

# The SAND BAR

---

Volume 18:2 April 2019

Legal Reporter for the National Sea Grant College Program

---

## The Lake Erie Bill of Rights: Will it Survive Legal Challenges?

---

*Also,*

Fin: United States/Mexico Seafood Trade Disputes and Effects on the MMPA

Maine Ordinances Take Aim at Commercial Activities

Hubbub in the Hamptons: New York Yacht Club Sues County Over Oyster Leasing

This Land Is Your Land, This Land Is My Land

# Our Staff

## **Editor:**

Terra Bowling

## **Production & Design:**

Barry Barnes

## **Contributors:**

Rachel Buddrus

Alex N. Dominguez

Catherine Janasie

Amanda Nichols

*THE SANDBAR* is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR*, visit: [nsglc.olemiss.edu/subscribe](http://nsglc.olemiss.edu/subscribe). You can also contact: Barry Barnes at [bdbarne1@olemiss.edu](mailto:bdbarne1@olemiss.edu).

Sea Grant Law Center, Kinard Hall, Wing E, Room 258, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: [tmharget@olemiss.edu](mailto:tmharget@olemiss.edu). We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

*THE SANDBAR* is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under award NA180AR4170079, the National Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi School of Law. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon.

The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the National Sea Grant Law Center or the U.S. Department of Commerce.

Recommended citation: Author's Name, *Title of Article*, 18:2 *SANDBAR* [Page Number] (2019).

Cover page photograph of the Historic 1904 Toledo Harbor Lighthouse on Lake Erie, courtesy of CMH Pictures.

Contents page photograph of a sunset on Lake Erie, courtesy of Jen Goellnitz.



Follow us on Facebook at:  
<http://www.facebook.com/nsglc>



Follow us on Twitter at:  
<http://www.twitter.com/sglawcenter>



The University of Mississippi complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, handicap, veteran or other status.

ISSN 1947-3966    NSGLC-19-02-02    April 2019  
ISSN 1947-3974





# The **SANDBAR**

## CONTENTS

**The Lake Erie Bill of Rights:  
Will it Survive Legal Challenges? ..... 4**

**Fin: United States/Mexico Seafood  
Trade Disputes and Effects on the  
MMPA ..... 7**

**Maine Ordinances Take Aim at  
Commercial Activities ..... 10**

**Hubbub in the Hamptons:  
New York Yacht Club Sues County  
Over Oyster Leasing ..... 12**

**This Land Is Your Land, This Land Is  
My Land ..... 14**

# THE LAKE ERIE BILL OF RIGHTS: WILL IT SURVIVE LEGAL CHALLENGES?

Catherine Janasie<sup>1</sup>



Photograph of a data buoy in Lake Erie,  
courtesy of Fondriest Environmental.

In recent years, Lake Erie has experienced multiple harmful algal blooms (HABs). The city of Toledo, Ohio relies on Lake Erie to supply drinking water to its residents. In 2014, a cyanobacterial HAB in Lake Erie forced Toledo to issue a “do not drink” order for tap water that resulted in 500,000 people being without drinking water for several days, and over 100 people in the city became ill from the water.<sup>2</sup> Toledo residents were forced to rely on bottled water, which sold out quickly and had to be brought in from neighboring areas.

Frustrated with the lack of federal and state regulation of industrial and agricultural runoff that has contributed to algal blooms, voters in Toledo recently passed a Lake Erie Bill of Rights (LEBOR). LEBOR seeks to hold business entities and governments liable for actions that threaten the ability of the lake’s ecosystem “to exist, flourish and naturally evolve.”<sup>3</sup> Farmers in the region have become increasingly concerned about how LEBOR could affect their fertilizing activities.<sup>4</sup> In fact, a lawsuit by an Ohio farm was filed the day after residents of Toledo approved LEBOR.

## The Lake Erie Bill of Rights

LEBOR is an amendment to the city's charter and establishes the value of the lake to the city, the threats to the health of Lake Erie, and how the current law is not protecting Lake Erie. In addition to industrial wastes and climate change, LEBOR singles out "runoff of noxious substances from large scale agricultural practices, including hog and chicken farms" as threats to Lake Erie that "constitute an immediate emergency."<sup>5</sup> LEBOR extends the inalienable rights of the citizens of Toledo, as well as the political power bestowed upon the state's residents in Ohio's constitution, to Lake Erie and its ecosystem. By doing this, LEBOR aims to elevate "the rights of the community and its natural environment over powers claimed by certain corporations."<sup>6</sup>

---

## LEBOR IS AN AMENDMENT TO THE CITY'S CHARTER AND ESTABLISHES THE VALUE OF THE LAKE TO THE CITY, THE THREATS TO THE HEALTH OF LAKE ERIE, AND HOW THE CURRENT LAW IS NOT PROTECTING LAKE ERIE.

