

THE LEGAL AND REGULATORY ENVIRONMENT OF FISHERIES LICENSING IN RHODE ISLAND

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February 8, 2001

Introduction

The regulation of fishing in Rhode Island dates to colonial times. Language regarding fishing appears in our colonial charter and state constitution. Countless statutes have been adopted and later repealed by the General Assembly as circumstances have changed. Fishermen have been going to court to protect their rights for nearly two hundred years. In recent years, the role of the federal government, even in state waters, has become more pronounced. Several themes emerge: finfish and shellfish have been treated very differently by the legal system; every state has attempted to restrict the activities of non-residents in state waters; on a national level, licensing and management systems have become more complex.

This study will trace the legal status of fisheries in Rhode Island from the colonial era to the present. Stops along the way will include state and federal case law which examine early regulatory programs in the context of the state and federal constitutions as well as more recent statutory efforts which impact the future of fisheries management in Rhode Island. The impetus for this study is the commercial fishing license moratorium adopted by the Rhode Island General Assembly on June 6, 2000 that is scheduled to expire on June 30, 2001. (GLRI 20-2-1.1)

(1) The Colonial Era and the Royal Charter

All agree that any discussion of the state's role in regulating marine fisheries must start with the Rhode Island Charter granted by King Charles II on July 8, 1663. Disagreement over the precise meaning of the language contained therein, however, has characterized our state's legal history ever since. The Charter, printed from the Secretary of State's web site (<http://www.sec.state.ri.us/rihist/richart.htm>) is a little over seven pages of single spaced text; the key section on fisheries is less than a third of a page. Since it has been misquoted so many times, the relevant text has been reprinted in its entirety below:

Provided also, and our express will and pleasure is, and we do, by those presents, for us, our heirs and successors, ordain and appoint that these presents, shall not, in any manner, hinder any of our loving subjects, whatsoever, from using and exercising the trade of fishing upon the coast of New England in America; but that they, and every or any of them, shall have full and free power and liberty to continue and use the trade of fishing upon the said coast, in any of the seas thereunto adjoining, or any arms of the seas, or salt water, rivers and creeks, where they have been accustomed to fish; and to build and set upon the waste land belonging to the said Colony and Plantations, such wharves, stages, and

workhouses as shall be necessary for the salting, drying, and keeping of their fish, to be taken or gotten upon that coast. And further, for the encouragement of the inhabitants of our said Colony of Providence Plantations to set upon the business of taking whales, it shall be lawful for them, or any of them, having struck whale, dubertus, or other great fish, it or them to pursue unto any part of that coast, and into any bay, river, cove, creek, or shore, belonging thereto, and it or them, upon the said coast, or in the said bay, river, cove, creek, or shore, belonging thereto, to kill and order for the best advantage, without molestation, they making no willful waste or spoil; anything in these presents contained, or any other matter or thing, to the contrary, notwithstanding. And further also, we are graciously pleased, and do hereby declare, that if any of the inhabitants of our said Colony do set upon the planting of vineyards (the soil and climate both seeming to concur to the production of wines,) or be industrious in the discovery of fishing banks, in or about the said Colony, we will, from time to time, give and allow all due and fitting encouragement therein, as to others, in cases of like nature.

The noted early American legal scholar Joseph Angell addressed the meaning of this section of the charter in his *Treatise on the Right of Property in Tide Waters* published in 1826. In Chapter III, entitled “The Public Right of Fishery in the Several States, How Affected by the Royal Charters,” he wrote:

In the charters to the colonies of New England, was reserved to the *king’s subjects*, “the trade of fishing upon the coasts of New England, in the seas thereto adjoining, *or in any of the said seas, or salt rivers*, where they have been accustomed to fish.” These are the words made use of, and they clearly amount to a reservation to *all* English subjects of the common right to fish, so that the subjects of one colony had still an undoubted right to fish in the salt waters of the other colonies. By the revolution, the remaining British subjects lost the right so reserved, and it of course became the common right of the people of the United States.

