permit

Q1. What is occurring today?

NOAA sent the Gloucester Seafood Display Auction a letter notifying them that they must abide by the terms of their 2003 settlement agreement and close the auction for 10 consecutive days unless, by June 24, they show legal reason they should not serve the sanction.

If there is none, the letter asks the auction when, between now and July 13, it will begin its 10-day closure.

If the Auction serves the sanction, the fishermen who use the facility to sell their catch will receive advance notification so the catch currently at the Auction can be sold and fishermen can make alternate arrangements for selling additional catches.

Q2. What is a 10-day dealer permit sanction on the Gloucester Seafood Display Auction's permit?

A. During the 10-day sanction, the Gloucester Seafood Display Auction (GSDA) may not purchase, possess, or receive for a commercial purpose, any federally regulated species of fish.

Q3. Why is this action being taken now?

A. The GSDA agreed to serve this sanction if they violated the terms of their probation. The GSDA has until June 24, 2009, either to show a legal reason that the sanction should not be served or to inform the agency when they intend to serve the 10-day sanction. The sanction was actually imposed in 2003, but suspended as long as no new violations were committed within a year. In 2009, an administrative law proceeding upheld a decision finding that the GSDA had committed a violation in 2004, during probation, so the 10-day sanction must be served.

Q4: What was the violation?

A. The initial case involved purchasing and possessing illegally landed cod, then falsifying dealer records to hide the amounts. The probation violation was maintaining a false record that omitted the illegally landed amount of cod the auction possessed.

Q5. Is NOAA unfairly targeting the GSDA with this 10-day permit sanction?

A. No. NOAA enforcement does not unfairly target any fisherman or dealers. To protect law abiding fishermen, who are in the majority, NOAA enforcement focuses its efforts on catching violators.

With this action today, NOAA is simply requiring the GSDA to honor the settlement agreement they reached with us for their previous violations.

Over the last two decades, NOAA has brought cases against numerous

fishermen and fish dealers throughout the nation for selling or purchasing illegally retained fish and maintaining or submitting false records attempting to hide those illegal fish. Some of those cases involved huge payments of compromise penalties or long-term removals from all fishing activity.

- Q6. Will the NOAA meet with the GSDA to work out a solution that will prevent future violations?**
- A.** NOAA has met with GSDA owners and managers in the past and discussed with them their regulatory compliance requirements. We will continue to respond to any inquiries from fishermen about how to comply with regulatory requirements. The GSDA will need to continue to work toward implementing policies and practices that avoid purchasing fish that they know or should know has been retained illegally.
- Q7. Is NOAA “heavy handed” or unfair with regards to its enforcement activities?**
- A.** No specific allegations about inappropriate behavior or wrongdoing by NOAA employees investigating or prosecuting enforcement cases have been made. However, for an objective look at the matter, the NOAA Administrator asked the Commerce Department's Inspector General to conduct a formal review of our enforcement operations, evaluating the overall approach to enforcement and litigation in New England and nationwide.

Subject: NOAA press release

From: andy cohen <andrew.cohen@noaa.gov>

Date: Fri, 19 Jun 2009 13:45:52 -0400

To: undisclosed-recipients::

BCC: rgaines@gloucestertimes.com, Janice Plante <jpcomfishnews@twcnny.rr.com>, Lorelei Stevens <lscomfish@comcast.net>, agetler@eagletribune.com, RLamont@gloucestertimes.com

I can be reached on 978-281-9213 if you have questions.
Andy Cohen

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NOAA

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
UNITED STATES DEPARTMENT OF COMMERCE



Contact: Lesli Bales-Sherrod
240-223-7404 (cell)

FOR IMMEDIATE RELEASE
June 19, 2009

NOAA Notifies Gloucester Seafood Display Auction of 10-day Sanction

NOAA today sent the Gloucester Seafood Display Auction a letter notifying it that in accordance with a 2003 settlement agreement, it is required to refrain from buying, possessing or selling federally regulated fish for 10 consecutive days if they cannot show a legal reason why the terms of the settlement agreement requiring the 10-day sanction have not been met.

The letter asks the auction to inform NOAA by June 24 if there is any legal reason it should not face the sanction. If there is none, the letter asks the auction to determine when – between now and July 13 – it will begin its 10-day sanction.

NOAA is providing advance notice of the requirement to serve the 10-day sanction in order to give the Gloucester auction the opportunity to notify the fishermen so they can make alternate arrangements for selling additional catches, as well as give the auction time to sell the catch it currently has in-house before the sanction takes effect.

The auction was found to have purchased illegal cod on nine occasions, totaling 20,691 pounds, during a three-month period from July to September of 2000. In addition, the auction was found to have falsified 35 records in an attempt to cover up those illegal purchases. The auction was assessed a civil penalty of \$125,000 and a 60-day permit sanction because of the severity of the violations.

In 2003, the Gloucester auction settled with NOAA, and ultimately agreed to a reduced 15-day permit sanction as one of the penalties for these violations. Permits are required to buy, possess, or sell any federally regulated fish commercially. When a permit is sanctioned, it means that the holder cannot conduct the activities that the permit authorized.