---

LEBOR establishes certain rights possessed by the both Lake Erie and the residents of Toledo. The Lake Erie ecosystem possesses the "right to exist, flourish, and naturally evolve" while the city's residents "possess the right to a clean and healthy environment," which includes the right to a healthy lake ecosystem.<sup>7</sup> LEBOR next enumerates the prohibitions necessary to secure these rights. First, the charter amendment makes it unlawful for any government or corporation, which includes any business entity, to violate the bill of rights. LEBOR, therefore, does not apply to the actions of individuals. In addition, LEBOR invalidates any "permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the" rights or prohibitions of LEBOR.<sup>8</sup>

In terms of enforcement, LEBOR holds any business entity or government from any jurisdiction strictly liable for its violation. Violators of LEBOR's provisions can be subject to criminal convictions and fines, with each day and violation of each of LEBOR's sections constituting a separate violation. LEBOR enables the City of Toledo and its residents to enforce the rights and prohibitions listed in LEBOR. In these actions, the city or its residents can recover all litigation costs.<sup>9</sup>

However, LEBOR also bestows upon the Lake Erie ecosystem the ability to bring an action in its own name, essentially giving legal rights to the natural objects of the ecosystem. The city or its residents would bring these lawsuits, but the named plaintiff in the case would be the Lake Erie ecosystem. Thus, the city or its residents would

simply be standing in for and protecting the ecosystem's rights and not their own. Under LEBOR's provisions, these lawsuits are entitled to damages to restore the ecosystem to its "status immediately before the commencement of the acts resulting in injury."<sup>10</sup> Any damages would be paid to the city to be used to restore the lake ecosystem.<sup>11</sup>

## LEBOR Challenge

The day after its passage, LEBOR was challenged in federal court by Drewes Farms, which claims the charter amendment is unconstitutional and unlawful. Drewes Farms believes that LEBOR places the farm's financial future at risk, as the provisions expose the farm to massive liability if it uses fertilizer on its fields. While the farm has invested thousands of dollars in trying to reduce the amount of runoff coming from the farm, "it can never guarantee that all runoff will be prevented from entering the Lake Erie watershed."<sup>12</sup> Drewes Farms is seeking an immediate injunction of LEBOR, which would allow the farm to fertilize its fields in time for the upcoming growing season.

Drewes Farms' complaint includes numerous federal and state claims that focus on how LEBOR's terms could affect the farm's operations. In particular, the farm believes that LEBOR's holding only corporations and governments to strict liability is unconstitutional, because it does not apply to individual actors engaging in similar activities or inactions. The farm also takes issue with the phrasing of the rights statements in LEBOR, as it targets conduct that impacts the lake ecosystem's "right to exist, flourish, and naturally evolve." However, the farm points out that LEBOR fails to define what any of these terms mean or provide a standard to determine when these rights are violated.

Further, the farm believes that LEBOR's provisions invalidating state or federal permits, licenses, or other authorizations is unconstitutional by violating the substantive and due process clauses. In its complaint, Drewes Farms discusses how two employees of the farm have obtained Fertilizer Applicator Certificates by attending training by the Ohio Department of Agriculture. Thus, the farm argues that LEBOR unconstitutionally takes away their employees' rights to these certificates. While not in the complaint, these provisions could also potentially impact any permits a farm or other business entity has to discharge pollutants into waterways.

In addition, the complaint contains some state public trust doctrine related claims. Under Ohio law, Lake Erie's waters and lakebeds "belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state . . ."<sup>13</sup> Ohio law designates the state Department of Natural Resources to handle "all matters pertaining to the care, protection, and enforcement of the state's rights" in the lake.<sup>14</sup> Thus, Drewes Farms argues that these provisions preempt the municipal regulation of Lake Erie, and Toledo does not have the authority to implement LEBOR.





Photograph of HABs research on Lake Erie, courtesy of the Ohio Sea Grant.

## Conclusion

We will have to wait to see whether LEBOR will survive the Drewes Farms and any other future lawsuits. While the City of Toledo is trying to take action to protect the lake's resources, similar actions to LEBOR have not been successful in court. For instance, when Columbus, Ohio proposed a "Community Bills of Rights for Water, Soil, and Air Protection," the Ohio Supreme Court found the proposal to be beyond the legislative power of the city.<sup>15</sup> Further, while LEBOR gives the right to the Lake Erie ecosystem to file a lawsuit in its own name, courts have previously held that natural resources do not have the ability to bring lawsuits.<sup>16</sup> Only time will tell if courts will view LEBOR differently than these previous cases. ❧

## Endnotes

<sup>1</sup> Senior Research Counsel, National Sea Grant Law Center. This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture under Subaward no. UA AES 05687-03 from the National Agricultural Law Center, University of Arkansas.

<sup>2</sup> See Greta Jochem, *Algae Toxins in Drinking Water Sickened People in 2 Outbreaks*, NPR, Nov. 9, 2017.

<sup>3</sup> *The Lake Erie Bill of Rights Initiative*, TOLEDOANS FOR SAFE WATER, [hereinafter LEBOR].