Several observations are in order before the review of case law begins: first, it is abundantly clear that the charter addressed finfish, not shellfish; second, it was a grant to fish throughout the waters of New England, in common with other inhabitants of the region, not an exclusive grant to Rhode Island colonial waters; and third, the federal Marine Mammal Protection Act has pre-empted the colonial right of “taking whales.” The phrase “free and common fisheries,” often incorrectly attributed to the Charter, was in reality first used by the General Assembly to distinguish between the thousands of acres of leased oyster grounds and those that remained to be fished “in common.”

(2) Statehood and the Rhode Island Constitution

For all practical purposes, the Royal Charter functioned as the state’s constitution well after independence. It was not until Dorr’s Rebellion, from 1840-1842, that the Charter’s inadequacies had become painfully apparent (e.g. by 1840, Rhode Island was the only state that limited voting rights to property owners, which meant only one of three white male inhabitants could vote); the “People’s Constitution” of 1842 was the result. The relevant section for our purposes is Article 1, Section 17. As originally written, it read:

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore to which they have been heretofore entitled under the charter and usages of the State. But no new right is intended to be granted, nor any existing right impaired, by this declaration.

It has been subsequently amended to further define the term “privileges of the shore,” but the key phrase “rights of fishery...under the charter and usages of the state” remains unchanged.

Just two years later, the term “free and common oyster fisheries” was used by the General Assembly for the first time – in the context of an oyster leasing statute! In 1844, the General Assembly adopted “An Act for the preservation of Oysters and other Shell Fish within this State.” Section 1 of the law prohibited the landing of oysters from the “free and common oyster fisheries” from May 15 to September 15; Section 8 provided for the appointment of three people as Commissioners of Shell Fisheries; and Section 9 provided for the leasing of *any piece of land covered by the public waters of this state, lying south of a line from Field’s Point, as a private oyster ground for the planting of oysters.* (Emphasis added) A complete reading of the law makes it clear that although it introduced the concept of “free and common” into the lexicon of fisheries management in Rhode Island, it could be cited as the ultimate example of taking a phrase “out of context.” In this case, “free and common” means only those acres that have not been already leased for private cultivation of oysters.

The private leasing of the bay for oyster aquaculture did not go unchallenged. In *State v. Cozzens*, 2 R.I. 561 (1850), the Rhode Island Supreme Court held that the General Assembly had the power to lease portions of the tide-waters of the state for private oyster fisheries to the complete exclusion, for the exercise of the shell fisheries thereon, of all but the lessees, even though the leases included portions of natural oyster and quahog grounds, notwithstanding Art. 1, Sec.17. In *State v. Medbury*, 3 R.I. 138 (1855), Medbury was a Massachusetts resident arrested for oyster fishing in Rhode Island waters. He argued that as an inhabitant of New England he was entitled under the state’s charter to fish in Rhode Island waters. The court held that the charter’s provision, as incorporated into the state’s constitution, did not even involve the state’s oyster fishery:

It is very evident from the terms used in relation to the rights granted, that it related to the cod fishery, and not to the oyster fishery. The former might require “wharves, stages and work-houses,” “for the salting, drying, and keeping” of the fish “to be taken or gotten upon the coast,” while the latter would not.

The subject of residency was again the key issue in *New England Oyster Co. v. McGarvey*, 12 R.I. 385 (1879). In that case, a group from Boston formed the New England Oyster Company with the intent of growing oysters in, among other places, Narragansett Bay. Faced with the state’s oyster leasing law in which only state residents could apply for leased ground, they contracted with Alexander McGarvey of Rhode Island to take out the lease in his name, and manage the acreage off Conanicut Point. McGarvey was paid “the large compensation of eleven hundred dollars the first year” to engage in this arrangement. This practice worked well from 1872-1879, until McGarvey simply refused to turn over the oysters to his partners in Boston. His partners sued, and McGarvey’s defense was simply that as non-residents they had no claim to Rhode Island oysters, even if they had paid for their purchase and planting. The court disagreed, and

held that McGarvey's Boston partners could file suit to enforce the agreement; otherwise, they said, he would be able to perpetrate "a monstrous fraud."