NOAA further agreed to suspend 10 days of the original 15-day sanction as long as no further substantial violations occurred within a one-year probation period after the settlement.

In February 2004, less than six months into the probationary period, the auction committed a new violation for maintaining a false record that omitted illegally landed cod. In 2005, NOAA found that the auction committed this second violation.

The Gloucester auction appealed the charge, but in April 2009, NOAA upheld its decision. Because the auction violated its probation, NOAA is now notifying the auction it must comply with the 2003 agreement's terms and serve the 10-day sanction, effectively shutting down the auction to federally managed fish for 10 days.

NOAA will continue to work with the New England fishing community to build a sustainable fishery. Compliance with fishery laws and regulations is critical to the success of our joint efforts. To achieve this goal, we both must ensure that regulations are followed and if not, that effective enforcement deters illegal fishing activities. It is unfair to those fishermen who abide by the rules to allow others to evade them without penalty.

NOAA understands and predicts changes in the Earth's environment, from the depths of the ocean to the surface of the sun, and conserves and manages our coastal and marine resources. Visit <http://www.noaa.gov>.

Subject: NOAA press release

From: andy cohen <andrew.cohen@noaa.gov>

Date: Fri, 19 Jun 2009 13:45:52 -0400

To: undisclosed-recipients;

BCC: rgaines@gloucestertimes.com, Janice Plante <jpcomfishnews@twcnj.rr.com>, Lorelei Stevens <lscomfish@comcast.net>, agetler@eagletribune.com, RLamont@gloucestertimes.com

I can be reached on 978-281-9213 if you have questions.
Andy Cohen

Press Releasegloucester auction_june09.doc

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THIS STORY HAS BEEN FORMATTED FOR EASY PRINTING

Seafood auction gets ban of 10 days

The Boston Globe

By Brian MacQuarrie, Globe Staff | June 20, 2009

GLOUCESTER - Federal regulators yesterday informed the Gloucester Seafood Display Auction, the main clearinghouse for fish brought into this historic port, that the business must close for 10 days for falsifying records involving illegally landed cod.

The National Oceanic and Atmospheric Administration sent the auction a letter saying that it cannot buy, possess, or sell federally regulated fish for 10 consecutive days. The action follows the end of a lengthy appeals process, in which the auction was found to have violated the terms of a 2003 settlement with the federal government.

"If dealers buy fish that are not properly accounted for, then it is impossible to manage the stocks in a responsible way," said Andrew Cohen, special agent in charge for the National Marine Fisheries Service, which brought the case against the auction house.

"They are a problem," Cohen said of the auction, "which is why we are prosecuting them."

Auction co-owner Larry Ciulla, who said he had not been notified of the decision when approached by reporters yesterday afternoon, declined to comment after receiving the notice later in the day.

Fishing boat captain Paul Cohan, however, reacted with disdain as he stood near the fish auction. Cohan, who has been fishing for 30 years, said that regulators "basically have nothing but contempt for fishermen, and it's shown in their heavy-handed enforcement policies."

According to regulators, the auction was found to have bought a total of 20,691 pounds of illegal cod on nine occasions from July to September 2000. In addition, the auction falsified 35 records in an effort to hide those purchases, the investigation found.

Officials hit the business with a 60-day ban on selling federally regulated fish, but later reached a settlement in which the shutdown was reduced to 15 days, with 10 suspended, if no significant new violations occurred for a year. Less than six months later, regulators discovered, the auction falsified new records involving illegally landed cod.

"The auction agreed to the terms of the settlement, and then turned around and had another serious violation," Cohen said. "It's an important violation because the vast majority of the industry is in compliance."

The letter asks the auction, which sells 15 million pounds of fish a year, to inform NOAA by Wednesday whether there is a legal reason why the closing should not occur. If there is no valid reason, the letter said, the auction has until July 13 to begin its 10-day shutdown.

Cohen said the penalty is necessary to ensure that all fishermen are treated the same.

"What we're trying to do is level the playing field," said Cohen, who estimated that 98 percent of the US fishing fleet from the Canadian border to the Carolinas adheres to the law. "We're really trying to keep the industry alive."

Cohan, the fishing captain, said regulators are overzealous in their enforcement efforts, which he said punish fishermen who often are unable to weigh their catch properly while at sea.

Business is "abysmal," said Cohan, 55, a former president of the Gulf of Maine Fishermen's Alliance.

"We're given no time to go where we can't go," Cohan said in a tongue-in-cheek description of restrictions faced by the fishing fleet. "And we can't bring in what we can't catch when we go where we can't go."

NOAA, however, counters that restrictions are necessary to maintain sustainable stocks.

"Our nation's fishery management laws are in place to help rebuild fish populations to ensure productive fishing livelihoods and healthy seafood for our people," the agency said in a statement that announced the auction closing. "Compliance with our fisheries laws is critical to making fisheries management work."

In addition to the pending 10-day closing, a 120-day shutdown is being sought by regulators for alleged violations by the auction house from 2004 to 2006. In that case, announced Feb. 13, the National Marine Fisheries Service has charged that the auction bought illegally landed fish more than 200 times, for a total of 66,000 pounds, over those years. In addition to the closure, the charges carry a \$355,200 fine. ■

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