<sup>4</sup> For further a discussion of LEBOR's potential impact on agriculture, see Peggy Kirk Hall, Ellen Essman & Evin Bachelor, *The Lake Erie Bill of Rights Ballot Initiative*, IN THE WEEDS (Feb. 8, 2019).

<sup>5</sup> LEBOR, *supra* note 3, at Declarations Statement.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 1.

<sup>8</sup> *Id.* § 2.

<sup>9</sup> *Id.* § 3.

<sup>10</sup> *Id.* § 3(d).

<sup>11</sup> *Id.*

<sup>12</sup> *Drewes Farm P'ship v. City of Toledo*, No. 3:19-cv-00434-JZ (N.D. OH, filed Feb. 27, 2019).

<sup>13</sup> OHIO REV. CODE ANN. § 1506.10.

<sup>14</sup> *Id.*

<sup>15</sup> *State ex. rel. Bolzenius v. Priebe*, No. 2018-1221, 2018 WL 4517024 (Ohio Sept. 14, 2018); see also Hall, Essman & Bachelor, *supra* note 4.

<sup>16</sup> See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

# FIN:

## UNITED STATES/MEXICO SEAFOOD TRADE DISPUTES AND EFFECTS ON THE MMPA

Alex N. Dominguez<sup>1</sup>



Photograph of dolphins swimming, courtesy of Alan Harper.

Over the past several decades, the United States and Mexico have been engaged in various legal trade disputes over U.S. imports of Mexican seafood and seafood products. Environmental protections in the United States, primarily stemming from the Marine Mammal Protection Act (MMPA), have been seen as discriminatory to Mexico's fisheries. Two key legal trade disputes over seafood and seafood products between the United States and Mexico highlight the issues.

The first legal dispute surrounds a World Trade Organization (WTO) dispute initiated by Mexico against the United States and its "dolphin-safe" labeling standards. The second legal dispute covers a group of U.S. non-profit organizations, the U.S. Department of Commerce, and a ban on Mexican seafood and seafood products. Below is a look at recent developments in both disputes.

### MMPP

The MMPA is one of the main instruments used by both public and private U.S. entities to prevent importation of certain seafood. This statute has been used in several instances to manage everything from labeling seafood products to banning seafood products outright. Congress passed the MMPA in 1972. Congress noted that certain species of marine mammals are critically endangered or on the way to becoming endangered.<sup>2</sup> The Act states that marine mammal populations should not be permitted to diminish "beyond the point at which they cease to be a significant functioning element in the ecosystem."<sup>3</sup> The MMPA contains various provisions covering topics such as: the creation of the Marine Mammal Commission; conservation and protection of marine mammals; and the International Dolphin Conservation Program.



In 1990, Congress passed the Dolphin Protection Consumer Information Act (DPCIA), which amended the MMPA to create the foundation from which U.S. “dolphin-safe” labeling standards would develop.<sup>4</sup> This act came primarily as result of a fishing technique known as dolphin set fishing, where fishermen would “encircle a dolphin pod with a purse seine net that closes like a drawstring” to catch fish swimming alongside the dolphins.<sup>5</sup> Mexican fishermen, aware of a phenomenon in which yellowfin tuna and dolphins swim together, would engage in dolphin set fishing in order to catch the tuna.<sup>6</sup> As a consequence, Mexican fishermen would trap dolphins in the net along with the tuna and severely injury or even kill the trapped dolphins.<sup>7</sup> The DPCIA aimed to end this practice. Naturally, with the enforcement of this new provision of the MMPA, lawsuits followed.

### **“Dolphin-Safe” Labeling Dispute**

While the United States/Mexico “dolphin safe” labeling dispute dates back to the early 1990s, the most recent action concluded a ten-year battle in the WTO. In 2008, Mexico initiated the dispute process under the WTO alleging U.S. “dolphin safe” labeling standards discriminated against Mexico.<sup>8</sup> Specifically, Mexico challenged the United States’s implementation of the DPCIA stating, “Mexican products are accorded treatment less favorable than like products of national origin and like products originating in any other country.”<sup>9</sup>

On September 15, 2011, the WTO Dispute Settlement Body released a panel report favoring Mexico.<sup>10</sup> This led to several appeals by the United States, resulting in additional decisions in favor of Mexico. In response, the United States amended its “dolphin-safe” labeling standards. These amended standards, which are referred to as the “Tuna Measure,” brought the United States in compliance with previous WTO decisions. On December 14, 2018, the battle came to an end when the WTO Appellate Body denied Mexico’s appeal of this decision.<sup>11</sup>

The method in which the United States enacted the measures was a key factor. The WTO found that the “Tuna Measure” was “calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.”<sup>12</sup> Therefore, the WTO panel found that the “Tuna Measure” was not applied in a manner that constitutes unjustifiable discrimination.<sup>13</sup>