The power of the General Assembly to simply "extinguish" a fishery was the issue in *Clark v. City of Providence*, 16 R.I. 137 (1888). The filling of the Providence Cove (recreated, in miniature, at Waterplace Park today) was challenged on the grounds that since Art. 1 Sec. 17 guaranteed the continued right to fish, and since citizens used to clam and fish in the cove, any action of the General Assembly authorizing the filling of the cove must be unconstitutional. The court disagreed, and noted that there were many places where fish and clams were formerly taken which were now solid land made by filling out the shores, with the tacit acquiescence or consent of the General Assembly. They held, in one of the most absolute statements of the General Assembly's power, that "*these rights of clamming and fishing are enjoyed in subordination to the paramount authority of the General Assembly to regulate and modify, and, to some extent at least, to extinguish them.*" (Emphasis added) A more complete grant of unfettered authority is difficult to imagine.

Another example of the General Assembly's power to simply extinguish fishing rights was seen in *State v. Nelson*, 31 R.I. 264 (1910). Nelson was arrested for gathering a peck of oysters in Point Judith Pond. In 1901, the General Assembly had authorized the towns of South Kingstown and Narragansett to open and maintain a breachway between the pond and the ocean. In exchange for the towns' commitment to finance the breachway, the Assembly allowed them to privately lease the entire pond, reserving nothing for the historic "free and common oyster fishery." Nelson challenged the act as an unconstitutional delegation of authority to the towns in violation of Art. 1 Sec.17. Once again, the court found this was a valid choice for the General Assembly to make: "We see no impropriety in permitting the towns undertaking the improvement to reimburse themselves out of the revenue to be derived from the leasing of the fishery created by the opening of the breachway."

The same year brought an interesting marine pollution case to the Supreme Court: *Payne and Butler v. Providence Gas Company*, 31 R.I. 295 (1910). Payne and Butler held a large and profitable oyster lease just south of a Providence Gas coal gas facility; coal tar pollution from the plant ruined the oysters, and Payne and Butler sued for damages. Providence Gas tried an interesting argument in their defense: they said the leasing statute was unconstitutional, so that Payne and Butler could not maintain a private action for damages. In a long and scholarly opinion, the court reviewed several oyster leases granted directly by the General Assembly in 1822 and 1827, even before the first Commission on Shell Fisheries was established in 1844. With regard to the power of the General Assembly, they said:

The rights which the General Assembly had in 1822 and 1827 were not abridged by the foregoing provisions of Art. 1, Sec.17 of the Constitution, for it is expressly stated therein "no new right is intended to be granted, nor any existing right impaired, by this declaration." In other words, no change was made. No greater privileges were reserved to the people than they already had, and no powers or rights of the General Assembly were thereby abridged. Therefore the whole subject of fisheries, floating and shellfish, and all kinds of shellfish whether oysters, clams, quahogs, mussels, scallops, lobsters, crabs, or fiddlers...are under the fostering care of the General Assembly...They may regulate the public or

private fisheries. They may even prohibit free fishing for a time and for such times as in their judgment it is for the best interests of the state to do so. ...and generally they have complete dominion over fisheries as well as all kinds of game. We find no limitation, in the Constitution, of the power of the General Assembly to legislate in this regard...

The Payne and Butler case, with such an expansive ruling on the power of the General Assembly, seemed to settle the question until 1958, when the Rhode Island Senate requested an Advisory Opinion from the Supreme Court related to the striped bass fishery. In *Opinion to the Senate*, 87 R.I. 37 (1958) the court was asked for their opinion on the following question:

Is it within the powers of the General Assembly under the provisions of Sec. 17 of Art. 1 of the constitution of the state of Rhode Island to pass an act prohibiting commercial fishermen from taking striped bass from the waters of the state at any time or for any length of time by means of seining, trapping or otherwise capturing striped bass?

The court spent little time answering the question in an opinion of just two pages. They quoted the Payne and Butler language, cited above, and held that it was clear that the power of the legislature to regulate fisheries in state waters is plenary and was no longer open to question. They also found that commercial fishermen do not have any special rights to the fishery in excess of those granted to the people of the state generally – the constitution gives the benefit of fishery to all the people in equal measure.

Thus the conclusion of this analysis of whether or not the state constitution provides any impediment to the powers of the General Assembly to design whatever type of licensing or management system they deem appropriate is quite clear: it does not. They may delegate some of their powers to the Marine Fisheries Council, discussed below, and may retain others. They may create whatever management system they deem to be in the best interests of the citizens of Rhode Island; assuming that in doing so they do not violate any provisions of the U.S. Constitution.