### **Another Path to Action**

On March 21, 2018, the Natural Resources Defense Council, the Center for Biological Diversity, and the Animal Welfare Institute filed suit in the U.S. Court of International Trade seeking an injunction requiring the U.S. government to ban the importation of fish and fish products from Mexico caught

with gillnets within the range of the vaquita, a critically endangered marine mammal within the porpoise family.<sup>14</sup> In its initial complaint, plaintiffs illustrated the severe circumstances surrounding the vaquita and its future viability.<sup>15</sup> The plaintiffs’ main argument dealt with the United States government’s failure to follow and enforce section 101(a)(2) of the MMPA.<sup>16</sup> Section 101(a)(2) specifically requires the United States to ban the importation of fish caught with technology that results in serious injury or death of an marine mammal in excess of U.S. standards.<sup>17</sup>

On April 16, 2018, the plaintiffs followed their initial complaint with a motion for preliminary injunction in order to seek immediate action on behalf of the U.S. government while the case continued.<sup>18</sup> In August, the court granted the plaintiffs’ motion for preliminary injunction.<sup>19</sup> In response to the court’s order, on August 28, 2018, the U.S. Department of Commerce enacted a rule prohibiting the importation of all shrimp, curvina, sierra, and chano fish, and fish products caught using gillnets within range of the vaquita.<sup>20</sup> Last November, the U.S. Court of Appeals for the Federal Circuit denied an appeal by the U.S. government, therefore, upholding the ban.<sup>21</sup>

---

## **IN RESPONSE TO THE COURT’S ORDER, ON AUGUST 28, 2018, THE U.S. DEPARTMENT OF COMMERCE ENACTED A RULE PROHIBITING THE IMPORTATION OF ALL SHRIMP, CURVINA, SIERRA, AND CHANO FISH, AND FISH PRODUCTS CAUGHT USING GILLNETS WITHIN RANGE OF THE VAQUITA.**

---

### **Conclusion**

While often times legal disputes are viewed in a negative light, the two surrounding the MMPA actually helped the statute evolve and become a stronger tool for protecting marine mammal populations. Although the United States lost several battles in the WTO regarding its “dolphin-safe” labeling standards, it won the war in creating a stronger MMPA and understanding the proper analysis in enacting additional standards going forward. Further, while administrative law provides a path for the public to petition federal agencies to act, the actions of the various non-profit organization in bringing a suit against the U.S. government provide a pathway to more immediate action. Going forward, it now seems there is an additional path for members of the public to initiate action and push the federal government to enforce its laws, aside from typical procedures of administrative law. ❧





Photograph of chano fish, courtesy of Bernard Spragg.

## Endnotes

<sup>1</sup> 2020 J.D. Candidate, University of Mississippi School of Law.

<sup>2</sup> 16 U.S.C. §1361.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* §1385.

<sup>5</sup> Alexandra Chase, *Mexico and the United States Continue to Spar Over “Dolphin-Safe” Labeling*, 15:4 SandBar 14 (2016).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Request for Consultations, Mexico – *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/1/G/1/858 (October 28, 2008).

<sup>9</sup> *Id.*

<sup>10</sup> Panel Report, United States – *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (September 15, 2011).

<sup>11</sup> Article 21.5 Appellate Body Report, United States – *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, AB -2017-9, (December 14, 2018).

<sup>12</sup> Recourse to Article 21.5 of the DSU, United States – *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/RW/USA, (December 14, 2018).

<sup>13</sup> *Id.*

<sup>14</sup> Complaint, Natural Resources Defense Council Inc. et al v. United States, No. 1:18-cv-00055 (U.S. Court of Intl. Trade March 21, 2018).

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> *Id.* at 17-18.

<sup>17</sup> 16 U.S.C. §1371(a)(2).

<sup>18</sup> Motion for Preliminary Injunction, Natural Resources Defense Council Inc. et al v. United States, No. 1:18-cv-00055 (U.S. Court of Intl. Trade April 16, 2018).

<sup>19</sup> Order Granting Plaintiff’s Motion for Preliminary Injunction, Natural Resources Defense Council Inc. et al v. United States, No. 1:18-cv-00055 (U.S. Court of Intl. Trade Aug. 14, 2018).

<sup>20</sup> *Id.*

<sup>21</sup> Court Order Denying Defendant’s Motion to Stay, Natural Resources Defense Council Inc. v. Ross, No. 2018-2325, 2018 BL 45933 (Fed. Cir. Nov. 28, 2018).

# MAINE ORDINANCES TAKE AIM AT COMMERCIAL ACTIVITIES

Terra Bowling

In recent years, local governments in Maine have taken action to regulate development impacting their waterfronts. In December, the Portland City Council enacted a six-month moratorium on development along its working waterfront. Last August, the City of South Portland's ordinance prohibiting the bulk loading of crude oil onto tankers within city limits survived a legal challenge.<sup>1</sup> Both actions illustrate how local governments in Maine have used zoning as a tool to manage development, as well as how developers have reacted to the zoning.

## Halt to Development

Commercial fishing activities in Portland, Maine compete for the waterfront with non-water dependent uses like hotels and restaurants. In the 1980s, the city enacted zoning to limit commercial development along the waterfront; however, the city amended the zoning in 2010 to allow more commercial development to support aging infrastructure.<sup>2</sup> The city created a non-marine use overlay zone, which allows compatible uses that meet certain standards and that help fund infrastructure improvements.<sup>3</sup>

In recent years, the commercial fishing industry has become more concerned that non-marine development on the waterfront is squeezing out water-dependent uses. A proposal for a waterfront hotel at Fishermen's Wharf led a group of local commercial fishermen to take action.<sup>4</sup> The group began collecting signatures seeking a referendum to halt non-marine construction on the city's piers for five years.<sup>5</sup>

The call for a referendum spurred city officials to pass a six-month moratorium on non-marine development in the Central Waterfront Zoning District.<sup>6</sup> The city will not accept applications for development in the zone unless necessary for public safety.<sup>7</sup> During the moratorium, a task force will consider issues such as access, zoning, transportation, berthing, ordinance enforcement, and investment in the city's pier.<sup>8</sup>

Recently, the commercial fishing group spearheading the call for a referendum decided that it would not submit its petition to force a vote on a new proposed ordinance.<sup>9</sup> The developer who induced the action has withdrawn his hotel proposal.<sup>10</sup> The next move belongs to the city when the moratorium expires in June.

## No Loading Zone

In South Portland, Portland Pipe Line Corporation (PPLC) maintains "Pier 2," an oceanfront pier where marine tank vessels dock to deliver crude oil. The crude oil is offloaded and moved to storage tanks in the city via pipelines with capacities of approximately 600,000 barrels per day. The pipelines pass underground from South Portland to oil refineries in Montreal.

In the early 2000s, a boom in crude oil production in Alberta's oil sands fields meant that Montreal refiners needed less oil delivered from South Portland. As a result, PPLC moved to reverse the flow of one of its pipelines to transport crude oil from Montreal to the South Portland Harbor where the crude oil would be loaded onto tanker vessels and shipped to domestic and international locations. The company applied for the necessary permits, licenses, and zoning approvals from federal, state, and local authorities but never completed the permitting process. In 2012-2013, the company once again proposed a flow reversal project.

Residents communicated concerns to city officials over the "heightened risk of spills of crude oil derived from tar sands, or more severe health and environmental impacts of those spills as compared to other types of crude oil."<sup>11</sup> The residents were worried that the activities would impact air and water quality, as well as aesthetics, noise, and development opportunities. In 2013, a group of citizens proposed the "Waterfront Protection Ordinance." The ordinance would restrict facilities within certain areas to unload only petroleum products, prohibit the expansion of existing facilities in certain districts, and prohibit new facilities on piers. The ordinance ultimately failed, with some voters fearing that the ordinance was overly restrictive.

The city then proposed and passed the "Clear Skies Ordinance" prohibiting the bulk loading of crude oil onto tankers within city limits.<sup>12</sup> The ordinance effectively stopped the flow reversal project. PPLC and the American Waterways Operators (AWO) brought suit claiming that the ordinance violated the dormant Commerce Clause and the Foreign Commerce Clause of the United States Constitution.

The U.S. District Court for the District of Maine upheld the ordinance. The court noted that a statute can violate the dormant Commerce Clause if it 1) has an impermissible





Photograph of fishing boats docked in Portland, Maine, courtesy of Corey Templeton.

extraterritorial reach, 2) discriminates against interstate or foreign commerce, or 3) excessively burdens interstate or foreign commerce.<sup>13</sup> First, the court found that the ordinance did not regulate extraterritorially, because it only applied to activities within the city. Second, the ordinance did not discriminate against interstate or foreign commerce on its face, in effect, or on purpose for three reasons. The court noted that the ordinance does not distinguish between out-of-state and in-state interests on its face; it does not unfairly burden interstate or foreign competitors since the oil company has no other competitors in Maine; and the purpose of the ordinance was not to discriminate against interstate or foreign commerce.

Next, the court next looked at whether the ordinance excessively burdened interstate or foreign commerce. To do so, the court balanced the residents' environmental concerns with the commercial impact of the prohibition. Although the court recognized the ordinance's impacts on local jobs and the economy, it did not find that those impacts outweighed the local benefits. "In light of copious conflicting evidence and scientific uncertainty regarding the magnitude of the air quality benefits and the existence of the benefits from water contamination risk reduction, along with the fact that the aesthetic and redevelopment benefits were unrebutted, it is not the Court's place to second-guess the findings of South Portland's political process."<sup>14</sup>

Finally, in addition to the three prongs that apply in the interstate commerce context, there is another requirement for the Foreign Commerce Clause. A state law may not interfere with the federal government's ability to speak with "one voice" when regulating commerce with foreign nations. The court held that the ordinance "merely has 'foreign resonances' because it impacts a piece of cross-border infrastructure and a large industry."<sup>15</sup> Thus, the ordinance did not violate the dormant Foreign Commerce Clause.