(3) Delegation of Power and the Marine Fisheries Council

By the mid 1970's, fisheries management had become an important political issue at both state and national levels. The response of the General Assembly was to create the Rhode Island Marine Fisheries Council, just two months after the Congress adopted the Fishery Conservation and Management Act in 1976. (GLRI Sec. 20-7-1) As originally adopted, the law governed the taking of "fish and shellfish;" amended in 1981, it now applies to "fish, lobsters, and shellfish." It gives jurisdiction over all marine species within the jurisdictional authority of the state, which includes both internal waters and the territorial sea (three miles from shore). The Council is composed of nine members: the chair is a designee of the Director of the Department of Environmental Management, three members from the commercial fishing industry, three from the sport fishing industry, and two with backgrounds in marine biology or the conservation and management of fishery resources. The General Assembly was quite explicit in their delegation of management authority to the Marine Fisheries Council:

The council is authorized, after the holding of a public hearing to promulgate and adopt rules and regulations **governing the following activities only:**

(a) The manner of taking fish, lobsters and shellfish

- (b) The legal size limits of fish, lobsters and shellfish to be taken or possessed
- (c) The seasons and hours during which fish, lobsters and shellfish may be taken or possessed
- (d) The numbers or quantities of fish, lobsters and shellfish which may be taken or possessed
- (e) The opening and closing of areas within the coastal waters to the taking of any and all types of fish, lobsters and shellfish

The “tools” given to the Council are the standard list of input and output controls used in traditional fisheries management regimes. Under this specific delegation of authority, the Council would not appear to have the discretion to adopt any type of transferable quota system.

The Council withstood a direct challenge to its authority to open and close management areas when it was sued in Federal District Court by Healey’s Seafood in 1986. Then District Court Judge Bruce Selya, who clearly enjoys employing creative writing techniques in his opinions, concluded his dismissal of Healey’s claims with the following remarks:

The molluscan morsels which Healey has served up are unfit for federal court consumption...

Healey has set a series of traps in the turbulent seas patrolled by the MFC and the DEM, but his catch has to proven to be undersized. *Healey v. Bendick*, 628 F.Supp. 1 (1986)

Today, the role of the Marine Fisheries Council remains unchallenged for fisheries management issues that remain within the confines of Rhode Island waters. However, with the exceptions of clams and oysters, we have been unable to convince most species to remain within our borders for their entire life cycles. If they move further offshore, we must deal with the concurrent jurisdiction of the New England Regional Fishery Management Council; if they move into the territorial water of an adjacent state, they fall under the jurisdiction of the Atlantic States Marine Fisheries Commission. Either way, licensing issues become much more complex as regional equity issues emerge.

(4) Federal Jurisdiction and the New England Regional Council

When Jake Dykstra, President of the Point Judith Fishermen’s Cooperative, went to Washington in 1975, he argued for a one-sentence law that would benefit New England fishermen: “Foreign fishing within 200 miles of the shore of the United States is prohibited.” Jake got his 200-mile limit, but the law he sought ended up over 80 pages long; today, after many amendments and reauthorizations, it is now over 120 pages long. (16 U.S.C. 1811) How did such a simple concept end up so complex in its execution? For one thing, foreign fishing was not eliminated, it was instead carefully regulated; foreign fishing rights would be granted if it served U.S. interests. For another, Congress insisted that there be a management mechanism in place so that a powerful new U.S. fleet would not simply replace the overexploitation of foreign fleets. The National Marine Fisheries Service (NMFS) volunteered to handle management from their headquarters; fishermen lobbied hard to have management carried out at the regional level, with the then revolutionary concept of councils dominated by fishing interests. Exempt from federal conflict of interest rules, the eight regional councils presided over one of the greatest expansions of effort in the history of commercial fishing.

State-federal relations were straightforward: state representatives on the regional council would represent local interests in the federal zone, and the federal government would not meddle in state waters unless a state's action or inaction would adversely affect a federal management plan for a species predominantly in federal waters. A new, cooperative environment emerged with the 1996 Magnuson Act Amendments, collectively known as the Sustainable Fisheries Act. Section 1856(a)(3) was modified significantly to include a state's right to regulate vessels outside of its boundary under certain circumstances. Indeed, it envisions a scenario where the power to regulate in the federal zone is simply delegated to a state where the state's regulations are consistent with the federal plan.