## Conclusion

As the nation's waterfronts become increasingly crowded, local governments will have to work to balance competing uses. Although the increase in commercial development has economic benefits, it raises environmental, economic, and public health and safety concerns. These issues illustrate that zoning is a powerful tool for local governments to address projects that have immense local consequences. ❧

## Endnotes

<sup>1</sup> *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264 (D. Me. 2018), amended, No. 2:15-CV-00054-JAW, 2018 WL 4901162 (D. Me. Oct. 9, 2018).

<sup>2</sup> [Portland, Maine: Balancing Maritime Uses and Waterfront Diversification Through Municipal Zoning](#), NATIONAL WORKING WATERFRONT NETWORK.

<sup>3</sup> *Id.*

<sup>4</sup> Randy Billings, [Portland council enacts 6-month ban on development along working waterfront](#), PRESS HERALD (Dec. 18, 2018).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Randy Billings, [Working-waterfront advocates end petition drive to limit use of Portland piers](#), PRESS HERALD (Jan. 14, 2019).

<sup>10</sup> *Id.*

<sup>11</sup> *Portland Pipe Line Corp.*, 332 F. Supp. 3d at 278.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 269.

<sup>14</sup> *Id.* at 313.

<sup>15</sup> *Id.* at 315.

# HUBBUB IN THE HAMPTONS:

## NEW YORK YACHT CLUB SUES COUNTY OVER OYSTER LEASING

Amanda Nichols<sup>1</sup>

“Nimby,” which began as an acronym for the phrase “not in my back yard,” is used to refer to the practice of objecting to something that will affect or take place in one’s locality. Those residents and groups who practice nimbyism—typically called “nimbys”—will oftentimes resist certain development solely because of its proximity to their property, where they would tolerate or even support it if built further away. When disputes between nimbys and advocates of development cannot be resolved informally, some nimbys file lawsuits to definitively decide the issue. These lawsuits sometimes target commercial aquaculture, often alleging that the equipment or farming practices associated with fish and shellfish farming unreasonably interfere with the enjoyment of private property. If successful, nimby lawsuits can completely derail the development of a commercial aquaculture farm, interrupting operations and perhaps forcing relocation. Nimbyism recently materialized in Amagansett, New York—a small, coastal hamlet located in the affluent Hamptons area of Suffolk County—when a local yacht club filed a lawsuit over the county’s aquaculture lease program.

### Background

Commercial shellfish aquaculture has been in development in Suffolk County, New York for years. In 2004, the State of New York ceded title to approximately 100,000 acres of underwater lands in Peconic Bay and Gardiners Bay to Suffolk County for the purpose of shellfish cultivation and authorized the county to prepare, adopt, and implement a shellfish aquaculture lease program for the region. In 2009, the Suffolk County Shellfish Aquaculture Lease Program was codified, providing secure access to marine space for private, commercial shellfish aquaculture.<sup>2</sup> Although the county is not presently permitted to wholly regulate aquaculture in the area, it is allowed to control both the leasing of shellfish farms within its delineated Shellfish Cultivation Zone as well as the extent and intensity of aquaculture through the imposition of lease limits.<sup>3</sup> The Lease Program is meant to increase private investment in shellfish aquaculture businesses, therefore creating local jobs while permitting operation of farms at secure

locations that would not conflict with existing bay uses.<sup>4</sup> Recently, alleged use conflicts induced the Devon Yacht Club to file a lawsuit against the county’s Lease Program.

### Lawsuit

The Devon Yacht Club is comprised of 326 member families who sail in Napeague Bay (which is connected to Gardiners Bay) from Memorial Day to the end of September. Its lawsuit—filed in January 2018 in the state supreme court—generally alleged that twenty-one potential leases for shellfish farms in Napeague Bay would infringe on club members’ sailing activities. More specifically, the suit argued that the Suffolk County Aquaculture Lease Board did not consider the club’s boating rights when it approved the leases. The plaintiff was seeking to both bar the leaseholders from undertaking or continuing any action related to oyster farming at their lease sites and to prohibit them from engaging in any other activity that would interfere with the club’s sailing.

---

**ITS LAWSUIT—FILED IN JANUARY OF 2018  
IN THE STATE SUPREME COURT—GENERALLY  
ALLEGED THAT TWENTY-ONE POTENTIAL  
LEASES FOR SHELLFISH FARMS IN  
NAPEAGUE BAY WOULD INFRINGE ON CLUB  
MEMBERS’ SAILING ACTIVITIES.**

---

In its lawsuit, the club cited vested property rights, historical access, and navigability, among other issues, as reasons why they should be entitled to the proposed relief.<sup>5</sup> In the club’s estimates, the 20-acre aquaculture parcels at issue would make roughly 120 acres of water unnavigable in the heart of the area used for Devon’s members and the children it teaches at sailing camp.<sup>6</sup> It noted that the club was only contesting the *process* by which the county reviewed the siting of the leases—which allegedly failed to meet the



demand of state review guidelines for considering potential impacts on various user groups—and not any existing leases. Regarding the county’s review process, the plaintiff argued that, since the approved lease sites would substantially interfere with the area where Devon had been conducting its sailing programs for close to a century, the lease board’s approval procedure was inadequate.<sup>7</sup>

Under New York’s State Environmental Quality Review Act, most projects or activities proposed by a state agency or unit of local government require an environmental impact assessment. In the plaintiff’s opinion, the environmental assessment the county conducted improperly failed to consider factors that were not purely environmental—the potential interference with recreational resources, in particular. The club argued that such a failure effectively permitted significant interference with a heavily used recreational resource of which Devon was a principal user, but not the only user.<sup>8</sup>

In response to Devon’s allegations, Suffolk County’s director of sustainability noted that the two active leases in proximity to the club (which were not involved in the lawsuit) did not appear to be impeding club members’ ingress and egress at the time, with one lease having been active for four years.<sup>9</sup> In the director’s opinion, it wasn’t until a more recent lease became active in a closer proximity, and the leaseholder informed the club as a courtesy, that members even took notice.<sup>10</sup> One of the two active leaseholders voiced his opinion as well, alleging that Devon’s view that it should have riparian rights in the middle of the bay because of its continued proximity was “crazy.”<sup>11</sup>

## Settlement

Before the lawsuit could be decided, the county and Devon Yacht Club reached a settlement in January 2019. As part of the settlement, the Amagansett Oyster Company agreed to withdraw from a lease site that the club’s officials said interfered with its members’ boating activities and posed a navigational hazard. In return, the county agreed to “take all reasonable steps” to expedite the company’s application to farm oysters in a new location.<sup>12</sup> Devon’s issues with the other leases originally at issue were resolved for various other reasons. Additionally, the county agreed to notify the Devon Yacht Club of any aquaculture lease site renewals and proposals in the future.

All parties involved appear to be content with the terms of the settlement, with a county representative stating that it establishes the county’s understanding that there are many stakeholders and solidifies the importance of coming to mutually acceptable resolutions with community members.<sup>13</sup> The plaintiff agreed, noting that it was looking forward to a constructive conversation in which it would participate as a stakeholder going forward.<sup>14</sup> Once the Aquaculture Lease Board approves the Amagansett Oyster Company’s

new site, it will still have to apply for permits from the Coast Guard, the New York State Department of Environmental Conservation, and the Army Corps of Engineers before it can begin farming shellfish in the bay.

## Conclusion

While this lawsuit was settled amicably, nimby disputes often become contentious and sometimes lengthy endeavors. Generally, those in favor of development will continue to argue for the potential benefits of higher employment, tax revenue, safety, and environmental benefits, while the motivations of nimbys will remain varied. Some nimbys may oppose any significant change or development, regardless of type, purpose, or origin, while others may object to a particular project because of its inherent nature or proximity. As nimby lawsuits continue to be filed against commercial aquaculture operations, municipalities such as Suffolk County will have to find new compromises to keep local residents content while allowing fish and shellfish farming to grow as an industry. ❧

## Endnotes

<sup>1</sup> Ocean and Coastal Law Fellow, National Sea Grant Law Center. This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture under Subaward no. UA AES 05687-03 from the National Agricultural Law Center, University of Arkansas.

<sup>2</sup> *Suffolk County Shellfish Aquaculture Lease Program*, SUFFOLK COUNTY GOVERNMENT.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Christopher Walsh, *Devon Yacht Club Sues County Over Oyster Farms*, THE EAST HAMPTON STAR (Jan. 4, 2018).

<sup>6</sup> *Id.*

<sup>7</sup> Vera Chinese, *Amagansett yacht club sues Suffolk over shellfish leases*, NEWSDAY (Jan. 8, 2018).

<sup>8</sup> Walsh, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Michael Wright, *Amagansett Yacht Club Sues County Over Shellfish Farms Off Its Shores*, THE SOUTHAMPTON PRESS (Jan. 2, 2018).

<sup>12</sup> Christopher Walsh, *Devon Yacht Club Aquaculture Lawsuit Is Settled*, THE EAST HAMPTON STAR (Jan. 14, 2019).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

# THIS LAND IS YOUR LAND, THIS LAND IS MY LAND

Rachel Buddrus<sup>1</sup>

Is private property truly private? In *Township of Long Beach v. Tomasi*, property owners in Long Beach, New Jersey challenged a township ordinance that authorized portions of their properties to be condemned for pedestrian public access to the beach.<sup>2</sup> After the township condemned the property for the public access easement, the property owners challenged the validity of the township's stated public use.

## Background

The Township of Long Beach condemned a ten-foot-wide strip of land along properties located on Block 20.107 for the purpose of a pedestrian public access to the beach and ocean. This strip of land runs perpendicular to the ocean and therefore serves to provide access from inland locations, such as streets and parking lots. In order for the state, acting through the township, to condemn private property it must satisfy three eminent domain factors: 1) the township must condemn the property for a public use; 2) the property owners must be justly compensated; and 3) the Due Process Clause of the U.S. Constitution must be followed.