The point of the foregoing discussion is simply that the licensing and management issues in Rhode Island must be viewed in the context of the emerging regional management system. This problem is particularly complex in the context of transferable quota systems, since the Congress recently extended the federal moratorium on ITQs for two more years.

(5) The Emergence of the Atlantic States Marine Fisheries Commission in Coastal Fisheries Management

The Atlantic States Marine Fisheries Commission (ASMFC) was created in 1942 by an interstate compact with the consent of Congress (16 U.S.C.A. Secs. 5101-5108). Nine states, including Rhode Island, were among the original partners; the six remaining states and the District of Columbia joined in a 1950 reauthorization of the compact. The purpose of the compact is to promote the better utilization of the marine, shell, and anadromous fisheries of the Atlantic states by the development of fishery plans. It was a practical recognition that many important stocks like striped bass, menhaden, and lobster are primarily coastal and migrate through the waters of several states. Each member state has three representatives: (1) the executive officer of the state fisheries agency; (2) a member of the state legislature; and (3) a citizen of the state who has knowledge and interest in the state's marine fisheries.

Until quite recently, the role of the ASMFC was hardly dramatic; its views were advisory, and more often than not, ignored. For most fishery managers, it was simply a nice convention to attend on annual basis, commiserate with a few old friends, and then back to business as usual. With the single and notable exception of striped bass, in which Congress empowered the group to act or face federal preemption, there was not a long list of accomplishments to look back on or much hope for a proactive future.

That all changed in 1993, with the passage of the Atlantic Coastal Fisheries Cooperative Management Act (16 U.S.C.A. Secs. 5101-5108). The purpose of the law is to encourage interstate conservation of Atlantic coastal fishery resources through the development of "coastal fishery management plans." The coastal fishery plan is intended to be the equivalent of the fishery management plans produced by the regional councils for the exclusive economic zone. The difference is that it provides a vehicle for complementary regulations in federal waters and a mechanism for federal enforcement in coastal waters. That "cooperative effort" goes a long way towards the goal expressed in National Standard (3) of the Magnuson-Stevens Act: To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination. Certainly the most

“high profile” stock to be affected is lobster; NMFS decided to withdraw the federal plan for lobster management in favor of an ACFCMA plan in an effort to turn away from the regional council system. It remains to be seen if this “new federalism” will be any more effective at lobster management. Once again, state efforts to rethink licensing must be cognizant of the fact that we are not working in a regulatory vacuum; any action we take must be seen in support of the broader coastwise effort to develop a more effective management system.

The most recent effort under this law was announced on February 5, 2001. NMFS has banned fishing for horseshoe crabs in nearly 1,500 square miles of federal waters off the mouth of Delaware Bay. The regulations were put in place under the authority of the ACFCMA that gives the Department of Commerce authority to implement federal measures compatible with the interstate commission’s fishery management plans. According to NOAA’s press release, any one of the Atlantic coast regional councils could have developed regulations for horseshoe crabs, but chose not to do so. In the absence of a federal FMP, the ACFCMA allows the Secretary of Commerce to implement regulations in federal waters that complement the interstate commission’s management in state waters.

One conclusion from the discussion above is that NMFS, frustrated in its dealings with the regional councils (at least on the Atlantic coast), has found a new mechanism for asserting federal jurisdiction through this interstate compact. After the ACFCMA, the ASMFC has emerged as yet another serious player in the world of fisheries management. Depending on the fishery, a new state license program may have yet another standard to meet.

Conclusion

The common perception of fisheries law in Rhode Island is that our unique history has somehow frozen us in time and limited our choices for the future. This paper has attempted to demonstrate that is simply not the case; the General Assembly has the power to do whatever it thinks is best in the state’s interest. A more serious impediment to reform, however, is the fact that few of the state’s fisheries are practiced within state waters alone; we are very much a part of both an interstate and a regional fishery management system which seems to become more complex on a daily basis. Any changes made in the state’s licensing and/or management system must take this new political reality seriously. It may be appropriate to change, but now more than ever that change must be made not on the basis of the home port of the vessel, but the migratory range of the species involved.