Long Beach asserted that it condemned the property for a public beach access in order to comply with the "Sandy Act." The Sandy Act, enacted in the wake of Hurricane Sandy, authorizes the U.S. Army Corps of Engineers (Corps) "to construct beach replenishment and dune construction projects to protect the New Jersey shoreline."<sup>3</sup> In order to qualify for this federal aid for beach replenishment and construction, towns must provide reasonable public access right-of-ways to the beach. The Corps guidelines state that "reasonable access is access approximately every one-half mile or less."<sup>4</sup>

The city determined that Block 20.107 was located at one of the required half-mile points of access. The township set about drafting and implementing an ordinance that would allow it to condemn property, including Block 20.107, for public beach access easements. According to the ordinance "the public access points served a public use by protecting the health, safety, and welfare of the citizens, protecting public infrastructure, mitigating future storm damage and public recovery expenditures, and protecting natural resources."<sup>5</sup>

Beginning in 2014, the property owners, in multiple legal actions, challenged the ordinance.<sup>6</sup> The property owners unsuccessfully argued against the township's condemnation proceeding. The trial court found that the township "duly exercised its power of eminent domain to acquire easements on defendant's properties for public use."<sup>7</sup> The trial court also appointed three commissioners to determine the appropriate compensation due to the property owners for the taking of their private property.<sup>8</sup> The property owners appealed.

---

**THE TRIAL COURT FOUND THAT  
THE TOWNSHIP "DULY EXERCISED  
ITS POWER OF EMINENT DOMAIN  
TO ACQUIRE EASEMENTS ON  
DEFENDANT'S PROPERTIES FOR  
PUBLIC USE."**

---

## Appeal

On appeal from the trial court, the property owners had two main arguments for why the township should not be able to condemn their property. The property owners argued "that the trial court erred because (1) the Township ha[d] not and [could not] establish a necessity for the condemnation of the easement on portions of their properties; and (2) the Township failed to establish a proper public purpose for the easements on their property."<sup>9</sup> Both arguments addressed the township's ability to condemn property through eminent domain. The court disagreed with both arguments, finding that the township's public use was a proper public purpose and satisfied the "public use" requirement for eminent domain.

The court also addressed the role of the Public Trust Doctrine in protecting beach access. The Public Trust Doctrine is based on the idea that certain resources should be protected






View of the Township of Long Beach, New Jersey, courtesy of Alan Lyons.

for the use and enjoyment of the public, regardless of private property rights. It is well established that states hold the title to the tidelands and submerged lands below navigable waters in trust for the benefit of the residents of the state. The court recognized that by condemning private property to protect access to the beach and ocean, township acted in accordance with the doctrine.

### Conclusion

The court of appeals affirmed the trial court's finding that the ordinance was appropriate. Although the court's opinion was unpublished and therefore not binding on other cases, it is unique in that the court ruled that the town was permitted to use eminent domain to provide perpendicular access. Most importantly, the court recognized this court's decision supports that the purpose of pursuing federal funding for natural resource preservation was as an approved public use as it relates to eminent domain. 

### Endnotes

- <sup>1</sup> 2019 J.D. Candidate, University of Mississippi School of Law.
- <sup>2</sup> *Twp. of Long Beach v. Tomasi*, No. A-0644-17T4, 2018 WL 6683927 (N.J. Super. Ct. App. Div. Dec. 20, 2018).
- <sup>3</sup> *Id.*
- <sup>4</sup> U.S. Army Corps of Engineers, ER 1105-2-100, Planning Guidance Notebook 3-20 (2000).
- <sup>5</sup> *Twp. of Long Beach v. Tomasi*, 2018 WL 6683927 at \*2.
- <sup>6</sup> *Minke Family Tr. v. Twp. of Long Beach*, Nos. A-2660-15T3, A-4036-15T3, 2018 N.J. Super. Unpub. LEXIS 1953 (Super. Ct. App. Div. Aug. 20, 2018).
- <sup>7</sup> *Twp. of Long Beach v. Tomasi*, 2018 WL 6683927 at \*2.
- <sup>8</sup> *Id.*
- <sup>9</sup> *Id.*



*The University of Mississippi*

**THE SANDBAR**

Sea Grant Law Center  
Kinard Hall, Wing E, Room 258  
University, MS 38677-1848



---

# Littoral Events

## **75th Annual Northeast Fish & Wildlife Conference**

*April 14-16*  
Groton, CT

For more information, visit: <http://www.neafwa.org/conference.html>

---

## **Monmouth University Climate Change, Coasts & Communities Symposium**

*April 17-18*  
West Long Branch, NJ

For more information, visit: <https://www.monmouth.edu/climate-coasts-communities>

---

## **UCOWR 2019 Annual Conference**

*June 11-13, 2019*  
Snowbird, UT

For more information, visit: <https://ucowr.org/2019-conference>